

SHERIFFDOM OF TAYSIDE, CENTRAL AND FIFE AT FORFAR

[2023] SC FOR 6

FFR-PD31-20

JUDGMENT OF SHERIFF JILLIAN MARTIN-BROWN

in the cause

CRAIG HILL

Pursuer

against

ANGUS COUNCIL

Defender

**Pursuer: Fitzpatrick; Digby Brown, Dundee**  
**Defender: Thomson; Ledingham Chambers LLP, Aberdeen**

Forfar 29 April 2022

**Introduction**

[1] This dispute concerned whether the defenders were liable for the pursuer's alleged accident. He averred that he fell down stairs in a dark, communal stairwell for which the defenders were responsible. The proof was restricted to liability only. The claim was based on the common law and statutory duties under the Housing (Scotland) Act 2001 and the Occupiers' Liability (Scotland) Act 1960. The key issue was the credibility and reliability of witnesses, in particular, the pursuer.

**Procedural history**

[2] Evidence was led from four witnesses on 8 April 2022 by WebEx:

1. Mr Ian Coutts, neighbour of pursuer.

2. Mr Craig Hill, pursuer.
3. Mr Ian Frier, neighbour of pursuer.
4. Grace Mather, retired housing officer for the defenders.

[3] Written submissions were lodged with the court and oral submissions were heard on 11 April 2022.

### **Findings in fact**

[4] I found the following facts to be admitted or proved.

[5] On or around 1 March 2019, the pursuer was resident in Brechin. The property in question is a residential flat located within a three storey block. The block contains two flats on each level. The pursuer's flat was on the top level.

[6] The pursuer was a tenant of this property. The property was owned by the defenders. The defenders were responsible for the inspection, maintenance and repair of the communal areas of the building.

[7] The pursuer required to descend four flights of stairs from his flat to reach the main entrance to the building. Lights were located on each landing in the building. The lights were operated by timers. The timers ought to have ensured that the lights were on during hours of darkness through the night and early in the morning.

[8] Prior to 1 March 2019, there was a problem with the lights in the communal stairwell. The lights came on during daylight hours and went off in hours of darkness. This problem had been reported to Grace Mather by Ian Frier. Grace Mather was the housing officer who routinely attended at the property on behalf of and in the course of her employment with the defenders. No remedial action was taken by the defenders prior to 1 March 2019.

[9] The pursuer attended the Angus Minor Injuries and Illness Unit at Arbroath Infirmary on 1 March 2019.

[10] The pursuer attended the Accident and Emergency Department at Ninewells Hospital in Dundee on 2 March 2019.

[11] Grace Mather visited the property on 12 February and 18 March 2019. She was subsequently asked by her manager to raise a works order in respect of the lighting at the property. She raised a works order on 2 April 2019.

### **Findings in fact and in law**

[12] The pursuer has failed to prove on the balance of probabilities that the accident on 1 March 2019 happened as averred on record.

[13] The defenders are entitled to decree of absolvitor.

[14] The pursuer is liable to the defenders in the expenses of the cause as taxed. As addressed at the conclusion of the proof, sanction is granted for the employment of junior counsel for the action.

### **NOTE**

[15] This case turned on the credibility and reliability of the four witnesses, in particular the pursuer, because no one witnessed his alleged accident. Though contributory negligence was pled on record, that was not insisted upon at proof.

[16] The defenders' primary position was that the pursuer had failed to prove that he sustained an accident in the manner averred on record. *Esto* there was such an accident, they denied any breach of statutory or common law duty on the basis that the defenders

were not told about any lighting deficiency prior to the alleged accident and did not fail to act.

[17] Quantum remained in dispute and in the event that the pursuer was successful on liability, dates for a proof on quantum were to be fixed.

[18] I have set out my findings in respect of each witness separately.

### **Mr Coutts – summary of evidence**

[19] Mr Coutts owned his property and lived there with his wife. His flat was on the bottom level of the block. He knew Mr Hill as a neighbour but had very little interaction with him. He also knew Mr Frier, who lived across from him on the bottom level of the block.

