SHERIFF APPEAL COURT

[2018] SAC (CIV) 31
[PIC-PN1874-16]

Sheriff Principal M Stephen QC
Appeal Sheriff N Stewart
Appeal Sheriff W Holligan

OPINION OF THE COURT

delivered by SHERIFF PRINCIPAL M STEPHEN QC

in appeal by

DIANE RAYBOULD

Appellant;

in the cause

DIANE RAYBOULD

Pursuer and Appellant:

against

T & N GILMARTIN (CONTRACTORS) LIMITED

Defenders and Respondents:

Appellant: Galbraith, Advocate; Digby Brown
Respondent: Stephenson QC; DAC Beachcroft Scotland LLP

18 December 2018

[1] The pursuer is a 59 year old lady with medical problems and restricted mobility who requires a walking aid. She lives in a house in West Forth Street, Anstruther along with her husband, daughters and other family members. The front door of her home gives straight

on to the pavement of West Forth Street. On 3 February 2015 when returning to her front door she fell when crossing or navigating an excavation on the pavement directly outside her home. She sustained injuries when she fell. The defenders are public works contractors who were working on the pavement outside her home. They were contracted by Fife Council to install new street lighting on West Forth Street. The works involved excavating sections of the footway or pavement by cutting a trench to accommodate ducting. The digging of the trench also created spoil which was piled adjacent to the excavation. The area was a mess.

[2] The pursuer's claim for damages lies against the defenders and is based on a breach of their common law duty to take reasonable care for the pursuer. The defenders admit that there are certain duties incumbent upon them but that they fulfilled these duties. In statement of facts 4 the pursuer expands upon the defenders' duty which is to take reasonable steps to provide safe access in particular to provide safe access to her front door across the excavation or works (statement of facts 4 on page 5C). The pursuer avers that there were no footway boards provided and therefore no safe access across the excavated trench in front of her door. Footway bridging boards providing access to residents' properties were put in place following her accident. The pursuer also says that the defenders ought to have had regard to the Department for Transport: "Safety at Street Works and Roadworks – A Code of Practice" (2013).

[3] The defenders' case on record is to the effect that the accident did not happen in the manner suggested by the pursuer. Instead she simply stumbled and fell there being no excavation at the place where she lost her footing. In other words, there were no works which caused or contributed to the pursuer losing her footing. It is apparent that the

defence pled on record was departed from in the course of proof and the focus then turned to the pursuer's duty to take reasonable care for her own safety.

[4] At proof over three days in March 2018 in the All Scotland Sheriff Personal Injury Court the pursuer gave evidence and led evidence from her daughter Ashleigh and from Mr Barber, a taxi driver, who on a fairly regular basis collected another of the pursuer's daughters to take her to university. The evidence of other witnesses was taken on commission: in particular that of a neighbour, Lesley Brand; Mr Dunston, Director of Surgery at the Victoria Hospital, Kirkcaldy; and James Christie, Clerk of Works with Fife Council who was a witness for the defenders. Additionally, Dr Colin Rodgers, Consultant Psychiatrist, gave evidence on behalf of the pursuer in respect of the psychological sequelae from the accident and particularly her adjustment disorder with anxiety.

[5] At the conclusion of evidence and submissions on 22 March 2018 the sheriff, by way of extempore judgment, assoilzied the defenders and found the pursuer liable to the defenders in the expenses of the cause. The sheriff's extempore is set out as a note on pages 16 to 18 of the appeal print. This appeal is against the sheriff's interlocutor of 22 March granting decree of absolvitor.

[6] In his note the sheriff analyses the evidence and material essential to his decision. The sheriff considered the key issue in the case to be whether the maxim *volenti non fit injuria* applied. He records:

> "At the stage when she embarked on crossing, P she knew that there was no board and that one not to be provided. According to her, the conditions were perilous and her opinion was that she couldn't cross. She was walking with a stick and has a number of health problems which affect her mobility. She knew that the barriers were there to discourage or limit access to the area.
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> In no sense could she be said to be unaware of the risk she was running by attempting to cross the excavated area. Indeed, she was apprehensive at entering the street at all."

The sheriff went on to observe that the pursuer did not require to enter the house by the front door. "She was under no time pressure. Jim had taken the dog in. She did not suggest she couldn't walk back round to the back door."

The sheriff concluded that *volenti* applied and that the pursuer knew of the risk and accepted it. The pursuer was seised of the relevant knowledge about the risk which, in the sheriff's view, was obvious. The sheriff, as must be the case, proceeded on the hypothesis that there was a duty on the defenders to exercise care towards householders including the pursuer which they had breached. The sheriff further reasoned that the pursuer had failed to show that the defenders' actings had caused her fall. Any breach of duty on the part of the defenders was not the proximate cause of the fall instead the cause was the pursuer's own attempt to cross unaided knowing that no assistance in the form of a ramp or footway board was to be forthcoming. Therefore, the pursuer had not established causation. Further, in the event he was wrong to conclude that the maxim of *volenti* applied then the sheriff considered there would be a substantial finding of contributory negligence of 80% on the part of the pursuer.

[7] The appeal raises the following questions:

(1) Whether the maxim *volenti non fit injuria* applies? Can the maxim apply in the absence of any plea in law or averment in answer or submission that it does? Whether the maxim can apply in the absence of a duty of care which has been breached?

