SHERIFFDOM OF LOTHIAN AND BORDERS AT EDINBURGH
IN THE ALL-SCOTLAND SHERIFF COURT

[2017] SC EDIN 84

PN2519/16

JUDGMENT OF SHERIFF KATHRINE EC MACKIE

In the cause

L C

Pursuer

Against

CITY OF EDINBURGH COUNCIL
A local authority having its headquarters at City Chambers, High Street, Edinburgh, EH1 1YJ

Defender

Act: Macmillan, instructed by Thompsons, Solicitors, Edinburgh
Alt: McConnell, instructed by Ledingham Chalmers, Solicitors, Edinburgh

Edinburgh, 1 December 2017

The Sheriff having resumed consideration of the cause finds the following facts admitted or proved:-

[1] The parties are as designed in the instance. The pursuer is aged 43 years. She is a full time student at the University of Strathclyde, Glasgow undertaking a Post Graduate Diploma in Education. She is a single parent with a non-dependent child and a daughter, F, aged 10 years.

[2] At about 8.40am on 5 December 2013 the pursuer, along with her daughter, F, entered the playground at South Morningside Primary School, Comiston Road, Edinburgh (the school). F was a pupil at the school. As they walked across the playground towards the entrance to her daughter's classroom a large sign, affixed to a backing board which in turn

was attached to an external wall near to the entrance, became detached from the board whereby the sign was blown over F's head and struck the pursuer on the forehead causing injury.

[3] Number 5/3/9 of process is a report by Dr Richard J Wild, Forensic Meteorologist. On 5 December 2013 at about 8.40am the weather in Edinburgh was very windy. The strongest gusts occurred between 8 – 9am with gusts in the region of 80 – 82 mph. The return period of this wind speed across the incident area is about 1 in 9 months to 1 year. On 5 December 2013 sunrise was at 08.26. From early morning until dawn, being sunrise, winds were south westerly or west south westerly, fresh to strong in strength measuring 5 – 6 on the Beaufort Scale. Wind speed is measured at 10 metres above ground in an open level situation. A gust is a rapid but momentary increase in the speed of the wind. Beaufort Forces do not apply to gusts of wind. Beaufort Scale 5 – 6 anticipates small trees in leaf begin to sway, crested wavelets form on water, large branches in motion and whistling heard in telegraph wires.

[4] The sign, which was one of about two or three erected in the playground, was made of heavy plastic which was inserted into a metal frame. The frame, which measured about 2m x 1m, was attached to a 10mm thick plywood board by about 16 screws, each about 20mm long, through pre-formed holes in the edge of the frame. The board was attached to the external wall of the school about 0.5m above the ground. Five strips of double sided tape were applied to the back of the sign.

[5] Prior to the accident a parent of a pupil attending the school, who had been involved in an accident there, expressed to the Head Teacher concern about health and safety issues in the playground, particularly in relation to slipping and tripping hazards. She requested a copy of the school's health and safety procedures. None was received.

[6] Immediately prior to the accident the top right corner of the sign was seen by the pursuer and other parents to be flapping in the wind away from its fixing to the wall. One parent observed a screw or screws missing from the corner and evidence of rust around them. Another parent reported to the school Janitor, Mr Nicholson, in his office, near to the front entrance to the school, that the sign was a potential hazard. Before he could take any action the accident occurred.

[7] After the accident Mr Nicholson collected the sign and screws from the playground. Some of the screws were rusted thin. He inspected the board and found it to be soaking wet with signs of water damage.

[8] Mr Nicholson stored the sign and such screws as he had recovered in a cupboard within the school. The sign and screws are missing and are not now available. They were not available for inspection and examination on behalf of the pursuer.

[9] The defenders had occupation and control of the school and playground in terms of section 1 of the Occupiers' Liability (Scotland) Act 1960. They were vicariously liable for the acts and omissions of the Janitor and other employees there.

[10] The sign was erected in 2003 by Apex Signs, 4a West Telferton Industrial Estate, Portobello, Edinburgh. The company was approved under the defenders' procurement system. Immediately following the accident Apex Signs were requested by the school to inspect the sign and other signs remaining in the playground. After they had done so they reported, by letter, their findings and recommendations to the school. The letter was forwarded by the school to the defenders' health and safety adviser. The letter was not produced.

[11] Apex Signs recommended that the board be replaced. Instead the school removed all the signs in the playground. At some time after the accident the board was removed from the wall, disposed of and the wall re-rendered.

[12] An Incident Report Form (number 6/5 of process) was completed by the school on about 5 December 2013 and forwarded to the defenders' health and safety adviser. On 10 December 2013 the defenders' health and safety adviser, Nicola Goveia or Fraser, attended at the school to investigate the accident.

[13] In investigating the accident Mrs Fraser spoke to the defenders' business manager at the school and the Janitor. She did not speak to any independent eye-witnesses, in particular those named in the Incident Report Form, or seek advice or information from any technical or skilled witnesses. Mrs Fraser has no expertise in the erection or fixing of signs.

[14] Mrs Fraser took photographs of the sign, the board and a couple of screws (number 6/7 of process). She took some measurements of the sign, board and screws. She prepared a draft report (number 6/9 of process) which was submitted to her then line Manager, Dennis Henderson. Dennis Henderson is no longer employed by the defenders. Mrs Fraser's draft report was substantially revised by him. A final report, as revised by Mr Henderson, was produced and dated 16 December 2013 (number 5/30 of process). Mrs Fraser's draft report was produced to the pursuer's agents only during the course of her evidence. The measurements taken by Mrs Fraser and recorded in her draft report were not all incorporated in her final report.

[15] At the time of Mrs Fraser's examination the condition of the screws varied. Some were visibly rusted on the face of the frame. Others appeared in good condition but were rusted thin behind the frame. Only approximately 6mm of the 20mm screw was fixed into the board.

[16] The school's Janitor at the time of the accident was Martin Nicholson. He was employed by the defenders in that capacity at the school for about 7 years until he retired in 2015. He had been employed previously as a Janitor at Queen Margaret College Edinburgh and as Facilities Supervisor when the college became part of the University of Edinburgh. He was made redundant in 2007. He was employed with British Rail for some 26 years until made redundant in 1996.

[17] Mr Nicholson carried out a walk around of the playground each morning before the pupils arrived. He would remove any animal droppings or broken glass and visually inspect benches and play equipment. The inspection would take less than 15 minutes. If he saw anything which he was unable to deal with immediately he might cordon off the area with tape or fencing and make a report to the defenders' helpdesk to request a maintenance team. He gave the sign only a cursory glance as he passed through the playground. He did not carry out a close visual or physical inspection of the sign at any time.

[18] On 5 December 2013 Mr Nicholson collected from the playground a piece of guttering which appeared to have blown off a tenement property next to the school and some broken branches and other debris. He secured the door of a gas meter at the old Janitor's house which had blown open and removed a loose banner from the school fence. He did not inspect visually or physically the signs in the playground.

[19] Mr Nicholson maintained two log books, one to record the date and time of his daily inspections and what, if anything, had been noted and/or dealt with, and one to record matters reported to the defenders' maintenance helpdesk with a note of the reference number provided by the helpdesk. He also kept diaries throughout his employment at the school. The logbooks and diaries are missing and not now available.

[20] No risk assessment of the playground was carried out by or on behalf of the defenders.

[21] On 8 February 2013 a survey of the school was carried out. The survey was commissioned by the defenders for the purpose of providing an assessment of the condition of the school. The assessment was based upon guidelines as to Core Facts from the Scottish Executive and subsequently the Scottish Government. The elements of the Core Facts to be inspected did not include signs affixed to external walls. The report following the survey did not make any reference to the condition of the sign. The sign was not inspected during the survey.

[22] The defenders had no system of inspection which included inspection of the sign. The sign had not been inspected since its erection in 2003. Had the sign been inspected visually the deterioration in the screws would have been seen. Had a physical inspection been carried out, including a "shoogle" test and the periodic removal of the sign from the board, the deterioration in the screws and the board would have been seen. Had such deterioration been seen the sign would have been removed or securely fixed. It would have been reasonable to carry out a visual inspection and a physical "shoogle" test on an annual basis. It would have been reasonable to carry out a physical inspection by the removal of the sign every two to five years.