[20] Mr Coutts gave evidence that Mr Hill told him that he had had an accident on the stairwell and that the stairwell lights were not working. Mr Coutts indicated that everyone in the building knew that the lights were not working. That problem had persisted for some weeks. He believed that the problem had been reported by Mr Frier to the defenders.

[21] Mr Coutts spoke to Grace Mather about the lighting in the stairwell after hearing about Mr Hill's accident. She indicated that she would look into it.

[22] He had seen contractors in the communal area working on the electricity box, which he took to mean that they were carrying out repairs for the lights. He did not know if that work took place before or after the alleged accident on 1 March 2019.

### **Mr Coutts – submissions on credibility and reliability**

[23] Neither party took issue with Mr Coutts' credibility or reliability.

**Mr Coutts – decision on credibility and reliability**

[24] I found Mr Coutts to be a credible and reliable witness. I am in agreement with both parties that he was a decent man, who gave his evidence in a truthful and dispassionate way. Unfortunately, his evidence did not shed any light on the circumstances of the pursuer's alleged accident.

**Mr Frier – evidence-in-chief**

[25] Mr Frier also resided in Brechin and had lived there for about seven years. He lived on the ground floor opposite Mr Coutts. The pursuer told him that he had an accident and fell down the stairs. That did not come as a surprise to Mr Frier because of the problems with the lighting in the building. Mr Frier said that the lights came on when they should have been off and were off when they should have been on. That was an ongoing problem that had been reported to the council on a number of occasions. Mr Frier had noticed the problems when he came back from work at around 00:30 – 01:00. The lights were off at that time. It was quite dark with no real illumination from other sources.

[26] Mr Frier had spoken to the housing officer, Grace Mather, in person when she was in the area doing her rounds and identified the lighting problems to her. He had also spoken to Ian Runcie, who was the clerk of works for the defenders at that time. He had also reported problems to the defenders by telephone and remembered speaking to a woman.

[27] Mr Frier was not surprised that the defenders had no record of complaints because on various occasions he had raised concerns with the defenders and then when he had chased up those concerns, the defenders would say that they didn't have a record of the complaint, ask for details again and say that they would get back to him. He indicated that the defenders had a "devil may care" attitude.

**Mr Frier – cross examination**

[28] In cross examination Mr Frier indicated that the lights were not working most of the time from December 2014 until he moved out in 2020. He complained to the defenders on a number of occasions in 2015, 2016, 2017 and 2018 prior to Grace Mather moving to a different location. He did not accept that the only report of problems was in March 2016. He had made constant requests to get something done.

**Mr Frier – submissions on credibility and reliability**

[29] The pursuer submitted that Mr Frier was a credible and reliable witness.

[30] The defenders submitted that Mr Frier was overly insistent that the council had been told on numerous occasions before March 2019 that there were problems with lighting. He painted the council as having a “devil may care” attitude to the question of repairs. He should be seen as a zealous witness with an axe to grind.

**Mr Frier - decision on credibility and reliability**

[31] I found Mr Frier to be a credible and reliable witness. He spoke to problems having existed with the lighting for a considerable time and of numerous complaints being made to the council. It was understandable that he characterised the defenders’ response as “devil may care” given the defenders’ inaction in response to his complaints. However, whilst his evidence supported the pursuer’s position that the defenders were told about the lighting deficiency prior to the alleged accident and failed to act, it did not shed any light on the circumstances of the pursuer’s alleged accident.

**Mrs Mather – evidence-in-chief**

[32] Grace Mather retired in December 2021 having been with the council for almost 20 years and a housing officer since 2002. The duties of a housing officer were very varied and included estate management, arrears, anti-social behaviour, child protection, complaints and repairs. Issues about the state of the premises, including lighting, became her responsibility as a housing officer in around 2017-2018 when the council did away with housing inspectors.

[33] As she was out and about she would take notes of repairs requested, go back to her office and input a works order to instruct a joiner, electrician or plumber etc. or go directly to a contractor and ask them to go out and repair what was necessary. A tenant could report a repair online or in person. It was normal if she was out and about for tenants to approach her with requests for repairs.

