

**SHERIFFDOM OF LoTHIAN & BORDERS AT EDINBURGH**  
**IN THE ALL-SCOTLAND SHERIFF PERSONAL INJURY COURT**

[2023] SC EDIN 12

PIC-PN1603-21

JUDGMENT OF SHERIFF DOUGLAS KEIR

in the cause

DONNA SLATER

Pursuer

against

TRACY ANN MCNELIS

Defender

**Pursuer: Christine, Advocate; Lawford Kidd**  
**Defender: Thomson, Solicitor Advocate; BTO Solicitors LLP**

Edinburgh, 28 March 2023

The sheriff, having resumed consideration of the proof, finds the following facts admitted or proved:

**Finds in fact**

- (1) The pursuer is Donna Slater. She is 58 years old.
- (2) The defender is Tracy Ann McNelis. At the time of the pursuer's accident on 20 July 2018, she was one of two partners in a business trading as Trossachs Holiday Park ("the Park"). The other partner, John Wrigley, died on 3 May 2021. The defender and John Wrigley were also partners in a care home business. The defender took primary responsibility for the care home business while John Wrigley took primary responsibility for the Park.

(3) The pursuer was employed by the defender and John Wrigley as a warden and housekeeper at the Park. Her husband, Andrew Slater, was also employed at the Park as a warden and groundsman.

(4) John Wrigley owned a female Doberman Pinscher dog called Khaleesi. He bought Khaleesi as a puppy in May 2016. He had owned other Dobermans before Khaleesi.

(5) Khaleesi was a family pet. She was not the Park's guard dog. She was a friendly, strong, overweight dog. John Wrigley used a Halti collar when walking Khaleesi due to her tendency to pull when walking on a lead.

(6) John Wrigley worked and stayed at the Park during the week. He travelled home to Middlesbrough at weekends. He brought Khaleesi to the Park and she stayed with him.

(7) On 20 July 2018, Khaleesi was in the office at the Park. At around 1545 hours on that day, the pursuer entered the office. Grace Babcock, the office manager at the Park, was present. John Wrigley was not present. The pursuer advised Grace Babcock that she had finished work and, as it was a nice day, she would take Khaleesi for a walk.

(8) The pursuer did not ask John Wrigley for permission to do so. John Wrigley did not ask or tell the pursuer to do so. The pursuer chose to walk Khaleesi that day of her own volition.

(9) The pursuer had walked Khaleesi on at least two occasions prior to 20 July 2018 without incident. Walking Khaleesi was not part of the pursuer's work duties.

(10) On 20 July 2018, she walked Khaleesi on the lead to the nearby dog exercise area at the Park. At that time, she was not working in the course of her employment with the defender.

(11) During the course of walking Khaleesi, a car drove towards the pursuer. The car was occupied by two guests staying at the Park. The pursuer stopped by the side of the road. The car also stopped. Khaleesi was on the lead and was sitting beside the pursuer.

(12) While the pursuer engaged in a short conversation with the two occupants of the car, Khaleesi suddenly pulled away from the pursuer. The pursuer was still holding onto the lead attached to Khaleesi. As a result of Khaleesi's sudden movement, the pursuer was pulled off her feet and landed heavily on her back.

(13) Prior to 20 July 2018, other employees of the defender had walked Khaleesi.

(14) Prior to 20 July 2018, there had been no reported incidents of a similar nature involving Khaleesi and there had been no concerns about Khaleesi's behaviour reported to John Wrigley.

(15) As a result of her fall, the pursuer sustained a wedge fracture to her T12 vertebra. She continued to suffer from significant back pain and also suffered from ongoing depressive symptoms. She had not returned to work since the accident and her ability to undertake paid employment in the future was affected. She had suffered from a loss of pension rights. She had also required a significant level of assistance from her husband and would continue to require assistance in the future.

### **Finds in fact and law**

(1) The pursuer has not suffered loss, injury and damage as a result of the fault and negligence of the defender.

(2) All questions of expenses are reserved. The sheriff clerk will fix a hearing on expenses.