[23] The length of the screws did not allow for a sufficient embedment in the backing board. The deterioration of the fixings and board reduced their pull-out resistance. As a result the sign was not securely attached to the board and was unable to resist outward force from wind suction.

[24] When struck by the sign the pursuer was knocked to the ground. She has limited recollection of events immediately after the accident and may have lost consciousness for a

period. She received first aid treatment within the school from one of the parents who was a doctor until taken by ambulance to the Royal Infirmary Edinburgh. She sustained a deep laceration in the middle of her forehead requiring stitches and a soft tissue injury to her left shoulder. She was transferred to St John's Hospital Livingston. She underwent surgical exploration and closure of the wound. She was prescribed antibiotics and discharged from hospital on 7 December 2013. Stitches were removed on 12 December 2013. She continued to experience headache, dizziness, motion sickness with occasional difficulty in speaking. In about 8 April 2014 she was diagnosed as suffering post-traumatic headache and prescribed amitriptyline. She underwent six sessions of physiotherapy and six acupuncture treatments to her left shoulder.

[25] Numbers 5/3, 5/4, 5/7 and 5/8 are copies of the pursuer's general practitioner and hospital records.

[26] Number 5/1 is a report by Mr Cameron Raine, Consultant Plastic and Reconstructive Surgeon. On examination on 16 October 2016 he noted a curvilinear scar measuring about 3cm in length running from the medial aspect of the pursuer's right eyebrow across the central forehead. The scar is pale in colour and easily seen. It is unlikely to benefit from revisional surgery or further treatment. There is some surrounding loss of sensation which is likely to be permanent. It is likely that the pursuer has sustained cutaneous nerve damage. The pursuer was noted to be sensitive to the appearance of the scar bringing back memories of the accident when looking at herself in a mirror. Number 5/28 of process comprises photographs of the pursuer without makeup in which the scar is easily seen.

[27] Number 5/2 of process is a report by Dr Colin Rodger, Consultant Psychiatrist. On examination on 17 January 2017 the pursuer was noted to have suffered, and to continue to suffer, a range of psychological difficulties including distressing ruminations about the

accident, its consequences and potential consequences, feelings of guilt and distressing ruminations about the adverse psychological effects on her daughter, sensitivity about the scarred and altered appearance of her forehead, difficulties with disrupted attention, concentration, memory and word finding, fluctuations in mood with increased tearfulness, diminished interest and enjoyment in life and diminished self confidence and anxiety that she or her daughter might suffer further similar accidents particularly in windy weather. The pursuer was diagnosed as suffering from an Adjustment Disorder with Anxiety which would not have been likely to develop if the accident had not occurred. She was prescribed antidepressant medication. She would benefit from psychological treatment which is to be commenced shortly.

[28] Number 5/5 of process is a report by Dr Jon Stone, Consultant Neurologist. On examination on 2 June 2017 the pursuer was noted to continue to suffer from headache, dizziness, impaired concentration and forgetfulness, sleep disturbance, exhaustion and anxiety. Dr Stone diagnosed the pursuer as having suffered a mild brain injury. The accident caused a recurrence of episodic migraine which is likely to improve in about 2 years and may be treated with medication, mild dizziness which may be improved by performing Brandt-Daroff exercises, cosmetic anxiety, fatigue and sleep disturbance which may benefit from cognitive behavioural therapy.

[29] Prior to the accident the pursuer was vulnerable to anxiety. Some of her symptoms are linked to those of her daughter. Following the accident the pursuer's daughter suffered from an Adjustment Disorder with separation anxiety. She developed secondary enuresis. She was very reluctant to attend activities such as gymnastics, Brownies, swimming unless the pursuer was present. Even when she did eventually return to the activities the pursuer required to wait outside and occasionally F would run outside to her. She was reluctant to

attend school and in particular would avoid the area of the playground where the accident had occurred. She required at times to telephone her mother from school to be reassured. She no longer stays overnight with friends or relatives unless her mother is also present.

[30] In December 2013 the pursuer was self-employed as a supply nursery nurse and as a cleaner. As a result of the accident the pursuer was unable to return to work until 3 March 2014 and lost wages in the agreed sum of £2,192.

[31] Following the accident the pursuer required assistance with personal care, driving, domestic tasks and childcare. Services were provided by her mother, Joan Hutchison, and father, Ian Coan. The value of those services is agreed in the sum of £2,500.

[32] Clinical Psychology treatment which the pursuer requires will cost £1,000.

[33] The pursuer's coat was damaged in the accident. Its value is agreed in the sum of £60.

[34] Prior to the accident the pursuer completed an Honours degree (2.1) in Psychology from the Open University. In August 2015 she obtained an MSc from Edinburgh University in Children and Young Peoples' Mental Health and Psychological Practice. Between January 2014 and December 2015 she volunteered in various capacities at the Edinburgh Royal Infirmary. Her intention was to undertake further study with a view to qualifying as a Psychologist. In September 2017 she commenced a Post Graduate Certificate of Education (PGCE) at Strathclyde University. She intends to qualify as an Educational Psychologist. With the further study required she will not attain this qualification until about August 2021. Her career progression has been delayed by about 3 years. The delay was a result of her daughter's separation anxiety and the pursuer's decision to avoid undertaking work or study which would have meant not being immediately available for her daughter.

[35] A reasonable sum by way of solatium is £40,000 of which 50% is attributable to the past.

Finds in fact and in law that the accident was caused by the defenders' fault and negligence; grants decree against the defenders for payment to the pursuer of the following sums:-

1. Forty Thousand Pounds (£40,000) Sterling with interest on £20,000 at the rate of 4% per annum from 5 December 2013 to date of decree and on £40,000 at the rate of 8% per annum until payment;
2. Two Thousand One Hundred and Ninety Two Pounds (£2,192) Sterling with interest thereon at the rate of 4% per annum from 5 December 2013 until 3 March 2014 and thereafter at the rate of 8% per annum until payment;
3. One Thousand Pounds (£1,000) Sterling with interest thereon at the rate of 8% per annum from the date of decree until payment;
4. Two Thousand Five Hundred Pounds (£2,500) Sterling with interest thereon at the rate of 4% from 5 December 2013 until 3 March 2014 and thereafter at the rate of 8% per annum until payment; and
5. Sixty Pounds (£60.00) Sterling with interest thereon at the rate of 8% per annum from 5 December 2013 until payment;

Thereafter, reserves meantime all questions of expenses, and assigns 14 December 2017 at 2pm within the Sheriff Court House 27 Chambers Street Edinburgh as a hearing thereon.

NOTE

Authorities referred to:

Redgrave's Health & Safety, commentary on Regulation 3 of the Management of Health and Safety at Work Regulations 1999

Regulation 13 of the Workplace (Health, Safety and Welfare) Regulations 1992

Regulation 10 of the Work at Height Regulations 2005

Occupier's Liability (Scotland) Act 1960

Dawson v Page 2012 Rep LR 56

Wardle v Scottish Borders Council 2011 SLT (Sh Ct) 199

Anderson v Imrie 2017 Rep LR 21

Telfer v Glasgow Corporation 1981 SLT (Notes) 51

Glasgow v Glasgow District Council 1983 SLT 65

Kennedy v MacKenzie [2017] CSOH 118

McDyer v The Celtic Football & Athletic Co Ltd 2000 SC 379

McDyer v The Celtic Football & Athletic Co Ltd unreported 6 February 2001

Judicial College Guidelines

Smith v Muir Construction Ltd 2015 Rep LR 8

McCallum v S&D Properties (Commercial) Ltd 2000 Rep LR 24

Black v CB Richard Ellis Management Services 2006 Rep LR 36

Booth v MacMillan 1972 SC 197

Wallace v City of Glasgow District Council 1985 SLT 23

Wilkinson v Hjaltland Housing Association 2015 Rep LR 62

Donaldson v Hayes PLC 2005 1 SC 523

Micklewright v Surrey County Council [2011] EWCA Civ 922

Richards v London Borough of Bromley [2012] EWCA Civ 1476

Brown v North Lanarkshire Council 2011 SLT 150

Hannington v Mitie Cleaning and De La Rue Cash Systems [2002] EWCA Civ 1847

Sutton v Syston Rugby Football Club [2011] EWCA Civ 1182

Determination by Sheriff Principal Stephen into the death of Keane Grace Wallis-Bennett [2017] FAI 14