[34] Mrs Mather was familiar with the property. She visited when there were issues or when she had to check something. It could be weekly and just depended if something was reported in that area. She could not remember anyone reporting lighting complaints to her. She could remember a few years back that new solar clock dials were put into the block. That would have been about 2016.

[35] Mrs Mather did not speak to Mr Frier often. She only spoke to Mr Frier a handful of times, maybe two or three times, since he made a complaint against her in 2016 and asked for her to be removed as housing officer.

[36] When Mrs Mather was asked if she could remember when she last spoke to Mr Frier, she indicated that she could not remember the last time that she spoke to him and that she may have written it down somewhere in the "tenancy notepad". She then turned to look at something. I asked her to explain what she was looking at and she indicated that she had

the “tenancy notepad”. I asked her not to look at the notepad unless asked to do so by myself or by counsel.

**Mrs Mather – cross examination**

[37] In cross examination, Mrs Mather was asked further questions about the tenancy notepad. She indicated that it was a document she had in paperwork, which had been kept in a cupboard in her home since she retired in December 2021. She had typed it up herself and comprised a list of dates she had visited to aid her memory. She had looked it out that morning to use as an aide memoire.

[38] Mrs Mather initially indicated that she was unaware of any problems with lighting at the property. She did not suggest that Mr Coutts, Mr Frier or Mr Hill were lying but maintained that she was simply unaware of the problem with lighting. There was nothing in the tenancy notepad. She accepted that she had visited the property on 12 February 2019 and that an observation of no reports of lights not working had been recorded at a later date after the pursuer’s alleged accident.

[39] Mrs Mather also initially indicated that she did not know about a repair instructed on 2 April 2019 and was not involved at all with the complaint that was made. When pressed, she accepted that she had visited the property on 18 March 2019 and took photographs. When pressed further, she indicated that she believed a works order had been raised, which caused an electrician to go out and check the lights. When pressed yet further, she conceded that she had been asked by her manager to raise a works order for the lighting in the property.

[40] When it was suggested that Mrs Mather felt vulnerable because of the criticism from three different sources that there were problems with the lights being on during the day and

off at night, she maintained that she did not remember anyone telling her there were issues with the lights. If she had been told, then she was aware that that would constitute an emergency repair, to which a response was required within two hours.

[41] Mrs Mather accepted that she had been asked by the pursuer's solicitors to provide a precognition and had declined to do so. She indicated that someone in the insurance section had told her that she could give a precognition to the pursuer's solicitors if she wanted but she did not have to do so.

#### **Mrs Mather – submissions on credibility and reliability**

[42] The pursuer submitted that Mrs Mather was not a liar or ill-motivated but that the evidence of Mr Coutts and Mr Frier should be preferred. Her tenancy notepad was not the same as an aide memoire. If she had accessed the defenders' computer system in order to access personal information about the pursuer then that would be unlawful. She had a partisan interest. While she had provided a precognition to the defenders' solicitors, she had declined to provide one to the pursuer's solicitors.

[43] The only issue that Mrs Mather could recall was to do with the solar dial clock a few years prior to the pursuer's alleged accident in March 2016. However, she accepted that she had been at the property in February 2019 and March 2019 and that a works order was not instructed until April 2019.

[44] The defenders submitted that Mrs Mather was neutral, measured, respectful and reasonable. She was clear that the only complaint had come in March 2016, some years prior to the pursuer's alleged accident. She pointed out that residents talking amongst themselves was not the same as a complaint to the council. Her evidence should be preferred over that of Mr Frier.

**Mrs Mather – decision on credibility and reliability**

[45] Mrs Mather's job as a housing officer appeared to me to include a vast array of responsibilities, including repairs. She accepted that tenants would come up to her while she was out and about with requests for repairs. She initially claimed that she was unaware of any repairs after the pursuer's alleged accident but then accepted that had visited the property in February 2019 and March 2019, that she had taken photographs and that she had been instructed to raise a works order by her line manager in relation to lighting at the property. Despite her evidence that a failure in the lights would require a response within two hours, there appeared to be a delay between 18 March 2019 when she attended the property after the pursuer's alleged accident and 2 April 2019 when repairs were carried out.