(2) Whether the sheriff accepted that there had been a breach by the defenders of any duty of care owed to the pursuer? On the assumption he did was the sheriff entitled to find the defenders' wrongdoing not to be the proximate cause of the pursuer's accident with the result that she had not established causation?

(3) Whether the sheriff's apportionment of responsibility for the damage suffered by the pursuer was outside the range of reasonable determinations?

Proof

[8] Having heard the proof the sheriff considered *volenti* to be the key issue which he had to decide. In keeping with the extempore nature of the judgment the sheriff did not review the entire evidence or give an assessment of the credibility and reliability of all witnesses. The only comment as to the pursuer's credibility and reliability is made in the immediate context of the effect of the accident on the pursuer. The sheriff observes "I did find that P was dramatic but I did not find her to be untruthful". Of course, much of the evidence was given on commission. We proceed on the basis that the credibility and reliability of the witnesses was not an issue at proof.

[9] The sheriff made certain findings in fact based upon the pursuer's evidence as follows:- "The pursuer was at home with her husband on the date of the accident. She could see from her first floor window that the footway outside her house had been dug up and there was a trench and rubble. The pursuer thought it was a mess and it was clear that the workmen were in the throes of an excavation. She did not consider that she could exit the house from the front door. The works were creating noise. Once her daughter returned from college she and her husband took the dog outside exiting via the back door. She required to take her stick as she was not able to keep her balance without it. They proceeded into an adjacent street to allow the pursuer's husband to walk the dog. The pursuer, herself, sat on a wall. When they returned to the house they found that the back gate had closed on them and could not be opened from the outside. Accordingly, they walked round to West Forth Street to enter by the front door. The pursuer was really nervous as she did not want to walk into a building site. There were a number of orange plastic barriers on the carriageway between the pursuer and the trench or excavation at her

front door. The barriers were not attached to each other. Looking towards her front door she could not see where the pavement started. The area was a mess and she felt disheartened when she saw how bad the situation was. Although the barriers were not attached to each other the pursuer knew that the barriers were there to stop people walking on the trench and rubble. Her husband preceded her into the house. He moved two barriers further apart, picked up the dog and half carried it into the house. The pursuer assumed that the workmen would put something across the excavation for her. One workman was standing close by. She motioned him over and said that she could not possibly get over it (the excavation). She asked him to put a ramp down. She thought that the workman would come with a ramp but instead the workman shrugged his shoulders and walked away. It was obvious to her that he was not going to do it. The pursuer then decided to put her stick into the trench and put her foot onto what she thought was firm earth. As she brought her other foot over her leading foot sank down and she fell striking her head on the wall". These are the salient findings upon which the sheriff reached his conclusions in law.

Volenti Non Fit Injuria

[10] Counsel for the appellant made submissions on the general approach to and effect of the maxim. Then, under reference to the specific circumstances of this case, she submitted that *volenti* could not apply. Further, no notice having been given by the defenders that either *volenti* or voluntary assumption of risk would be argued and no submissions having been made to the sheriff by either party led to an outcome which was unfair not only to the pursuer but to both parties.

[11] Counsel emphasised the maxim had very restricted application. Under reference to Thomson on Delict (Chapter 8) and Stewart: Reparation: Liability for Delict (Chapter 30) she

observed that this case fell into the category where *volenti* might provide a complete defence to a breach by the defender of a duty of care. In these circumstances the pursuer must know the risk and also consent to accept the consequence of the breach of duty. This, in effect, constitutes a waiver of the defenders' liability for their negligence or breach of duty (*Winnik* v *Dick* 1984 SC 48). There must exist a duty of care which has been breached before *volenti* can apply. In this case the defenders accept they owed a duty of care to the pursuer. In the pleadings they accept that such a duty exists but that they fulfilled that duty by providing barriers and in any event the accident did not happen as suggested by the pursuer. In the absence of pleas in law in chapter 36 personal injury procedure answer 6 may be taken as stating the defenders' pleas in law. They admit that there are certain duties of reasonable care incumbent on them but explain that they fulfilled these duties. Otherwise the defenders' position is stated in common or traditional form firstly, that they are not liable to make reparation and secondly if they are, the damages should be reduced by operation of the Law Reform (Contributory Negligence) Act 1945 and thirdly, the residual proposition that the sum sued for is excessive. *Volenti* does not feature nor was it mentioned in submission. Indeed, *volenti* did not feature at all in either oral or written submissions before the sheriff. *Volenti* first emerged when the sheriff gave his extempore judgment now confirmed in the interlocutor and note.

[12] Even if there is no duty of care the issue of lack of notice remains important. There is no suggestion that voluntary assumption of risk is part of the defence. The defenders would require to state that the pursuer knew and accepted the risk and consented to absolving the defenders (*Dawson* v *Page* 2013 SC 432). The defenders' contention on record is that the accident did not happen at the place or in the manner suggested by the pursuer. The defenders had to change tack at proof and answer the evidence as adduced. The pursuer

did not get a fair hearing as a result of the sheriff's approach to *volenti* and also due to the defenders' failure to mention that the circumstances pointed to *volenti* or voluntary assumption of risk. Had such notice been given then a different approach in cross examination would be expected. The evidence of a neighbour, Ms Lesley Brand, was taken on commission prior to the proof. The commission proceeded on the basis of the pleadings. There was no suggestion that Ms Brand should not have been attempting to enter her home by the front door across the pavement excavation. Counsel then presented what was, in effect, an equitable argument that it was contrary to our system of justice to make a decision based on a legal argument or maxim which was not addressed in evidence or argued by the parties (see *James* v *Wellington City* [1972] NZLR 978). Cross examination of the pursuer proceeded on the basis that she contributed to the accident which caused her injury. This, of course, is a quite distinct concept from *volenti*.