West Sussex County Council v Pierce [2014] PIQR P 101

Dyer v East Sussex Council unreported Brighton County Court 19 December 2016

English v Burnt Mill Academy Trust unreported Southend County Court 1 August 2016

Hobbin v Vertical Descents [2011] CSOH 207

Smith v Opportunus Fishing 2011 Rep LR 34

Robertson v Turnbull 1982 SC (HL) 1

Allan v Barclay (1864) 2 M 873

Introduction

[1] The pursuer seeks damages for personal injury sustained on 5 December 2013 in an accident within the playground of South Morningside Primary School, Edinburgh (the school) when she was struck by a sign which had become detached from its fixing to the external wall of the school. That the pursuer sustained injury in an accident in the circumstances averred by her was not disputed. The defenders did not dispute that they had occupation and control of the premises and, notwithstanding their pleadings, that they were vicariously liable for their employees including the Janitor. The defenders denied liability for the accident and averred that the sum sued for was excessive. Prior to proof parties entered a Joint Minute of Admissions whereby reports by skilled witnesses, medical records and photographs were agreed obviating the need for a number of witnesses to give evidence. Parties also agreed quantification of some heads of claim.

[2] Evidence was led over a number of days. The pursuer gave her evidence in a clear and succinct manner without any obvious exaggeration or embellishment. I observed the

pursuer, both when giving evidence and when sitting in court, occasionally brushing her fringe across her forehead in an almost unconscious attempt to hide the scarring to her forehead. I also noted that she became tearful when required to speak about her daughter, F. I formed the impression that the pursuer continues to be self-conscious of the scarring to her forehead and distressed when thinking about the potential consequences of the accident.

[3] The pursuer and her witnesses to the circumstances of the accident were, in my opinion, all credible and reliable. Where there were differences between the recollections of the pursuer's witnesses and the Janitor or Headteacher I preferred the version given by the pursuer's witnesses. However any such differences appeared to be of no material significance.

[4] In this Note I propose to deal separately with the evidence as it relates to the issues of liability and quantum.

Circumstances of the Accident

[5] As indicated above the circumstances of the accident were not disputed. The pursuer was walking with her daughter, F, to the school, as usual, on the morning of 5 December 2013. She said it was very windy but nothing she was not used to coming from Shetland. They arrived at the school at about 8.40am and proceeded across the playground to the entrance to F's classroom. F was just ahead of her. As she walked across the playground she was aware of the top of the sign flapping. It then came off the wall, flew over her daughter's head and struck her on her forehead. Her recollection of the incident thereafter was a little unclear. She may have lost consciousness. She remembered mothers of some other children coming to her assistance, her daughter standing on her own and then

being upset and refusing to enter the room inside the school to which the pursuer had been taken.

[6] Mrs Hoole and Mrs Hur saw the sign before the accident. Mrs Hoole observed the top corner of the sign flapping in the wind. She considered this to be a potential hazard. After looking for someone that she was expecting to meet she went to the Janitor's office to alert him to the danger. She was initially uncertain whether she had attended at his room or the school office but from her recollection of the Janitor putting on his High Visibility jacket I inferred that it was the Janitor that she had spoken to. The Janitor, Mr Nicholson, had no recollection of Mrs Hoole telling him about the sign. Nothing turns on this but in so far as there is a difference in their evidence I preferred the evidence of Mrs Hoole. In any event her warning was too late. As she left the school building she saw an injured lady being helped in to the building.

[7] Mrs Hur saw the sign before the accident. She looked at it often. She observed signs of rust and a screw missing from the top right corner. On the day of the accident she saw the corner flapping in the wind while it was still attached to the wall. She was a bit concerned about the risks from the sign and other things but did not do anything about it. Counsel for the defenders sought to undermine her reliability by submitting that her evidence that the sign exhorted quietness was incorrect. From the photograph of the sign number 6/7 of process it is clear that amongst other things the sign includes the message "keep the quiet area quiet". Accordingly it appeared to me that Mrs Hur was entirely reliable and it was Counsel who was incorrect.

[8] Mrs Morris and Mrs Guy saw the sign fly off the wall and strike the pursuer. Mrs Guy described it as loosely adhered to the wall. She said it peeled away and hit the pursuer in the forehead. She acknowledged that she had not seen anything untoward before

the day of the accident. She knew the sign was old but she had not inspected it. She was critical of the general state of repair of the playground and of the school's attitude to health and safety matters. Prior to the accident she had asked for but had not received a copy of the school's health and safety procedures. Mrs Grierson recalled having met with Mrs Guy to discuss her concerns in preference to communicating with her by letter or email. Whether there was such a meeting is immaterial. However I accepted that no policy documentation was provided in response to Mrs Guy's request.

[9] There was minimal cross-examination of these witnesses. Indeed Mrs Morris and Mrs Guy were not cross-examined and cross-examination of the pursuer did not relate to the factual circumstances.

The Sign

[10] The evidence in relation to the sign was, at best, unsatisfactory. After the accident the Janitor, Mr Nicholson, collected the sign and such screws as he could find and secured them in a cupboard in the Janitor's room. Counsel for the defenders advised that a claim on behalf of the pursuer was intimated within days of the accident. Despite this the sign and screws have gone missing and are no longer available. The backing board was removed and, together with its fixings, disposed of, apparently without any attempt to preserve it for the purposes of the pursuer's claim, and the wall into which it was fixed was repaired, without even photographs being taken prior to any work being carried out. Accordingly the evidence relating to the sign, its condition and fixings consisted of photographs taken by the defenders' Health & Safety adviser, Mrs Gonevia or Fraser shortly after the accident together with her reports and oral evidence principally from her and Mr Nicholson.

[11] It would be generous to say that Mrs Fraser was an unimpressive witness. At times in her evidence she appeared dismissive, disinterested, defensive and evasive. Ultimately, and regrettably, I formed the impression that at times she was being disingenuous in her account of events. She explained in her evidence that she had received notice of the accident either by a telephone call from the school or the Incident Report Form and arranged to attend the school. She advised, in answer to a question from me, that she understood her task to be to investigate what had happened, why it had happened and what measures might be put in place to ensure it did not happen again. I understood that her attendance at the school to investigate the accident was in response to information received from the school. However, during submissions Counsel for the defenders advised that, in fact, Mrs Fraser had been instructed to attend by the defenders' insurers following intimation of a claim on behalf of the pursuer. Counsel took no steps during her evidence to "clarify" the circumstances of her instructions.

[12] Counsel's information is not evidence but it casts doubt upon the candour of Mrs Fraser which might also explain some of the apparent difficulty experienced by the pursuer's agents in recovering relevant documentation. Mrs Fraser was also the person responsible for responding to the pursuer's calls for production of documents and signed the certificate of disclosure. A Commission was held on 20 July 2017. It is not necessary now to consider whether Mrs Fraser's reports were subject to any privilege, as was claimed at the Commission, but it is more than regrettable that when it was decided by the defenders that any privilege should be waived, in the absence of the physical evidence, namely the sign and fittings, all relevant documentation was not disclosed. The existence of Mrs Fraser's draft report, which contains important measurements omitted from her final

report, only came to light during her cross-examination although a copy of the report had been provided to the defenders' agents several days before proof commenced.

[13] While, as Mr McConnell said, this is not an enquiry into the quality of Mrs Fraser's investigation, which could hardly be said to be thorough, her subsequent conduct and the conduct of the defenders or their agents in withholding relevant documentation, having failed to preserve the physical evidence, does not cast them in good light and flies in the face of the principles underlying this procedure of early, and candid, disclosure. It also undoubtedly adds fuel to the fires of suspicion and conspiracy theories.