[46] As a result of her changes in position and the inconsistencies in her evidence, I did not find her to be a reliable witness. I do not believe that she was seeking to mislead the court, but her recollection did not seem to me to present a comprehensive or accurate description of events.

**Pursuer - averments on record**

[47] The pursuer averred that on 1 March 2019, he left his property at approximately 06:30. When the pursuer left his property, he noted that the lights were off. The stairs were in darkness. Sunrise on 1 March 2019 was at 07:04. As the pursuer began to descend the stairs, he was unable to see where he was placing his feet. He lost his footing and slipped down the stairs, resulting in his injury.

[48] The pursuer averred that he was immediately aware of pain in his left hip and left ankle and foot, as well as his right knee. He was also aware of blows to his head and lower back as he fell against a wall.

[49] The pursuer averred that he was transferred by his brother to the Minor Injury and Illness Unit in Brechin. The pursuer underwent examination and was discharged home with advice to attend at Ninewells Hospital in Dundee. The following day, on 2 March 2019, he attended at the Accident and Emergency Department at Ninewells Hospital in Dundee due to ongoing symptoms. He underwent x-rays before again being discharged with further advice.

#### **Pursuer - evidence-in-chief**

[50] During evidence-in-chief, the pursuer indicated he had lived at the property for about five years, initially with his brother and then on his own. At the time of his accident he was working part-time doing general yard work. On 1 March 2019 he got up slightly earlier than usual because he had an interview that day. He had breakfast and was ready to go. He headed out his front door at around 06:30 because he had to be in Forfar for about 07:30 – 08:00.

[51] When he got out of his flat it was shockingly dark. It felt like he had got up in the middle of the night. He locked his door and headed down the corridor leading to a set of steps. He held onto the bannister, placed his right foot at the top of stairs and raised his left foot, but as he went to step he misplaced his foot because it was so dark and he could not see the step. He fell right down to the bottom of the flight of three steps and went over himself. He landed on his left foot, impacted his knee off the wall and hit his head.

[52] The pursuer lay on the floor for maybe five to six minutes and gathered himself. He was in shock and did not know what had happened. The pain was not immediate but he knew something was not right. He got up on his feet and carried on down the stairs to his car.

[53] The pursuer thought to himself that he would not be able to get to his interview. Instead he thought he would go to his part-time job. An hour or so later his boss said he was not getting around the way that he should and that he could not have him on site like that. The pursuer had changed from work shoes to steel toe caps and that was when the pain came. His boss told him to leave or get someone to collect him. The pursuer arranged for his father to come and collect him. His father brought the pursuer's brother with him.

#### **Pursuer - cross examination**

[54] In cross examination, the pursuer confirmed that he usually started work at around 09:00 but the yard was open early for joiners from around 07:00 onwards. The journey would take only 15 - 20 minutes from his home. He accepted that meant that he would have got to his work that day around two hours early at around 07:00 and said maybe he went to get a coffee. He did not remember what he did between leaving his home and getting to work. He had a flask and probably went to the yard and spoke to his colleagues.

[55] It was put to the pursuer that having fallen down three stairs, lying prone and not having to start work until 09:00, the more natural thing to do would be to go back up the three stairs he had fallen down and go back into his flat, as opposed to going down a further three flights of stairs comprising 23 steps, getting into his car and going to work two hours early. The pursuer replied that was preferable because it was dark and difficult to get his

keys into his door. He did not know how long he sat in his car for. It could have been 15 minutes or half an hour to gather himself.

[56] The pursuer was asked to describe the accident again and indicated that he came out his front door and was scrambling to lock it up. He remembered scrambling to lock the door because it was dark. He felt for the key and locked his door. When his door had opened, the lights from his flat provided some illumination for the stairwell. Once he was out of his flat, it was a different story. He turned left along the hallway and put his right foot first on the steps. He held onto the bannister and raised his left foot, but as he went to step he fell. He bounced against the wall on the left hand side, landed on his foot and went over himself.