[13] There was ample evidence that a duty of care existed and that duty had been breached due to the hazardous state of the pavement works and the lack of a suitable ramp or board. The reference to the barriers and the area having been cordoned off is largely irrelevant. The barriers were "not formed" in the sense of channelling pedestrians down a particular route or preventing access to certain work areas. In any event the duty of care is owed to the pursuer as a householder to provide safe access to her front door. Counsel invited us to find that there was a breach on the part of the defenders of their duty of care to the pursuer; that *volenti* did not apply and that the sheriff was not entitled to find that it did so in the absence of a specific defence or averments which would give notice to the pursuer.

[14] Counsel for the respondent adopted the written note of argument. He submitted that the question whether *volenti* applies is not essential to this appeal. The sheriff's note gives his oral decision in bullet points. His assessment of the pursuer's actions is entirely

consistent with the evidence led at proof. Even if the appellant's submissions on *volenti* are correct and accepted the sheriff was entitled to find as he did and assoilzie the defenders. Firstly, on the question whether there was a duty on the defenders to provide access boards, the defenders do not accept that such a duty existed. The defenders' position as stated on record is simply that there was no pedestrian access allowed to the locus at the time. It is submitted that the sheriff accepts this proposition. Secondly, the sheriff was entitled to decide on an *esto* basis that any breach of duty was not the proximate cause of the accident ("the causation issue"). Therefore, whereas the sheriff may have indulged in a frolic of his own on *volenti* that did not matter. Mr Stephenson accepted that the circumstances of this case may not have justified the sheriff finding that *volenti* applied. *Volenti* strictly involves not only acceptance of risk but also waiver of liability. It is accepted that waiver was not argued nor was the pursuer asked about it. In so far as the sheriff made a finding that *volenti* applied he may well have been wrong resulting in unfairness to both parties. However, that does not mean that the appeal should be allowed.

Discussion

[15] If the maxim *volenti non fit injuria* applies it is a complete defence to any claim in delict (Thomson Delict 8.35). Normally v*olenti* is advanced as a separate plea in law however as pleadings in personal injury cases have become simplified (Chapter 43 of the Rules of the Court of Session; Chapter 36 of the Ordinary Cause Rules in the Sheriff Court) there are now no pleas in law. Answer 6 is, in effect, equivalent to the defenders' pleas in law. The defenders there set out the legal basis for their defence to the action and there is, of course, no hint that the defenders proposed advancing v*olenti* as a defence.

[16] "The effect (of the maxim) is that where a duty of care exists and has been breached the defence of v*olenti* may absolve this breach" (Thomson Delict 8.39). Accordingly, we

proceed on the basis that the sheriff could not make a finding that v*olenti* applied without first of all accepting that the defenders owed a duty of care to the pursuer which they had breached. In this appeal, we require to consider both the substantive and procedural consequences of the sheriff's approach to *volenti*. Parties had no notice that the sheriff considered *volenti* might apply until the sheriff delivered his extempore decision. It therefore appears that the question of *volenti* arises in this case by virtue of the sheriff innovating. Clearly, *volenti* only has application where there has been a breach of duty and liability on the part of the defenders would otherwise exist. *Volenti*, in effect, amounts to a waiver by the pursuer of the defenders' liability to her in damages. There must be proof that the pursuer knew of the risk (*sciens*) and also that she accepted the risk or voluntarily assumed the risk (*volens*). In this case there is no suggestion that the pursuer either implicitly or explicitly gave any such waiver or that the circumstances would allow the court to infer that the pursuer has impliedly consented to take the risk. It is accepted on behalf of the defenders that the pursuer was not asked about "waiver" or whether she was prepared to absolve the contractors of any liability they may have towards her. For *volenti* to apply, this must be trailed in the pleadings and put to the pursuer and any relevant witnesses who could shed light on that matter. It is accepted that the proof was not conducted on that basis. The defenders position is that they deny that any duty is owed to the pursuer which is far removed from *volenti* which is consent to accept the consequences of a breach of duty. Therefore no notice of v*olenti* had been given nor was it argued in submissions following evidence. It would appear that the sheriff introduced this legal proposition into his judgment when he was considering his decision. Assuming that to be the case, and there is nothing to suggest otherwise, then he ought not to have proceeded in this manner on his own initiative without giving the parties an opportunity of being heard on the competency

and relevancy of what he had in mind. There were neither averments nor submissions to support the legal proposition which the sheriff introduced into his judgment. To decide the issue between the parties on a legal maxim not supported by the evidence; not argued for and of which no notice had been given is simply not appropriate. Accordingly we have little hesitation in finding that this is not a case in which the maxim v*olenti non fit injuria* applies.

Breach of Duty and Causation

[17] Counsel for the appellant acknowledged that the appeal is directed against the sheriff's erroneous application of the maxim volenti non fit injuria. However, before the sheriff could consider v*olenti* he must have accepted that the defenders owed a duty of care to the pursuer which they had breached. Otherwise, v*olenti* could not be considered.