[14] The photographs taken by Mrs Fraser at the time of her investigations are not particularly informative. They offer little in terms of the actual dimensions of the sign, the frame into which it is fitted or the screws securing it to the board. They offer limited information about the condition of the sign, frame, screws, fixings or board. Her draft report is probably the most informative albeit still lacking in relevant details, such as the depth of the frame. In that report Mrs Fraser noted that the sign was 2m (h) x 1m (w). It had an aluminium frame, which was not measured, with a heavy plastic insert. The sign was fixed to 10mm plywood board, which was fixed to an external wall. There was no information whether the board was of external quality or not. The sign was fixed in place with approximately 16 x 20mm screws and 5 pieces of double sided tape. She noted that only 6mm of the length of the screw was into the plywood, implying that the frame was about 14mm deep and some 4mm deeper than the board it was affixed to. She also noted that the condition of the screws varied, some appearing rusted on the visible part of the frame with others looking in good condition but having rusted inside.

[15] Mr Nicholson appeared to give his evidence in a much more straightforward manner. Mrs Grierson, Headteacher at the time of the accident, could not praise him highly

enough. He was the best janitor she had ever worked with. Despite the fact that he is now retired he had made efforts to try to locate the sign and fixings. He was prepared to disagree with Mrs Fraser's draft report where it states that "Mr Nicholson carries out a visual check on signage on a daily basis with an occasional "knock" on the front of the signage to check that it is secure." He denied ever giving the sign a "knock". Mr Nicholson said he had never had any reason to be concerned about the sign and no reason to inspect it "more closely". More closely than what was not explored.

[16] Mr Nicholson received no training following his initial induction. He claimed to be aware of health and safety requirements although any awareness or training would appear to have been delivered when he was employed by British Rail several years previously. His morning walk around lasted less than 15 minutes and from the moving of his head to left and right while describing what he did I inferred that his practice was to glance around the playground looking for anything obvious, such as fallen debris or animal droppings. I did not accept that he "inspected" the sign in any way. The loose banner on the railings and the blown open door of the gas meter which he dealt with on the morning of the accident would have been obvious to him from his glancing around.

[17] I formed the impression that, at times, Mr Nicholson was defensive in his evidence. He was quick to say it was a lie that there had been any report of the sign being loose. The first he knew about it was when a parent or a member of staff came in to report that someone had been hurt and a sign was off the wall. When he went out there was no one around. That would suggest that it was some time after the accident and that pupils were all in their classrooms and the playground had emptied of pupils, parents and staff. It would also suggest that Mr Nicholson was unaware of, or at least uninterested in, any commotion following the accident and the arrival of an ambulance to take the pursuer to

hospital. His office was next to the front door of the school. Mr Nicholson did not appear to be the sort of person who would be unaware of such goings on. I have preferred the evidence of Mrs Hoole that she told the Janitor that the sign was coming off the wall and that someone might get hurt. I accept that Mr Nicholson is the type of person who would be concerned that he did not prevent the accident from happening. I do not accept that he was told only after the accident but do accept that he was told at about the time the accident was happening.

[18] Mr Nicholson was referred to number 6/6 of process which is described as copies of emails between the Service Support Officer, or Janitor, and the Head Teacher. Why these are in part redacted was not explained. He confirmed that he had sent an email, he thought to Mrs Grierson, "because he had been asked to check". There is no date or time of the email which is said to be from Mr Nicholson. It was not established when it was sent. It does not appear to be a response to the email at the top of the page. It appears to comprise not only a report of what Mr Nicholson did after being informed of the accident, and thus his "check", but also a report of a visual inspection prior to the accident. Why that is included in a response to a request to "check" is not obvious unless it was in defence of anticipated criticism. Paragraph 5 in that report states "At the time of checking signs, fencing etc all appeared to be safe". This was inconsistent with his evidence in which he made no mention of checking signs, fencing etc., other than such as might be included in his glancing from left to right.

[19] Mr Nicholson's description of the size of the sign confirmed the measurements, such as they are, in Mrs Fraser's draft report. He agreed that the plastic sign was in a frame which was fixed to a soft board. He described some of the screws as paper thin and rusted away. He said the board was soaking wet. However he also said that some of the screws

went right through the frame and the board into the wall. He had had to hammer down some screws that were left sticking out. Mrs Fraser's investigation did not disclose different sizes of screws being used to fix the frame to the board. Only 6mm of the screws measured by her was available to fix into the board. If the board was 10mm thick then any screw which went through the frame, the board and into the wall would have to be significantly longer than the screws described by Mrs Fraser. There was no other evidence to suggest that some of the screws were fixed into the wall behind the board. In their defences the defenders aver only that the sign "was secured to a backing board with sixteen screws and adhesive tape.". I formed the impression that Mr Nicholson was being defensive and exaggerating the fixing in order to attempt to suggest that, at least until the accident, the sign was more securely fixed than it actually was. I did not accept his evidence in this regard.

[20] It was common ground between the parties that the sign was erected in about 2003. Mrs Grierson was familiar with the type of sign and said that such signs were seen frequently in school playgrounds. It had never occurred to her that such a sign would become detached from its fixing on the wall. I formed the impression that she had been a conscientious and caring teacher and headmistress whose priority had been the welfare of her pupils. She had risk assessed a variety of activities and instituted changes to reduce the risk of harm including procedures for after school clubs and reduction of numbers of children in the playground at any one time. It had not occurred to her that anyone should consider the risk of harm from the sign. There had been a number of people including architects and other "property" people who had attended the school to assess its state. No one had mentioned anything about the sign. She would have accepted guidance about any checks.

[21] The company who erected the sign, Apex Signs, continue in existence. They were not called to give evidence. They carried out an inspection after the accident. Mrs Grierson delegated matters to her business manager, who did not give evidence. Mrs Grierson appeared to have limited recollection and little, if any, direct knowledge about what the company may have done or said and left to her Business Manager the task of contacting and dealing with the company. She believed that the company would have special knowledge because they were in the business of erecting signs. There was no evidence to establish whether the company or the person or persons who erected and inspected the sign did or did not have any specialist knowledge. She did not see any report from them but understood that a letter had been received following their inspection which she further understood had been forwarded to the defender's Health & Safety adviser. The letter was not produced. Mrs Grierson understood it contained a recommendation that the backing board be replaced. She accepted that the board showed evidence of weathering. However she decided not to replace the board for reasons which were said to be unconnected with the accident, namely that the message conveyed in the sign was no longer consistent with the school's current development policy, and indeed all signs were removed from the playground.

Expert Evidence for the Pursuer

[22] David Narro gave evidence for the pursuer. He is chairman of David Narro Associates, a company of consulting structural and civil engineers based in Edinburgh. He graduated from the University of Edinburgh in 1974 with a BSc (Hons) in civil engineering. He was employed as a graduate and then section leader with Blyth & Blyth Edinburgh until 1983. From then until 1986 he was a senior project engineer with Wren & Bell Edinburgh. In

1986 he established his current business and in July 2017 became chairman of the company. In 1978 he became a member of the Institution of Civil Engineers and a Chartered Engineer. In 1982 he became a member of the Institution of Structural Engineers. In 1997 he became an affiliate of the Royal Incorporation of Architects in Scotland. He became in 2000 a Fellow of the Institution of Structural Engineers, in 2002 a Fellow of the Association of Civil Engineers and in 2003 a Fellow of the Institution of Civil Engineers. In 2005 he became an approved Certifier of Design, in 2015 an Honorary Fellow of the Royal Incorporation of Architects in Scotland and in 2016 a Conservation Accredited Registered Engineer. He has expressed an opinion or given expert evidence in a number of actions. He provided two reports in this case, numbers 5/27 and 5/31 of process.

[23] Mr Narro was instructed in April 2016 on behalf of the pursuer to comment on the fixing of the sign and to provide an opinion on causation and responsibilities. His initial report was not produced until July 2017. It became apparent from subsequent evidence that a significant part of the reason for the delay was related to the expectation that further material would become available to assist his consideration. Eventually it became known that the relevant material including the sign, board and screws was not available for inspection.