[57] The pursuer was referred to the attendance notes from the Angus Minor Injuries and Illness Unit at Arbroath Infirmary (production 5/3/10 and 5/3/16). He indicated that he had not seen those notes before.

[58] The notes indicated that he had attended the unit at 17:14. The pursuer thought that sounded about right and was the correct date. He was not aware that it was so late in the afternoon. The day must have slipped away from him.

[59] The notes indicated that he reported that he had left his house, street lights were not on and that this caused him to fall and injure his ankle. There was no mention of stairs. The pursuer thought that the nurse had perhaps picked him up wrong.

[60] The notes indicated that he had driven himself to the unit for assessment. However, the pursuer explained that when he was asked how he got there, he would simply have said that he had driven there and must not have said he was driven by his father.

[61] The notes indicated he wished an accident number as he wanted to let the council know about his injury. The pursuer replied that he did not know what was meant by an accident number.

[62] The notes indicated that he had worked all day in a yard. The pursuer indicated that he did not work a full day. He worked past midday and then he had a proper limp and his boss said that he was no use like that. He could not give an exact time but at some point his dad came and picked him up. Prior to that he went to have a cup of coffee. He thought maybe the nurse had rounded things off.

[63] The notes indicated that he presented very oddly and that he appeared under the influence of an unknown substance. The pursuer replied that all he could say was that he had never really taken co-codamol before. He may have taken two doses throughout the day. He thought that he was acting perfectly normally. He was absolutely not under the influence of any substances.

[64] The notes indicated that he was advised that he did not appear fit to drive and that he had said he would phone his friend who lived in Arbroath to get a lift to A&E in Dundee for further assessment. The pursuer did not remember being advised he was unfit to drive. He thought maybe the nurse had got mixed up and got the wrong end of the stick. The pursuer explained that he had no friends in Arbroath and that point was completely wrong. His father did not come in with him, he went by himself so maybe they jumped to that conclusion. His father would have given him a lift back and so therefore he guessed he would have waited for him outside the unit. They could not deal with him at the minor injuries unit and wanted to palm him off to one of the bigger hospitals. He could not remember what happened afterwards. He did not know if he went to his mother's house.

He remembered being issued with crutches and being told to attend A&E at Ninewells in Dundee. He thought that he went to Ninewells Hospital that night.

**Pursuer – submissions on credibility and reliability by pursuer’s counsel**

[65] The pursuer’s counsel accepted that the pursuer’s evidence was vague as to what happened after the accident. He described the defenders’ counsel’s position as appearing to be that the pursuer was an “evil genius”. He characterised the defenders’ counsel’s cross examination as a “valiant effort to make a silk purse from sparse materials”. There was no agreement that the minor injury unit records were an accurate account of what was discussed about the accident circumstances. Hospital and medical notes could inform treatment and prognosis but they were not holy scripture. This was an entry made by one nurse on the evening of what was likely a busy Friday night in a minor injuries unit. It would be an odd result for the pursuer to complain at the minor injuries unit of a fall outside his house due to street lighting but to go on and pursue a damages claim in respect of a fall at his own flat due to the stair lights not functioning. It was the sort of “evil genius” conspiracy that only appealed to insurers.

[66] The minor injury unit’s notes were wrong or inconsistent with credible evidence on a number of points. The accident time was noted as 06:00 and as 06:30. The pursuer did not drive there, his father drove him and his brother was in the car too. He did not have an accident at a house but in the stairwell of his flat. The problem was one of stair lighting, not street lighting. If it was accepted that the pursuer did not have any friends in Arbroath then that narrative must be wrong too. No witness spoke to the pursuer’s appearance.

**Pursuer – submissions on credibility and reliability by defenders' counsel**

[67] The defenders' counsel submitted that the accident being unwitnessed, the court was largely reliant on the pursuer's testimony. In both examination-in-chief and cross examination, he gave a detailed, blow by blow account of the mechanics of his alleged fall. In cross examination this level of detail was to be contrasted with his relative vagueness about the aftermath of the accident, his working day and his visit to the minor injuries unit.