**NOTE****Introduction**

[1] In this action, the pursuer seeks damages for the loss, injury and damage she suffered as a result of being pulled off her feet by the dog she was walking at the holiday park where she worked (Trossachs Holiday Park - "the Park"). A proof proceeded on 31 January, 1 and 2 February 2023. Parties had agreed quantum on a full liability basis at £345,890 (inclusive of interest to 31 January 2023) and the proof was restricted to liability.

[2] The defender was one of two partners who owned and operated the Park. The other partner, John Wrigley, was the owner of the dog, a Doberman Pinscher called Khaleesi. John Wrigley passed away in May 2021.

[3] The pursuer called the following witnesses:

(i)The pursuer

(ii)Andrew Slater

(iii)Colin Parsons

(iv)Kevin Gallagher

(v)Anne Hamilton

(vi)Martin Scobie

[4] The defender called the following witnesses:

(i)The defender

(ii)Nigel Allen

(iii)Grace Babcock

## **The evidence**

### *The pursuer*

[5] The pursuer was 58 years old. At the time of the accident, she was employed at the Park by the defender and John Wrigley as a warden and head housekeeper. Her husband also worked at the Park and they lived in on-site accommodation provided as part of their employment. They had worked at the Park for around 4 years. Her hours of work were generally 0830 until 1700. Employees were allowed to take a tea break between 1030 and 1145 in the morning and 1530 and 1545 in the afternoon along with 30 minutes for lunch at 1300 hours. Following her afternoon tea break on 20 July 2018, the pursuer had gone into the office at around 1550 hours. John Wrigley had been present along with his dog, a Doberman Pinscher called Khaleesi. He told the pursuer that he had not had time to walk his dog. He had put the lead on Khaleesi and handed the lead to her. The pursuer had then walked Khaleesi down to the dog walk area in the Park where she had let Khaleesi off the lead to exercise. On the way back to the office, she was walking with Khaleesi on the lead. She heard a car driving along the road so she stopped. The car also stopped and the occupants of the car lowered their window and engaged in a short conversation with her. Khaleesi was sitting beside the pursuer at this point. Suddenly Khaleesi bolted and she was thrown into the air before feeling "an explosion" in her back. She did not know what had caused Khaleesi to react in that way.

[6] The pursuer described Khaleesi as a good natured but very nervous dog who frequently got spooked. Khaleesi was overweight and the pursuer estimated the dog's weight at around 8 stone, similar to her own weight. She had walked Khaleesi prior to the accident. Khaleesi was powerful and always pulled on the lead but she had behaved herself on those previous occasions. A couple of weeks before the accident, John Wrigley had been

on holiday and Grace Babcock, the office manager, had volunteered to look after Khaleesi. Grace Babcock had brought Khaleesi to work with her and the pursuer had ended up walking her all that week. She recalled that Grace Babcock had contacted her by radio during the course of that week to ask when she was going to walk Khaleesi.

[7] According to the pursuer, John Wrigley never walked Khaleesi and another employee, Martin Scobie, was mainly responsible for walking her. If asked to walk Khaleesi, she would do as she was told. Every member of staff at the Park walked the dog apart from John Wrigley. She referred to Khaleesi as the Park's guard dog.

#### *Andrew Slater*

[8] Andrew Slater was the pursuer's husband. He had worked as a warden and groundsman at the Park, living on site with pursuer. He was now the pursuer's full-time carer. He had been working at the Park on the day of the accident but had not witnessed it. He had spoken to both the pursuer and John Wrigley in the aftermath. The pursuer had not been able to speak while John Wrigley had told him that she had had an accident with the dog.

[9] He had walked Khaleesi on previous occasions during working hours when he had been asked by John Wrigley. He had also looked after Khaleesi when there had been no one on site. He described Khaleesi as a really friendly dog. She was overweight and pulled a bit on the lead but otherwise was quite obedient. He recalled that John Wrigley's previous Doberman, Cleo, had been larger and more aggressive.