[24] Initially Mr Narro was provided only with an outline of the factual circumstances, some photographs, including those at 5/20 of process, a meteorological report number 5/9 of process and other documents relating to severe weather actions issued by the defenders. Shortly before proof he was provided with a copy of Mrs Fraser's report number 5/30 of process which led to his second report.

[25] From his examination of the photographs number 5/20 (and 6/7) of process Mr Narro was unable to make more than general comment. The board showed signs of water staining

indicating that it had been damp over a period of time. The screw appeared rusted. He had no measurements to work with. He was unable to comment on the extent to which the screws were embedded into the board. The quality of the board, that is whether it was made from external grade plywood, was not known. In his opinion the obvious deterioration in the board could contribute to the failing of the screw fixings.

[26] Following receipt of Mrs Fraser's report number 5/30 of process Mr Narro considered the matter further. He still had no measurement of the frame. Without that he was still unable to comment on the embedment of the screws. He commented that it would not be sensible to have a longer screw than the thickness of the frame and board. While it appeared that the number and length of the screws, said to be 20mm, were adequate he did not have the diameter of the screws to be able to assess the withdrawal load capacity of each screw.

[27] Mr Narro explained at paragraph 5.8 of his report 5/31 of process that the screws would have to fit through the frame and into the board to a sufficient depth of embedment to allow the screws to attain sufficient fixity into the board. He did not have the actual measurements of the depth of the frame or the screws to assess the pull-out capacity of each fixing. He advised that "if the embedment is insufficient the screw will not have adequate "grip" to resist the outward force from wind suction. In addition if the board had deteriorated then then this pull-out capacity would be greatly reduced. One photograph appears to show a screw still attached to the sign. It does not appear to have sufficient length to give an adequate embedment into the backing board." He could not determine the length of the screw from the photograph.

[28] In Mr Narro's opinion with the deterioration of the board the pull-out resistance of the board would reduce and would allow the failure of the screw fixings. If the screws were

of insufficient length they would be unable to attain the required embedment and would be inadequate to resist the loads imposed by the wind.

[29] Items affixed to a building, in his opinion, should be checked on a periodic basis. He recommended a visual and physical inspection, with a "shoogling" of the sign to detect any weakness of the fixing, each year with a thorough inspection every two to five years. By thorough inspection he meant removing the sign from the board, checking the board and its fixing to the wall and the fixing of the sign to the board.

[30] Following the production of Mrs Fraser's draft report containing some further measurements Mr MacMillan clearly considered but decided against recalling Mr Narro. The defenders led no evidence to contradict any view expressed by Mr Narro. Instead, Mr McConnell submitted that the evidence of Mr Narro, having no qualifications in health and safety or any meaningful professional experience, should be disregarded. Further his recommendation that the sign should have been inspected every 2 to 5 years was simply a bald statement of opinion without any foundation having been laid.

[31] It was not suggested that Mr Narro was not an experienced structural and civil engineer. While he did accept in cross-examination that he was not "an expert in health and safety" he explained that he had experience of health and safety issues all the time in the course of his professional business. It was necessary for him to have regard to health and safety issues in relation to the construction of buildings. In the course of construction work, which was not restricted to new buildings, he had to take account of risk. His experience included considering the risk of deterioration over periods of time and its effect upon structures.

[32] Mr McConnell did not seek to object to the admissibility of Mr Narro's evidence on the ground that it failed to meet any of the recognised tests, namely whether Mr Narro's

evidence would assist the court, whether he has the necessary knowledge and expertise, whether he was impartial and whether there is a reliable body of knowledge and experience to underpin his evidence. One of the principal issues for consideration by Mr Narro was the structural integrity of the sign. It was not suggested, and in my opinion correctly, that Mr Narro did not have the necessary knowledge and experience to comment on such an issue. That he was unable to offer other than brief and general comment was due to the lack of information with which the pursuer's agents were able to provide him. For reasons set out above he was unable to examine the physical evidence and had only less than informative photographs and a brief, and as it turned out an incomplete, report to work with. Nonetheless he was able to highlight the importance of a number of factors in relation to the security of the fixing of the sign, such as the length of the screws to provide sufficient embedment and what might lead to the failing of the pull resistance. Quite properly there was no suggestion that Mr Narro was anything other than impartial in the presentation of his evidence.

[33] In his submission that Mr Narro's evidence should be disregarded Mr McConnell did not clarify what was meant by qualifications or experience in "health and safety". It appeared to me, as explained by Mr Narro, that in any construction or engineering project it would be necessary for someone such as Mr Narro to have regard to any risks attendant upon the structure or nature of the project. It would, as explained, be necessary to have regard to the risk of any deterioration of the integrity of the structure. That would, in my opinion, lead to someone such as Mr Narro needing to be aware of and having regard to the assessment of such risks. If an assessment of risk was not carried out in conjunction with the construction of a structure that may lead to a breach, in its broadest sense, of health and safety. Mr Narro may not have any of the sort of Health and Safety qualifications claimed

by Mrs Fraser but I do not accept that that means that he does not have the necessary body of knowledge and experience to assist the court in relation to the risk of deterioration of a structure such as the sign affixed to an external wall or what steps ought to be taken and over what period of time to become informed in respect of any such deterioration.

[34] Further I do not accept Mr McConnell's submission that Mr Narro's opinion that a physical inspection of the sign including the backing board should have taken place every 2 to 5 years to be "worthless" or that it was an "unsubstantiated *ipse dixit*". Mr McConnell proceeds on the assumption that Mr Narro was not qualified to express any opinion on the question of regular inspection, a position which I have not accepted. Mr Narro's opinion on the period of inspection is based, as he said in his evidence, on his forty or so years' experience as a structural and civil engineer. It is apparent from his evidence and the terms of his reports that once he had sight of Mrs Fraser's final report he based his assessment on the length of time the sign had been in existence, the description of the condition of the screws and board and such observations as he could make from the photographs. His estimate of the intervals of time could not be more specific because of the lack of information such as the type of plywood used as the backing board. The period for any inspection would be dependent upon a risk assessment being carried out having regard to all factors including the materials used and the site in which the sign was erected.

[35] I found Mr Narro to be a reliable and experienced witness whose evidence was helpful despite the limitations imposed upon him by the absence of the opportunity to inspect and examine the physical evidence. His evidence that the sign and the backing board should have been inspected on a regular basis, between 2 to 5 years, was not contradicted by any other witness. Indeed, the defenders relied upon a combination of daily inspections by the Janitor and five yearly Condition Surveys of the school as evidence of the

reasonable care taken by them, which implies an acceptance of the necessity for regular inspection as evidence of fulfilment of their duty to take reasonable care for the safety of employees, pupils and others invited onto the premises and that the upper end of Mr Narro's recommended interval was within a reasonable range already accepted by the defenders.

[36] It is difficult to accept Mr McConnell's submission that although it was regrettable that the physical evidence was not available, having been lost while in the defenders' possession and under their control, the pursuer had not been prejudiced by its absence. In my opinion, the absence of the sign, the frame, the screws, the backing board and its fixings and the ability to examine the wall to which it was affixed has made it difficult to determine whether the sign was ever securely fixed or whether the fact that it has remained attached to the wall until this accident was due to no more than good fortune. The fact that only 6mm of the screws were embedded in the plywood board, which may or may not have been of external quality, to hold in place a large, heavy plastic sign in a large metal frame, apparently of greater depth than the board into which it was fixed, may suggest that good fortune was indeed involved. In *Micklewright* the deceased was unloading bicycles from the family car when he was struck by a branch of an oak tree. Following the accident the road was cleared of debris and the branch sawn into logs. In considering the difficulties presented by the disposal of relevant evidence HHJ Reid QC said "This failure to conduct an immediate and thorough investigation into the cause of the branch's failure made, it was said, the case analogous to *Keefe* v *Isle of Man Steam Packet Co* [2010] EWCA Civ 683 in which Longmore LJ at para 19 in the context of the defendant's failure to make or keep proper records said that "the court should judge the claimant's evidence benevolently and the defendant's critically." 20 In my judgement that is a correct approach. The claimant has

been put at a substantial disadvantage in advancing her claim by the manner in which the defendant dealt with the remnants of the branch once it had fallen. In those circumstances I take the view that the proper way to approach the evidence is that suggested by Longmore LJ. This does not however reverse the burden of proof or relieve the claimant of the need to prove her claim on the balance of probabilities.".