[18] The sheriff's decision should be analysed from that standpoint. Accordingly, the sheriff is not proceeding on a hypothesis but as a matter of law. The evidence entirely supports that conclusion. In particular the evidence of James Christie given on commission was available to the sheriff. That witness confirmed that the 'code of practice' sets out the standards to be expected of those carrying out roadworks and works to footpaths in Scotland. It emphasises the need to provide safe routes for pedestrians which would include access to adjacent buildings. Contractors must consider the needs of those with *inter alia* reduced mobility. It refers to the use of footway boards which are important to give people safe access to their property. The sheriff makes no reference to that evidence.

[19] The defenders led no oral evidence at proof and accordingly their averments were not supported in any respect. The defenders departed from their defence in the course of proof. Ultimately, it was not disputed that there was an excavation outside the pursuer's home and that the area was hazardous. As the defenders failed to lead evidence any inference which may be drawn from the evidence led at proof should be favourable to the

pursuer (*O'Donnell* v *Murdoch Mackenzie & Co Ltd* 1967 SC(HL) 63). The defenders' contention that they owed no duty of care to the pursuer far less that they had breached any duty of care is not a proposition which the sheriff could reasonably have accepted on the evidence. In any event, the sheriff must have accepted there had been a breach of duty before he could consider whether *volenti* applied.

[20] Turning to the matter of causation, and anticipating the argument to be made on behalf of the defenders, counsel for the appellant pointed out that there was no submission made by the defenders as to causation. In so far as the defenders now seek to rely on that part of the sheriff's note which focuses on causation they are not entitled to do so. The sheriff made his decision based on *volenti* and the sheriff's observations as to causation are based on his views, wrongly held, as to *volenti*. The pursuer's actings do not constitute a *novus actus interveniens* (see *Clay* v *TUI UK Ltd* [2018] EWCA Civ 1177).

[21] Counsel for the respondents considered that the fundamental flaw in the appellant's argument is that there is no acceptance by the sheriff that the defenders owed duty to the pursuer and had breached that duty. The finding required by the pursuer simply does not exist. The sheriff's note, when analysed properly, makes it clear that he was proceeding on a hypothesis only and there is no finding of breach of duty which is essential to establish liability. The sheriff's decision must be analysed on that basis. The sheriff makes the point that if any duty to provide safe access existed (which he is not convinced of) it could not exist whilst works were ongoing in the sense that it would not be reasonable to put down foot boards during active operations when the men were digging, excavating or engaged in other works necessary for the purpose of the contract. That was the situation which prevailed at the time of the accident. This was an active site. There is evidence of that from the pursuer herself; from her daughter Ashleigh and from the evidence of the Clerk of

Works, Mr Christie. The latter gave evidence that foot boards would provide safe access over an excavation however he qualified that in the sense that he would only expect a foot board to be put down once the tracking was completed, or once the duct itself was installed into the excavation and then backfilled (Commission evidence page 30). The evidence supports there being a basis for saying that there were works going on at the time despite there being no specific finding in fact to that effect. Had the sheriff accepted that there was a duty of care which had been breached the sheriff would not have expressed that proposition by way of hypothesis. On the pursuer's own averments the defenders' workmen were still working on the day of the accident. Furthermore, the pursuer acknowledged that there was a row of safety barriers and that they were meant to prevent access to the footway. Accordingly, the appeal must fail as the pursuer has not established the duty averred or a breach thereof. There is no finding of a breach of duty and this court cannot be satisfied that there existed a duty which was breached.

[22] The second substantial reason why the appeal must fail rests on the matter of causation. The sheriff makes this observation in his note (page 17 of the appeal print).

> "Can be analysed from point of view of causation: if D in breach of duty, that was not proximate cause of P's fall. The cause was her attempt to cross unaided – and knowing that no aid in form of ramp was to be forhtcoming (sic)."

That finding alone is sufficient to support the sheriff's interlocutor absolving the defenders. As no appeal is taken against the sheriff's finding on causation the appeal must necessarily fail. The pursuer requires to establish that the defenders' breach of duty was the cause of her accident. The sheriff does not accept that. There is in essence no appeal on causation but in any event an appeal on causation could only succeed if the sheriff made an error of law. There is ample in the findings in fact and the sheriff's reasoning to support his conclusion that the cause of the accident was not the breach by the defenders but her own

wilful and unreasonable behaviour in persisting to enter by her front door unaided and in face of there being an open excavation and spoil in front of her door. The pursuer's actions may be classified as so unreasonable in circumstances where she had an alternative means of access to constitute a *novus actus interveniens* in terms of the test set out by Hamblen LJ in *Clay* v *TUI* (*supra* at paras 27 and 28)

Discussion

[23] As a matter of law before the sheriff could consider, far less apply, the maxim of *volenti non fit injuria* he must have accepted that the defenders owed a duty of care to the pursuer and that they had failed to take reasonable steps to comply or had breached that duty. The sheriff misdirected himself on *volenti* which he considered to be the key issue in the case. The views expressed by the sheriff as to causation, briefly stated, appear to be inextricably linked with his opinion that *volenti* is the key question and applies here ("*P knew of risk and accepted it*"). As the sheriff is clearly wrong about *volenti* the question arises as to the scope of this court's powers. In our view, the task for this court is not limited to interpreting what the sheriff means when he mentions "*scope of duty/breach of duty*" in his note (B/C on page 16 of the appeal print). Under that heading at the third bullet point it is noted:

> "While I am not convinced on the evidence that such a duty existed given state of works going on at time, for limited purpose of giving this ex tempore judgment, I accept that hypothesis."