[10] During cross-examination, Andrew Slater agreed that the pursuer had walked Khaleesi prior to the accident. They were both dog people and had previously owned dogs themselves. There were two other dogs on site owned by fellow employees and he and the

pursuer had taken those dogs for a walk on occasion as well. Walking Khaleesi was not part of his working duties. He agreed that Khaleesi was John Wrigley's pet. He did not consider that Khaleesi was a guard dog as she was too soft although John Wrigley had liked to portray her as one for appearance's sake. He and the pursuer had felt sorry for Khaleesi as she did not get walked a lot in the office.

*Colin Parsons*

[11] Colin Parsons had been employed as the maintenance manager at the Park. He had worked there for around 8 years. He had not witnessed the pursuer's accident. He described Khaleesi as a young Doberman who was well behaved for her age. He estimated her weight at around 30kg. He did not consider her to be overly nervous. He brought his own dog (a West Highland Terrier called Stuart) with him to work. Both dogs got on well with each other. John Wrigley had asked him to walk Khaleesi on a couple of occasions and he had done so as it had been a "good skive". He had kept Khaleesi on the lead and had not experienced any difficulties. He was aware that Martin Scobie had also walked Khaleesi on occasions when asked by John Wrigley.

[12] During cross-examination, he was clear that Khaleesi was John Wrigley's pet and not a guard dog. When he had walked Khaleesi, he had done so as a favour to a friend and not as part of his work duties. On a previous occasion, he had seen the pursuer and another member of staff walking Khaleesi and his own dog. Neither had asked him for permission to do so.

*Kevin Gallagher*

[13] Kevin Gallagher had worked at the Park as the general manager until around March 2017. John Wrigley had owned a Doberman Pinscher called Cleo during that time. Kevin Gallagher had walked Cleo regularly with his own dog. Martin Scobie had also walked Cleo on rare occasions. He could not comment on who walked what dog after March 2017. He agreed that other staff members had walked Cleo. They had done so of their own volition and it had not been part of their work duties.

*Ann Hamilton*

[14] Ann Hamilton had been a resident at the Park for almost 24 years. She would spend up to 9 months a year there. In the week before the accident, she had seen the pursuer on two consecutive days walking a Doberman. She described the dog as large and powerful. She considered that the dog was pulling the pursuer along and that the situation looked very wrong. She had not seen any other members of staff walking the same dog at the Park. She had seen Grace Babcock standing outside the Park's reception building with the same dog. She had asked Grace Babcock if she was going to walk the dog. Grace Babcock had said no as the dog was too powerful for her. She had also told her that she was looking after the dog for John Wrigley but her husband would walk the dog at night along with their own dog. During cross-examination, when asked how she thought the pursuer came to be walking the dog when the accident occurred, she stated that she would not have thought the pursuer would have done so of her own volition.

***Martin Scobie***

[15] Martin Scobie was employed as a groundswoker at Park. He owned his own dogs and confirmed that he liked walking dogs. He had walked Khaleesi on numerous occasions during working hours. He had been asked to do so by John Wrigley. If you were asked to do something by John Wrigley, you would do it.

[16] He described Khaleesi as a big powerful dog who was timid and scared. He recalled that a special type of collar/harness was used with Khaleesi's lead called a Halti collar. The collar went round the dog's head/muzzle and was attached to the lead, like a halter worn by a horse. The Halti collar was used because Khaleesi pulled when walking on the lead.

However he had not experienced any difficulties when he had walked Khaleesi. He thought that Khaleesi might have been a guard dog although he accepted that she was

John Wrigley's pet.

**Defender's evidence*****Nigel Allen***

[17] Nigel Allen was a claims inspector employed by NFU Mutual. He had met with John Wrigley in December 2019 to obtain a statement for the purposes of investigating the pursuer's claim. The meeting lasted around 1.5 hours. He had been provided with a copy of the letter intimating the pursuer's claim. He had asked John Wrigley a series of questions regarding the issues detailed in the letter of claim and noted his responses as a statement on an iPad. He had then read the statement back to John Wrigley. When John Wrigley confirmed that the statement was accurate, he had digitally signed the statement to confirm the position. Nigel Allen recalled that Khaleesi had died by the time of the interview so there had been no opportunity to have her assessed.