[37] I see no reason not to approach the evidence of Mr Narro, not least in relation to the failing of the fixings of the sign, with an appropriate degree of benevolence as a result of the defenders' failure to preserve the physical evidence for examination. In any event his conclusions as to the reasons for the failure of the fixings were not challenged or contradicted by other evidence.

Liability

[38] The pursuer's claim is based on the defenders' breach of their duty at common law to take reasonable care for the pursuer, "as informed by regulation 13 of the Workplace (Health Safety and Welfare) Regulations 1992 and thereafter Regulation 10 of the Work at Height Regulations 2005" (the regulations) and their breach of their statutory duty under the Occupiers Liability (Scotland) Act 1960 (1960 Act) and their vicarious liability for the Janitor's failure to manually check the sign and secure or remove it when told it was loose.

[39] Under s2(1) of the 1960 Act the care which the defenders, as occupiers of the school, required to show towards the pursuer "in respect of dangers which are due to the state of the premises or to anything done or omitted to be done on them ……..be such care as in all the circumstances of the case (was) reasonable to see that (the pursuer) will not suffer injury or damage by reason of any such danger." The degree of care required at common law and

under the statute is reasonable care. What is reasonable must be considered in light of the whole circumstances of the case.

[40] The pursuer did not insist upon any breach of Articles 3.2.3 (b) and (c) of Annex I of Directive 2009/104/EC. The regulations referred to by the pursuer have, as was accepted on her behalf, no direct relevance to the circumstances of this accident given that they are concerned principally with the responsibilities and duties of an employer. The defenders, however, would have required to comply with the regulations, so far as in force from time to time, in respect of their employees. In these circumstances the evidence that no risk assessment had been carried out of the school's playground was, at best, surprising.

Mr McConnell submitted that there was no requirement under the 1960 Act to carry out a risk assessment and relied upon the observations by Lady Dorrian, as she then was, in *Brown*. It is true that the 1960 Act makes no mention of any risk assessment. As set out above what the 1960 Act requires is that an occupier shows reasonable care in respect of dangers due to the state of the premises or anything done or omitted to be done on them. What Lady Dorrian said in *Brown* was that "the effect of reg 3 (of the Management of Health and Safety at Work Regulations 1999) cannot be to create a common law duty to assess risk in the manner required by the regulations". However, as was said in *Kennedy*, albeit in the context of the common law of an employer's liability, "it has become generally recognised that a reasonably prudent employer will conduct a risk assessment in connection with its operations so that it can take suitable precautions to avoid injury to its employees. The requirement to carry out such an assessment, whether statutory or not, forms the context in which the employer has to take precautions in the exercise of reasonable care for the safety of its employees. That is because the whole point of a risk assessment is to identify whether the particular operation gives rise to any risk to safety and if so what is the extent of that risk

and what can and should be done to minimise or eradicate the risk….The duty to carry out such an assessment is therefore…logically anterior to determining what precautions a reasonable employer would have taken in order to fulfil his common law duty of care.". In my opinion, the same approach may be adopted in relation to the reasonable occupier. Without any assessment of dangers present on the premises which are occupied, and the extent of them, may not be identified nor what might be done to eradicate or minimise any risk arising therefrom. This is not to say that the type or manner of the risk assessment prescribed in, for example, regulation 3 of the Management Regulations, is necessary. What is necessary is evidence that some appropriate person has applied their mind to the question whether there is anything about the premises or what is being done there which presents or might present a danger. It appears to me to be a relevant and significant factor in considering whether the defenders as occupiers of the school fulfilled their duty of care.

[41] The defenders arranged for the sign to be erected by Apex Signs in 2003. It did not occur to Mrs Grierson that the sign might become detached from the wall. Mrs Fraser did not think that the sign would be considered a potential hazard. Mr Nicholson did no more than glance in the direction of the sign, if that, when walking round the playground. The survey conducted by the defenders in February 2013 did not include any reference to the sign. The individuals who conducted the survey and in particular the Building Surveyor, Stewart Mackay, did not give evidence. I did not find Mr Macleod to be of any real assistance. He did explain that the survey was a requirement of Scottish Government and that all local authorities had to report annually to the government in respect of 6 Core Facts, namely, the extent of the school estate, the value of it, the condition of it, its sufficiency, its suitability and financial performance. Every 5 years a visual inspection would be carried out of the school estate which would allow defects to be identified and recommendations

made for prioritizing remedial works. This exercise would assist the local authority in their financial planning. The core elements to be considered during the survey did not include any reference to signs affixed to walls. His evidence that if there had been any issue or defects noted with regard to the signs it would have been recorded in paragraph 2.2 of the report under the heading of External Walls or in paragraph 4.2 under the heading Items requiring urgent attention appeared to me to be without foundation. While Mr Macleod is a Chartered Surveyor he did not conduct the survey of the school, he was not in the department responsible for the carrying out of the survey and had no knowledge of any instructions which may have been issued in connection with the survey. I was not prepared to accept Mr McConnell's submission that the absence of any reference to the sign meant that its condition was considered and found to be acceptable. Other areas inspected by the surveyor and found to be in good condition are referred to. For example on page 5 of the report it is noted that there are a number of pyramid dome type roof lights within the lower flat roofs and that "These are in good condition with no major defects noted." Had the sign been inspected during the survey and found to be in good condition with no major defects noted one would expect to find a similar entry. The condition of the external walls was examined and noted in the report at paragraph 2.2. There is no reference to the condition of any signs affixed to these walls. There was no evidence which I accepted that there was any inspection of the sign from the date of its erection. Indeed the evidence suggests that no one thought about the sign at all.

[42] The evidence of Mr Narro was that the condition of the fixing of the sign and the board to which it was affixed would deteriorate over time due to weathering, particularly if the board was not of external quality. On inspection after the accident it was obvious to Mrs Fraser and to Mr Nicholson that the condition of the screws had deteriorated, some

being visibly rusted on the surface, some being rusted thin behind the sign, and that the board showed evidence of water damage and was in fact soaking wet. As explained by Mr Narro these factors would reduce the pull-out resistance of the board and, together with the probability that the screws were of insufficient length to attain the required embedment, would contribute to a failure of the screw fixings.

[43] It is accepted by the defenders that, at least at the time of the accident, there being no evidence of any report of any weakness of the sign being observed other than on the day of the accident, the sign was not securely fixed to the board and became detached in the wind, blew off and struck the pursuer to her injury. A sign that is properly and securely fixed ought not to become detached, blow off and cause injury. While the weather on the morning of the accident was a matter of agreement there was no evidence that the force of the wind that morning was sufficient by itself to detach a sign if securely affixed. It would seem from the evidence of the condition of the screws and the board and Mr Narro's evidence that, on balance of probabilities, the pull resistance of the board was reduced due to its deterioration from water damage, the length of the screws did not provide sufficient embedment, were rusted and deteriorated and were incapable of withstanding sufficient load and wind suction.

[44] Whether at common law or under the 1960 Act the questions to be addressed are, firstly, whether the accident was foreseeable, that is whether the defenders knew or ought to have known of the danger, and, secondly, whether the defenders failed to take reasonable care to prevent the accident.

[45] As I have indicated above, it would seem that no one applied their mind to whether the sign was a potential hazard. While it was agreed that it was erected in 2003 there was no evidence about the expected lifespan of the sign as fixed. Even without the assistance of

Mr Narro it seems to me to be a matter of common sense that a sign, such as in this case, or more probably its fixings, affixed as it was to an external wall, is likely to deteriorate over time with exposure to the elements. In these circumstances it is likely that the sign may become a danger if its fixings fail through deterioration.

[46] It was for this reason that Mr Narro indicated that the sign, its fixings and the board should have been inspected on a regular basis. A close visual inspection would have disclosed surface deterioration in the screws. The "shoogle" test referred to by him would have disclosed any weakness in the fixings which might then have led to further inspection and finally, the regular removal of the sign would have disclosed any weakness caused by deterioration in the screws and/or the board. No such inspections were carried out and accordingly, in my opinion, the danger was allowed to develop. Wind, and at times a gusting wind, is a fact of life in Scotland and entirely predictable. If a sign, such as in this case, is not securely fixed to the wall it is likely to become detached and blow off.