As we have already emphasised this is no mere hypothesis as *volenti* could not be considered unless there was a breach of duty. Accordingly, in our view the question now arises whether the findings in fact (apparently made by the sheriff when delivering his extempore decision) support there being a breach by the defenders of a duty of care owed to the pursuer. There is no finding in fact and law to that effect. In the passage set out above

the sheriff appears to qualify or question whether a duty existed "*given state of works going on at time*". It follows that we must analyse the sheriff's findings to answer the question whether the defenders owed a duty to the pursuer at the time of the accident during the afternoon of 3 February 2015 and were in breach of that duty. There is no specific finding that the works were active or ongoing at the time. As a general proposition the defenders owed a duty to provide safe access to persons in West Forth Street including pedestrians and neighbouring proprietors where it was reasonably foreseeable that such persons and, indeed, other visitors such as the postman, doctor or people making deliveries would require to use the front door.

[24] The sheriff has made findings based on the pursuer's evidence (page 16 C-17A of the appeal print). We have been provided with the transcript of evidence although neither party asked us to make additional findings in fact. What we can derive from an analysis of the sheriff's findings (as set out in para [9] above) is that the pursuer encountered a number of orange barriers (on West Forth Street) which were not attached to each other or linked together positioned between the point where she was standing on West Forth Street and her front door. The pursuer knew the barriers were there to stop people walking on the trench and the rubble. She felt disheartened but her husband separated the barriers further, picked up the dog and went into the house. The pursuer assumed that the workmen would put something across the excavation for her (presumably to use as a means of access over the excavation). She noticed a workman who was standing close by. She motioned him over and asked him to put a ramp down. She expected that the workman would come with a ramp but instead the workman shrugged and walked away. It was obvious that he was not going to assist. Then, at that point she embarked on crossing the trench to reach her front door using her stick to steady herself however, the soil under her foot moved causing her

foot to sink ultimately causing her to fall sustaining injury. A proper analysis of these facts in the absence of a contrary finding in fact does not support any suggestion that there was work actively ongoing in front of the pursuer's door. A trench had been excavated and there was spoil and a mess. None of the sheriff's findings support the proposition that there was digging or ducting work of any sort ongoing at the time the pursuer required to access her front door. The only evidence adduced on behalf of the defenders supports the proposition that contractors require to provide not only safe routes for pedestrians but also safe access to adjacent buildings including the need to consider those with reduced mobility. The use of footway boards is referred to and recommended in the code of practice. They are important to give safe access to peoples' homes. Mr Christie may be thought to have qualified that evidence by expecting to see a yellow access board in position once the tracking was completed which would take "a matter of minutes") it is clear that in response to a question regarding the laying of ducting that he would place the walk board in situ after finishing or after backfilling which is generally done at the same time or shortly after the ducting is placed in situ. Then the walk board would be placed on top. However, we do not understand his evidence to mean that it would be acceptable not to put a walk board in place if there were to be any significant gap in time between the various stages in that operation. Mr Christie's evidence does not support the proposition advanced by the defenders in submission that they came under no duty to provide access until the works were fully completed. This would, in effect, condone leaving the trench and spoil outside the front door until backfilling was completed regardless of the hazard it presented. Were this to happen it was reasonably foreseeable that something harmful could arise to persons seeking to access their homes. There was evidence that footway boards were provided following the pursuer's accident which allowed safe access to residents' properties. It is, of

course, the defenders' position that no access was permitted to the front doors of the houses in West Forth Street due to the operation of the orange barriers. That is not supported by the facts which simply point to there being barriers located on West Forth Street which were not formed or connected and did not prevent access to the property (see the evidence of Lesley Brand a neighbour of the pursuer). On our analysis of the facts it was not only reasonable but fair and just that the defenders owed such a duty of care to the pursuer. It is open to us to conclude, as we do, that the defenders had breached that duty by failing to provide the simple and utilitarian measure of a foot board to bridge the excavation. A reasonable contractor would have had regard to the fact that the occupants of the property and other visitors would require to access the properties on West Forth Street and that this straightforward measure would facilitate safe access. The DFT "Code of Practice" points to this being accepted good practice. Therefore we are of the view that the defenders were in breach of the duty to provide safe access to householders on West Forth Street at the relevant time due to the absence of walk boards or foot boards.

[25] Causation is not raised as a ground of appeal by the appellant. The appeal is directed to what the sheriff says is the key issue namely, *volenti*. Having disposed of the principal ground of appeal the underlying issues emerge including causation. We consider that it would be manifestly unjust if we were to decline to deal with causation. Firstly, in the course of the appeal we were addressed on causation. Secondly, and importantly, it appears that no argument was made to the sheriff as to causation. In submissions following proof it was not suggested that there was a lack of a causal link between the defenders' actings and what befell the pursuer. The sheriff's brief analysis of causation appears to proceed either in a vacuum or through the prism of *'volenti*'. Thirdly, as the key issue in the sheriff's consideration is *volenti* and the legs having been cut from that we must analyse causation

from a different standpoint namely, that although the pursuer may have known or been aware that the excavation presented a risk she neither accepted that risk nor did she intend to absolve the defenders of liability for their actings. This is, of course, a quite distinct approach from that taken by the sheriff.