[68] After the accident the pursuer had the choice of going back up three stairs, back into his flat and waiting for two hours before going or not going to work. Instead, he went down the remaining 23 stairs in pitch darkness to his car and then onto his unidentified place of work.

[69] When asked in cross examination to firm up about some of the details, he engaged in speculation about events that only he could know about, such as maybe going for coffee. When describing events at his work, he was equally short on detail. His physical deficit was spotted after an hour or so, but whether that was after he arrived at work or after his official start time was not known. He was unable to coherently explain the time between leaving his flat at 06:30 and arriving at the minor injuries unit 10 hours 44 minutes later at 17:14.

[70] He provided no cogent explanation as to the disparity between his version of events and what was recorded in the medical records. Although it had been suggested by the pursuer's counsel that medical records were notoriously inaccurate, the defenders' counsel submitted that medical records tended to be notoriously accurate and any shortcomings tended to be caused either by omission or by being too brief. Neither was the case here. The minor injuries record was full and detailed and not consistent with the pursuer's version in the witness box.

[71] For all those reasons, the evidence of the pursuer was unsatisfactory and should not be accepted. On the balance of probabilities, he did not sustain an injury in the manner averred. Evidence about conversations he had with some of the occupants as to the circumstances of the alleged accident was not strong enough to confirm his version of events. That was enough to dispose of the action.

#### **Pursuer - decision on credibility and reliability**

[72] The pursuer's evidence about the circumstances of his accident and the aftermath were slightly different to what was averred on record, in that there was no mention on record of his father taking him to the Minor Injuries and Illness Unit, and the unit was in Arbroath rather than Brechin as averred. Those are minor points, which on their own, did not cause me to doubt the pursuer's credibility or reliability.

[73] The pursuer's evidence about the immediate aftermath of his accident, that he decided to proceed down three flights of stairs and some 23 steps in darkness and go to work two hours early rather than returning to his flat, seemed to me to be illogical but again, on its own, did not cause me to doubt the pursuer's credibility or reliability.

[74] The pursuer's very detailed description of his fall, despite being in darkness, and his precise estimate of how long he lay on the floor contrasted with the vagueness of his evidence about what happened for the rest of that day for some ten hours, raised questions in my mind about the pursuer's credibility and reliability. I accepted that the passage of time could explain the failure to remember and again, taken in isolation, would have been insufficient to cause me to doubt the pursuer's credibility or reliability.

[75] However, the numerous inconsistencies between the pursuer's evidence and the medical records from the Minor Injuries Unit in Arbroath caused me more concern. While I

accepted that the records were not agreed to be an accurate account of the circumstances of the accident and that evidence was not led from the author of those notes, the sheer number of inconsistencies raised doubts in my mind about the pursuer's credibility and reliability.

The notes recorded: (i) nothing about stairs; (ii) a failure in street lighting rather than stairwell lighting; (iii) that the pursuer had driven himself to the unit; (iv) that he had worked all day in a yard; (v) that his presentation was very odd; (vi) that he appeared under the influence of an unknown substance; (vii) that he was advised he was unfit to drive; and (viii) that he would contact a friend in Arbroath.

[76] Had the medical records been briefer but generally consistent with the pursuer's version of events, my doubts may have been assuaged. However, the notes were full, detailed and inconsistent with the pursuer's version of events. In the absence of any other evidence from other sources about the accident and taken together with the other factors outlined above, I did not find the pursuer to be a credible or reliable witness. I do not doubt that he had an accident, but I do not believe it happened as he described.

### **Disposal**

[77] In order to succeed, the pursuer required to prove that the accident happened as set out in the pleadings. Having found the pursuer not to be a credible or reliable witness, I was left with the evidence of Mr Coutts and Mr Frier that the pursuer told them he fell down the stairs and that the lights were not working. Though consistent with the pursuer's evidence, it simply proves that he told them that he fell down the stairs. I did not consider that it was strong enough to confirm the pursuer's version of events. Consequently, I was not satisfied that the pursuer sustained an accident as averred on record.