[47] I was helpfully referred to a number of authorities on the question of liability. I do not intend to refer to all of these in detail. Each case turned on its own facts and circumstances. There are some general principles to be derived from them. The test to be used in determining whether reasonable care has been exercised is an objective one and whether an accident of the type sustained is foreseeable is tested according to the standard of the reasonably careful person (*Wardle* at paragraph 10). Reasonableness is evaluated in light of all the circumstances of the case (*Anderson* at paragraph 30). When considering whether an occupier has fulfilled his duty of care it is important to avoid using the benefit of hindsight (*Micklewright* at paragraph 8).

[48] Mr McConnell referred to a number of cases involving accidents within schools. I did not find these to be of assistance given the different facts and circumstances from the

present case. He also referred to the *Determination by Sheriff Principal Stephen into the death of Keane Bennett* [2017] FAI 14. The child died in an accident within another school occupied by the defenders. A regime of daily inspection by janitors together with a quinquennial Condition Survey was accepted as meeting the appropriate requirements *if properly implemented* (my emphasis). A regime of inspection is of no effect if in fact no inspection is carried out. In the present case I have found that no one applied their mind to or inspected the sign and accordingly whatever regime of inspection was supposed to be in place was not implemented in this case.

[49] In my opinion it was, or ought to have been, reasonably foreseeable that the fixings of a sign attached to an external wall would deteriorate over time leading to the likelihood that the sign would become unsafe. In not assessing the risk of such an event or implementing a regime of inspection which included the sign the defenders failed to take reasonable care for the safety of visitors to the school. The defects in the fixings were readily identified when inspected after the accident. On balance of probabilities if the defenders had inspected the sign fixings at any time prior to the accident, and in particular at the time of the Condition Survey upon which they rely, the defects would have been noted and the sign removed or secured. Had that been done the accident would not have occurred.

[50] I accept that cordoning off the area around the sign may not have prevented an accident of this type and that closing the school would have been disproportionate.

Quantum

[51] The pursuer confirmed that the reports by Mr Raine, Dr Rodger and Dr Stone described accurately the injuries sustained in the accident and their sequelae. She suffered a deep laceration to her forehead such that she was referred to St John's Hospital for treatment

by a Consultant Plastic Surgeon. She underwent surgery to explore, clean and close the wound. She remained in hospital for two days before being discharged. She also sustained an exacerbation of a frozen left shoulder.

[52] As observed above the pursuer was clearly self-conscious about the scarring to her face. It extends about 3cm from above her right eye across her central forehead. In October 2016 it was described by Mr Raine as "easily visible". The scar is permanent. There is a small subcutaneous swelling on the righthand side of the scar which is not visible but can be palpated. This is also permanent. Further she has lost sensation around the area of the scar and to the left side of her nose. It is unlikely that the skin sensation will return to normal. Following the accident the pursuer suffered a variety of symptoms including migraine headaches, dizziness, motion sickness, anxiety, sleep disturbance and impaired concentration. She was diagnosed by Dr Stone as having suffered a mild brain injury. The accident was psychologically traumatic both in terms of the pursuer's response and in terms of the interaction with her daughter's response to which I will return. A large part of her distress was found to be guilt and distress that her daughter was present and saw the accident. She suffered distressing ruminations about the accident, its consequences and potential consequences, sensitivity about her altered appearance, fluctuations in mood, diminished self-confidence and enjoyment in life. She was found by Dr Rodger to suffer an Adjustment Disorder with Anxiety. To some extent she has been reassured by the medical practitioners but other than medication she has not yet received any psychological treatment which could ameliorate her symptoms. In evidence she indicated that such treatment is to be commenced shortly. In his report Dr Rodger observed that the pursuer appears to have a susceptibility to develop difficulties with anxiety in response to adverse stressful events,

however, he did not consider it likely that she would have developed an Adjustment Disorder without the accident acting as a precipitating trigger and perpetuating influence.

[53] With regard to her shoulder injury the pursuer underwent sessions of physiotherapy and acupuncture with recovery in about 3 months.

[54] The reports of Mr Raine and Drs Rodger and Stone were agreed to be a true and accurate account of the nature and extent of the injuries from which the pursuer suffered and was suffering at the date of their respective examinations and the cause thereof and the prognosis.

[55] Mr McMillan invited me to award the sum of £45,000 in respect of solatium with half attributed to the past. He relied upon the upper end of the ranges indicated in the Judicial College Guidelines under the headings for facial disfigurement, brain and head injury, and psychiatric and psychological damage. In respect of the shoulder injury he referred to the guidelines on shoulder injuries of a minor nature with considerable pain but almost complete recovery within 3 months. The total of the respective sums was £61,060 but having regard to a degree of overlap, the fact that the top of the ranges may not be appropriate for each aspect of the claim and the approach adopted by Lord Glennie in *Smith* together with the observations on multiple injuries in the JCG Mr McMillan modified the sum in respect of solatium to £45,000.

[56] Mr McConnell submitted that a reasonable sum by way of solatium would be £14,000. He suggested that the scar would not be seen unless one looked for it and that this was supported by Dr Stone who said that "it's the kind of scar that in my view most people would not notice unless their attention was drawn to it.". He also records that it is a "visible scar". Dr Stone is a Consultant Neurologist. Mr Raine, a Consultant Plastic and Reconstructive Surgeon, who would in my opinion have greater experience in such matters,

observed on examination that the scar is "easily seen located between [the pursuer's] eyebrows.". From my own observation of the pursuer the scar was noticeable despite her efforts to hide it behind her hair. It was also very clear that she remains very self-conscious of it. I reject the defenders' submission that the scar would fall within the Less Significant bracket of the JCG. He did not disagree with Mr McMillan's apportionment with 50% to the past.

[57] Mr McConnell suggested that the other aspects of the pursuer's claim should fall within the middle of the ranges for minor brain or head injury and less severe psychiatric damage. He referred to two recent decisions in *Hobbin* and *Smith* and submitted that a figure about midway between the awards in each case was reasonable.

[58] In my opinion it is a misconception to suggest that the pursuer's injuries were more similar to those in *Hobbin* than in *Smith*. In *Hobbin* the pursuer suffered a concussive injury and, as Lord Woolman observed, did not require any treatment or even attend her GP, returned to work after 3 weeks and the diminution in her sense of smell did not wholly compromise her ability to smell or taste. In *Smith* the pursuer suffered a head injury which exacerbated pre-existing migraine headaches for a period of 8 months. Lord Doherty found that the pursuer suffered an intense period of incapacity for about 8 months including severe headaches, he then returned to work with some difficulty and was left with permanent neuropsychological deficits making his work as a fisherman more demanding. Lord Doherty approached solatium by reference to only one category of the then applicable Judicial Studies Guidelines namely Minor Brain injury with a range between £10,000 and £28,250.

[59] In my opinion neither case is particularly helpful in the circumstances of the present case. There are a number of components of the pursuer's injuries which were not present in

either *Hobbin* or *Smith*, in particular the permanent scarring, the Adjustment Disorder or the shoulder injury. In my opinion taking into account all the various components and as Lord Glennie said, assessing them in the round, I assess solatium in the sum of £40,000.
Mr McConnell did not disagree with the submission that one-half be attributed to the past.

Past Wage Loss/Services/Treatment/Miscellaneous

[60] Past wage loss and services were agreed in the sums of £2192 and £2500 respectively. The cost of Clinical Psychology treatment was agreed in the sum of £1,000 and the loss of the pursuer's coat was agreed in the sum of £60.