[26] We require to consider whether the pursuer's actions or response to the hazard were so unreasonable that the defenders' breach of duty ceased to be the true cause of her accident. The facts established following proof amount to this: The pursuer wished to get into her home by her own front door having been locked out of the back door. Her husband preceded her into the front door together with the dog. The pursuer is a lady with compromised mobility which would suggest that the most direct route would be best and she had to assess the risk presented by the hazards. The pursuer did not carry on regardless instead she asked a workman standing nearby for assistance in the form of a ramp or foot board. He walked away and did not assist. The foreseeability of householders wanting to access their front door appears to us to be so obvious that it hardly needs stating. However the evidence of Lesley Brand underscores this. In our opinion, the question of causation involves a broad assessment of the facts and circumstances. The question whether the chain of causation has been broken involves a broad evaluation of these facts and fairness. We were referred to the recent English decision of *Clay* v *TUI* (*supra*). Mr Clay's action for damages was dismissed following trial as it failed on the issue of causation. Mr Clay and his family were on holiday abroad and occupied adjoining rooms. Late at night Mr Clay and the adult members of his family became locked out of their hotel room on the balcony due to a defective door locking mechanism. Mr Clay, after trying to obtain assistance, decided to cross from the balcony his party was stranded on to the balcony of the adjoining room where his children were asleep. In doing so a ledge gave way causing him to fall some

distance sustaining serious injuries. The court concluded that his injuries were a product of his own actions and that these actions namely, stepping or jumping across the gap between the balconies was so unexpected and foolhardy as to constitute a *novus actus interveniens*. The defect in the locking mechanism on the balcony door was not the proximate cause of the accident. Mr Clay's appeal was refused by a majority. At paragraphs 27 and 28 Hamblen LJ makes the following observations:

> "27 Determining whether there has been a *novus actus interveniens* requires a judgment to be made as to whether, on the particular facts, the sole effective cause of the loss, damage or injury suffered is the *novus actus interveniens* rather than the prior wrongdoing, and that the wrongdoing, whilst it might still be a "but for" cause and therefore a cause in fact, has been eclipsed so that it is not an effective or contributory cause in law.
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> 28 As Aikens LJ observed in *Spencer* v *Wincanton* at [45], where the line is to be drawn is not capable of precise definition. Various considerations may, however, commonly be relevant. In a case involving intervening conduct, these may include:
>
> (1) The extent to which the conduct was reasonably foreseeable – in general, the more foreseeable it is, the less likely it is to be a *novus actus interveniens*.
>
> (2) The degree of unreasonableness of the conduct – in general, the more unreasonable the conduct, the more likely it is to be a *novus actus interveniens* and a number of cases have stressed the need for a high degree of unreasonableness.
>
> (3) The extent to which it was voluntary and independent conduct – in general, the more deliberate the act, the more informed it is and the greater the free choice involved, the more likely it is to be a *novus actus interveniens*."

If we apply these considerations to the present case we can make the following observations. It is a common place activity and foreseeable that a householder such as the pursuer would seek to enter her home by the front door. The pursuer asked for assistance before proceeding. She used her stick to assist her by providing another point of contact with the ground. She chose this manner of accessing her home when the back door had closed on her and her husband. She could have arranged for her husband to open the back door and then

for her to return via the back door. That decision must be assessed against the whole background and context of her restricted mobility and general anxiety. This is an assessment, in our view, which bears upon contributory negligence rather than on causation. We must also evaluate the pursuer's actions against the whole evidence including that of her neighbour Lesley Brand, who, it appears, navigated the excavation albeit with difficulty during these works. Mr Christie's evidence, although not referred to by the sheriff, is also of some importance. He envisages the requirement for foot boards and the reason for that is to provide safe access for householders.

[27] Accordingly, as there was no real evaluation by the sheriff broad or otherwise on the question of causation and as there were no submissions on causation it is open to us to answer the question: whether the pursuer's actions or response to the hazard can be categorised as being so unreasonable that the defenders' failure to take reasonable steps to provide a safe access by way of a foot board ceased to be the cause of her accident? In our opinion the facts and circumstances do not disclose the requisite high degree of unreasonableness required to establish that the pursuer's actions constitute a new or intervening event which broke the chain of causation. It follows that we are of the view that the sheriff, in so far as he considered causation without being addressed by parties, wrongly categorised the pursuer's actions as reaching such a high degree of unreasonableness. Accordingly, we consider that the facts and circumstances point to the defenders' failure to take reasonable steps to provide a proper means of access by way of a walk board or ramp to be the real and proximate cause of the pursuer's accident.

Contributory Negligence

[28] Having regard to the sheriff's conclusion on the merits unsurprisingly his conclusion on contributory negligence is brief and in the following terms:

> "Contributory negligence
> If not VNFI, substantial CN, on same evidence and facts; P was blameworthy.
> If wrong on primary liability would nevertheless have reduced award by 80%"

[29] Counsel for the appellant argued that it was open to this court to assess the question of contributory negligence anew and to apply its own determination to the facts and circumstances. The sheriff's hypothetical consideration of negligence and apportionment of responsibility fell outwith the range of reasonable determinations. (*Jackson* v *Murray* [2015] SC (UKSC) 105 Lord Reed at para [38]).

[30] The appellant argued that several important considerations ought to be taken into account in any determination of apportionment.

1. The sheriff had erred in his approach to liability. The maxim *volenti* did not apply.

2. It was open to the sheriff to take the view that responsibility ought to be shared between the pursuer and defenders.

3. The pursuer was entering or endeavouring to enter her own home by the front door.

4. She had restricted mobility.

5. She felt she had little option but to proceed as she did.

6. She had asked a workman employed by the defenders for assistance but none was forthcoming.

7. She thought the ground was firm and used her stick to steady or support herself.

8. The evidence of other residents of W. Forth Street confirmed that they had difficulty entering their home by the front door. It was not put to them that using the back door was a safer alternative.