Future Loss/Disadvantage on Labour Market

[61] The pursuer gave evidence that at the time of the accident she was self-employed as a nursery nurse and a cleaner. Her determination to advance her career was very evident. An impressive CV was attached to a report by Keith Carter, Employment Consultant, number 5/6 of process. It was clear that notwithstanding the no doubt many practical difficulties of being a single parent she had achieved a number of qualifications principally by distance learning. In particular shortly before the accident she completed an Honours degree (2.1) in Psychology from the Open University. It was her intention to continue to study with a view to obtaining qualification as a Clinical Psychologist. After the accident she completed an MSc in Children and Young People's Mental Health and Psychological Practice. While undertaking her various courses she also continued in forms of employment. I was impressed by her determination and resilience.

[62] In order to achieve qualification as a Psychologist it appears that there were options available to the pursuer. Either she obtained a position within the NHS as an Assistant

Psychologist to gain relevant experience or she undertook a PhD funded by the NHS. For reasons which I will address she did not pursue either course. Instead in September 2017 she commenced a Post Graduate Certificate of Education at Strathclyde University with the intention of progressing towards qualification as an Educational Psychologist. Mr Carter produced his report and an updated report, number 5/32 of process on the basis of a delay in her career progression of 3 years. Dr John Pollock, a very experienced Actuary, produced a report, number 5/33 of process, showing calculations of pension loss based upon Mr Carter's figures for potential earnings. There was no evidence to contradict Mr Carter or Dr Pollock's evidence which I accepted on the premise on which it was given.

[63] The delay in the progression of the pursuer's career was explained by reference to the difficulties experienced by her daughter F. F witnessed the accident to the pursuer. She was aged 7 years at the time of the accident. The pursuer led evidence from Dr David Maclean, Specialty Doctor in Child & Adolescent Psychiatry. He examined F on 27 August 2017 and prepared a report number 5/29 of process. Mr McConnell objected to the admissibility of Dr Maclean's evidence on the ground that there were no averments on Record to the effect that F was suffering from a psychological reaction being an Adjustment Disorder. It was accepted that there were averments which gave notice of the child suffering from separation anxiety. This, he submitted, was not sufficient to give notice of a psychological condition categorised in terms of the International Classification of Mental and Behavioural Disorders. I allowed Dr Maclean's evidence subject to competency and relevance. In his submissions Mr McConnell renewed his objection.

[64] In his evidence Dr Maclean explained that a condition of "separation anxiety" would be how a lay person would describe the condition from which the child was suffering. The main symptoms were separation anxiety being a particular form of anxiety brought on by

particular circumstances. In his opinion the condition would be best labelled as an Adjustment Disorder. In my opinion all that Dr Maclean was doing was giving a professional label to a condition which was described in the pleadings as separation anxiety. Adjustment Disorder would appear to cover many types of anxiety. Indeed the pursuer was diagnosed as suffering from such a disorder with anxiety. Her anxiety took a different form from that of her daughter. At paragraph 8.01 of Dr Maclean's report he states "For F this anxiety included features consistent with Separation Anxiety.". In my opinion, having regard to the fact that abbreviated pleadings are adopted in these proceedings, the defenders have been given adequate notice that the pursuer's daughter was suffering from a form of anxiety following the accident. The defenders took no steps during the proceedings to investigate the nature or extent of the condition. I considered that the evidence was admissible there being no objections on any other grounds.

[65] It was clear from the evidence of the pursuer and Dr Maclean that F had suffered significantly as a result of having witnessed the accident to her mother. It might be readily understood that a child of 7 years seeing her mother struck by a large object, falling to the ground, possibly unconscious, bleeding from a head wound and carried away ultimately in an ambulance would be very frightened and distressed. It is also understandable that at least for a time F would be anxious about being apart from her mother and would be reluctant to be in situations where she could not see that her mother was present.

[66] The pursuer is to be commended for her understanding of F's problems and the manner in which she has dealt with them. Although she did not attend parental classes she has followed the recommended strategy of gradual exposure to increasing separation and as a result F has returned to school, is achieving there and enjoying various social activities.

[67] It is understandable that while addressing F's problems the pursuer would delay progressing with her career. The welfare of her daughter was not unreasonably her priority. The question is whether the defenders are liable for the losses calculated by Mr Carter and the consequential loss of pension as calculated by Dr Pollock.

[68] It is a matter of agreement that the pursuer was able to return to work after about 14 weeks. In parties' Joint Minute it is agreed that her loss of wages ended by 3 March 2014. Mr Raine refers in his report to the pursuer having required 14 weeks off work. Dr Rodger observed in his report that the pursuer had successfully returned to work. Dr Stone noted that the pursuer was working 27 hours per week. He stated "Although her symptoms trouble her they do not impair her ability to work full time and I would not expect them to lead to any impairment of occupational functioning in the future.". According to the CV provided to Mr Carter the pursuer worked between October 2011 and August 2015 as a supply childcare practitioner for the defenders. Between November 2011 and November 2013 she also provided childcare in other circumstances to increase her working to full time. Between November 2012 and November 2015 she operated a company providing childcare and housekeeping. Between December 2015 and May 2017 she worked as a full time pupil support assistant for the defenders. In May 2017 she commenced employment as a Life Long Learning Advisor. I have no doubt that her working hours were intended to be such as would fit around her daughter's needs. However it would appear that the pursuer was capable of and continued to work in a childcare or similar setting from about 14 weeks after the accident.

[69] While as I have said it is perfectly understandable that the pursuer would prioritise her daughter's welfare above her career aspirations Mr McMillan offered no authority for recovery of loss sustained in such circumstances. He merely asserted that the loss was the

pursuer's. In contrast Mr McConnell referred to the decision in *Robertson.* In that case the pursuer and other members of his family claimed damages following serious injuries sustained by his wife. The action was dismissed as irrelevant. *Inter alia* Lord Fraser of Tullybelton said "It may be thought that the law is harsh in leaving relatives who suffer patrimonial loss in the discharge of a moral duty towards an injured person without remedy. That is often the case under the present law when they give up employment to look after him or incur other expenses, except where the injured person happens to have funds of his own from which he repays his relatives, or where he is under a contractual obligation to repay them. But compassionate persons are not generally inclined to make contracts with an injured relative on a matter of that sort, and merely notional responsibility will not entitle the injured person to recover expenses incurred by his relatives—see *Edgar* v *Lord Advocate* 1965 SC 67. If a remedy for this state of affairs is to be provided it must, in my opinion, be done by the legislature." No such remedy has been introduced for relatives of an injured person who survives and accordingly, however understandable and reasonable the pursuer's actions may have been, her claim for future patrimonial loss and disadvantage on the labour market incurred as a result of caring for her daughter is irrelevant.

[70] Mr McConnell further submitted that this head of claim is too remote. He referred to the "grand rule" as set out in *Allan* namely "The grand rule on the subject of damages is, that none can be claimed except such as naturally and directly arise out of the wrong done; and such, therefore, as may reasonably be supposed to have been in the view of the wrongdoer. Tried by this test, the present claim appears to fail. The personal injuries of the individual himself will be properly held to have been in the contemplation of the wrongdoer. But he cannot be held bound to have surmised the secondary injuries done to all holding relations with the individual, whether that of a master, or any other."

Mr McConnell submitted that while the injuries to the pursuer would be within the contemplation of the defenders they cannot have surmised secondary injuries to parties such as the pursuer's daughter. This is of course not a claim for damages by the pursuer's daughter. It is a claim by the pursuer for damages for, as Mr McConnell put it, her reaction to her daughter's reaction to the pursuer's injuries. I was not referred to any authority to suggest that such a claim was competent.

[71] For the foregoing reasons I do not consider that any award can be made for future patrimonial loss and consequently none for pension loss.

[72] Mr McConnell also criticized the evidence of the pursuer in relation to her future intentions. Her evidence was somewhat vague. I have no doubt, given the determination she has shown to date, that the pursuer did intend to continue to advance a career in psychology following her obtaining her Open University degree and her Masters from Edinburgh University. Quite what path she intended to follow was not clear and indeed much might have depended upon what was actually available. For these reasons the evidence from Mr Carter which proceeded on certain assumptions could not be said to be entirely reliable. It may be that given her background in childcare and the focus of her Masters degree that the path she has now chosen is entirely appropriate.

[73] I was not addressed on the question of expenses. In the event that these cannot be agreed a hearing will require to be assigned.