[31] Having regard to these considerations and the evidence as a whole counsel for the appellant proposed that a finding of no more than 25% contributory negligence by the pursuer was warranted.

[32] Counsel for the respondent advanced the proposition based on *Jackson* v *Murray* (*supra*) that the assessment of contributory negligence is primarily a matter for the judge at first instance. This court ought not to interfere with the sheriff's assessment especially in a low value claim. The appellant had failed to demonstrate that 80% contributory negligence was not a reasonable apportionment given the facts and circumstances. The appellant was aware of the risk she was taking. The pavement was blocked to pedestrians. Having regard to the pursuer's duty to take reasonable care for her own safety the assessment made by the sheriff was one open to him on the evidence.

Discussion

[33] Assessment of contributory negligence involves the exercise of judgment based on the facts and circumstances of each case. That is in keeping with the language of the statutory provision (section 1(1) of the Law Reform (Contributory Negligence) Act 1945) which provides:-

> "Where any person suffers damage as the result partly of his own fault and partly of the fault of any other person or persons, a claim in respect of that damage shall not be defeated by reason of the fault of the person suffering the damage, but the damages recoverable in respect thereof shall be reduced to such extent as the court thinks just and equitable having regard to the claimant's share in the responsibility for the damage."

The focus is on 'responsibility for the damage' as opposed to 'the accident'. (*Jackson* v *Murray* (*supra*) paras [19] and [20]).

[34] We must first of all consider the sheriff's approach to contributory negligence 'having regard to the claimant's share in the responsibility for the damage'. Understandably, the sheriff's consideration of this aspect is brief due to the abbreviate nature of the extempore judgment. His assessment is a 'rough and ready' one due to liability and apportionment of blame being a subsidiary or *esto* aspect of his decision and reasoning. The sheriff's primary

position is that the pursuer assumed the risk and relieved the defenders of liability for her accident and injury. The sheriff's conclusion that *volenti* applies permeates his reasoning. However, we have found that *volenti* does not and cannot apply to the facts of this case. In assessing contribution the sheriff correctly observes that the pursuer was blameworthy however there is no assessment of the respective blameworthiness of each party. The UKSC in *Jackson* v *Murray* observes that section 1(1) of the 1945 Act does not specify how responsibility is to be apportioned but refers to the guidance found in *Stapley* v *Gypsum Mines Ltd* [1953] AC 663 and the *dicta* of Lord Reid at page 682 where he states:-

> '*A court must deal broadly with the problem of apportionment and in considering what is just and equitable must have regard to the blameworthiness of each party, but "the claimant's share in the responsibility for the damage" cannot, I think, be assessed without considering the relative importance of his acts in causing the damage apart from his blameworthiness.'*

Stapley is an employers' liability case where the court on appeal altered the trial judge's assessment of contributory negligence by increasing the contribution or blameworthiness of the deceased.

[35] In this case the sheriff proceeds to make an assessment of blameworthiness or contribution based on the pursuer's evidence in a vacuum. The sheriff's findings in fact are based on the evidence led by or on behalf of the pursuer. Of course, only the pursuer led evidence from witnesses who could speak to events on the day of the accident. Nevertheless, the defenders lodged with the court the evidence of Mr Christie, Clerk of Works with Fife Council given on commission. He gave evidence as to safe practice at street works and road works and commented on the Department of Transport Code of Practice in these areas. He was not in a position to give evidence as to what occurred at the locus on 3 February 2015 or about the state of the pavement works as he had no clear memory of the site on that day. Nevertheless his evidence was not only available to the sheriff but, in our

view, important not only to liability but also assessment of relative blameworthiness. He accepted as good practice the guidance set out in the Code of Practice which emphasises the need to provide safe routes for pedestrians including access to adjacent buildings. Contractors must consider the needs of those with…*inter alia* reduced mobility. He recognises that reinforced fibreglass walk boards would be used to maintain foot access during excavation work. He agrees that footway boards are important to give (people) safe access to their property or homes. Under cross examination he considered that the walk board would be put in situ after tracking or cutting the trench and again after backfilling as the ducting is generally backfilled at the same time as the ducting is placed in situ. (Report of Commission pages 30 and 31) As we have already observed, there is no finding either about ducting or the stage the pavement works had reached at the time of the pursuer's injury. Nor is there a finding or evidence about excavation work or ducting work being ongoing in front of the appellant's home at the material time. Applying the guidance set out in *Stapley* above it does not appear that any consideration, even brief, has been given to the blameworthiness of both the pursuer and the defenders.

[36] We consider that the sheriff's assessment of contribution is inextricably linked with his approach to the primary question of liability. On appeal the arguments have focussed on issues involving both liability and contributory negligence. We are of the view that the failure to properly assess relative blameworthiness, even as an *esto* factor means that the sheriff's reasoning on this matter has not been fully or satisfactorily explained. It leads to the conclusion that he has erred in his approach to contributory negligence which is now open to us to assess of new based on the findings in fact made by the sheriff and the evidence which, in all material aspects, is available to us. We require to give consideration to the parties' actings against the entire context or background and decide to what extent damages

should be reduced. The statutory language emphasises that is a just and equitable judgment having regard to the claimant's share in the responsibility for the damage. However, that judgment requires us to give consideration not only to relative blameworthiness but also causative potency (as affirmed in *Jackson supra*). In cases of road traffic accidents involving pedestrians (as in *Jackson*) the relative causative potency is thrown into stark relief by virtue of the potential damage which a motorist might cause compared with a pedestrian. The distinction between causative potency and relative blameworthiness is less obvious in the circumstances of this case. We were not addressed on the significance of the two factors. However, in our view the "principal" causative potency was the defenders' action in digging up the road outside the house; leaving a hazard and giving the pursuer no safe access. For the reasons we have already given in some detail it is clear that the pursuer in seeking to access her home by her front door was aware of the risk posed by the excavation but nonetheless we are of the view that her conduct in negotiating the hazard was not so unreasonable as to eclipse the defenders' own wrongdoing. Adopting the same evaluation as we have in respect of *novus actus interveniens* or causation we take the view that the pursuer must accept her share in the responsibility for the damage and injuries she sustained. She was blameworthy in pressing on over a dangerous area of ground and that contributed to her loss. For the reasons we have given we consider that the sheriff's assessment does not consider the relative blameworthiness of the defenders nor the relative causative potency of the parties' actings. Having regard to all the circumstances in our judgment we consider that the pursuer's conduct contributed equally to that of the defenders in causing her injury. Any damages should accordingly be reduced by one half. We were also urged to reconsider quantum. However, we see no error on the part of the sheriff in his approach to damages. The sheriff's assessment may be lower than that

suggested by the defenders in submission. That in itself is not indicative of error. Accordingly, we propose to allow the appeal and award 50% of the damages as assessed by the sheriff to the pursuer. Both solatium and the award for past services should attract interest as proposed by the sheriff.

[37] Having disposed of the appeal we make some observations on the extempore judgment in this case.

[38] As we understand matters, the sheriff issued his judgment the same day as he heard submissions. The judgment comprises the interlocutor dated 23 March 2018 attached to which was a note. The sheriff read out his conclusions. At some point (and it matters not when) the interlocutor and note were made available to parties. The judgment is described as an extempore judgment as the same as prescribed in OCR 12.3. The rule raises certain issues of practice in this and other cases which have come before the Sheriff Appeal Court. OCR 12.3 appears in chapter 12 of the OCR under the heading of interlocutors. Chapter 12 was extensively amended by the Act of Sederunt (Sheriff Court Rules) (Miscellaneous Amendments) 2012 -SSI 2012/188 ("the amending Act of Sederunt").

[39] Prior to the enactment of the amending Act of Sederunt there was no provision in the OCR for a sheriff to issue anything other than a conventional Note containing findings in fact, findings in fact and law and a Note setting out reasons. The report of the Scottish Civil Courts Review recognised that it was not always necessary, particularly in straightforward matters, for there to be a long form judgment. The report recommended providing for the use of extempore judgments (paragraphs 135-139). The amending Act of Sederunt gave effect to the recommendations. Read short, in most cases involving the leading of evidence (and for the exception thereto see rule 12.2(3)) the sheriff may either pronounce an extempore judgment or reserve judgment (rule 12.2(4)). For cases not involving the leading

of evidence (which we take to include a debate) the sheriff may (and must if requested to do so) attach a note to his interlocutor setting out the reasons for his decision (rule 12.2(5)). Rule 12.3 deals with extempore judgments. The relevant parts are as follows:

> "(12.3(1)) This rule applies where a sheriff pronounces an *ex tempore* judgment in accordance with rule 12.2(4)(a).
>
> (2) The sheriff must state briefly the grounds of his or her decision, including the reasons for his or her decision on any questions of fact or of law or admissibility of evidence.
>
> (3) The sheriff may, and must if requested to do so by a party, append to the interlocutor a note setting out the matters referred to in paragraph (2) and his or her findings in fact and law".

[40] It would appear that the rule anticipates the sheriff issuing an oral judgment which satisfies the requirements of rule 12.3(2). Should a written judgment be issued, either at the request of a party or because the sheriff elects to do so, that judgment must satisfy the requirements of rule 12.3(3). The difference between rules 12.3(2) and 12.3(3) is that, in the case of the latter, the judgment must contain findings in fact and law. The requirements for findings in fact and law (which we take to include the conventional distinction between findings in fact and findings in fact and law) are that, in the event of an appeal, the appeal court and the parties will know what the relevant findings were. It is the written judgment which comprises the judgment of the sheriff. It is not necessary that the written judgment follows exactly the oral judgment. By their very nature the two are different. However, there should be no material difference in relation to the crucial facts found admitted or proved and the legal reasoning as to the conclusion. We suggest that, should a written judgment be issued, it would be preferable that any findings in fact and findings in fact and law are expressed in the conventional way so that should an appeal ensue there is no doubt as to the sheriff's views. The sheriff also proceeded upon acceptance of a hypothesis as a

basis for determining liability. We do not consider that it was open for the sheriff to proceed in that way: the proposition fell either to be accepted or rejected and reasons given therefor.

[41] The appellant has succeeded in this appeal. The sheriff's interlocutor of 22 March 2018 will be recalled. Although we heard no submissions on expenses, as the pursuer has been successful the defender will be liable to the pursuer in the expenses not only of the appeal but of process to date in so far as not already determined. Sanction for the employment of junior counsel was granted in the All Scotland Sheriff Personal Injury Court and we understand that parties were agreed as to sanction before this court. We invite parties to agree any outstanding questions as to expenses failing which they should lodge a motion seeking a hearing on expenses.