*John Wrigley*

[18] The digitally signed statement provided by John Wrigley to Nigel Allen was lodged in process (number 6/6). John Wrigley was a partner in the Park in June 2018. The business had been sold in 2019. He had bought Khaleesi as puppy in May 2016. She was a family pet, not a guard dog. He had owned four Doberman Pinschers over the years. Khaleesi stayed with him when he was at the Park during the week and when he returned home to Middlesbrough at weekends. He described Khaleesi as a standard size for her breed. She was not skittish but not over-confident. He walked her with a Halti collar as she had a tendency to walk ahead without it. He had taken Khaleesi to puppy training classes.

[19] In relation to the incident on 20 July 2018, he had not asked the pursuer to walk Khaleesi that day. He had not been aware that the pursuer had walked Khaleesi before. He had never been told that Khaleesi was ever a problem. When Khaleesi was at the Park, she would be in the office with two or three other dogs and a cat. Khaleesi had not been a problem with either customers or members of staff.

*Grace Babcock*

[20] Grace Babcock was employed as the Office Manager at the Park in 2018. She had worked there for around two and half years and had worked with the pursuer during that time. She confirmed that John Wrigley was generally at the Park during the week and at home at the weekend. When he was staying at the Park, he would have Khaleesi with him. On the afternoon of the accident, the pursuer had come into the office. The pursuer said that she had finished early, that it was lovely day, that she felt sorry for Khaleesi and was going to take her down to the dog walk area. John Wrigley had not been present in the office at that time. The pursuer did not say that John Wrigley had asked her to walk Khaleesi.

[21] Ms Babcock recalled that it had been a lovely day and was not surprised that the pursuer had decided to take Khaleesi out for a walk as they had all felt sorry for her being stuck in the office on occasions.

[22] Grace Babcock described Khaleesi as a strong dog but a big softie who loved attention. There were usually three dogs in the office: Khaleesi, her own dog and Colin Parsons' dog. Khaleesi was fine with those dogs and did not react when people came in and out of the office during the day. Khaleesi was John Wrigley's pet and not a guard dog. She recalled that Martin Scobie would take Khaleesi out for walks before he started his shift. She had also looked after Khaleesi for a week in June 2018 when John Wrigley had been on holiday. She had felt bad about Khaleesi being put in kennels. She had then brought Khaleesi into work at the Park each day along with her own dog. She had walked Khaleesi each day that week. She used a lead with the Halti collar to stop Khaleesi from pulling. She had not experienced Khaleesi being spooked while walking her.

[23] During the week when Khaleesi stayed with her, the pursuer did not walk her. She denied contacting the pursuer by radio in relation to walking Khaleesi. She did not recall any conversation with Ann Hamilton about Khaleesi. If she had had concerns about Khaleesi's strength then she would not have offered to look after her for a week.

[24] During cross-examination, Grace Babcock said that there was a general consensus that Khaleesi was overweight and did not get enough exercise. She was uncertain if Martin Scobie had walked Khaleesi during working hours. She thought that he only walked Khaleesi before the start of his shift. She was certain that she had looked after Khaleesi in June 2018 as she recalled a photograph she had taken of Khaleesi at Loch Lomond. The pursuer had walked Khaleesi on previous occasions. She did not consider it odd that the pursuer had taken Khaleesi out on the day of accident as she had done so before as had

others. She maintained that John Wrigley had not been in the office when the pursuer took Khaleesi out for a walk.

### *The defender*

[25] The defender had been a partner with John Wrigley in the business that ran the Park. John Wrigley passed away in May 2021. They had bought the Park in around 2005 and sold it in around 2019/2020. John Wrigley had responsibility for running the Park. She had rarely visited the Park and did not remember the pursuer.

[26] The Park was pet-friendly and a number of employees brought their dogs to work with them. She had met Khaleesi on a few occasions but had not walked her. She described Khaleesi as smaller than Mr Wrigley's other Dobermans and more timid. Khaleesi was John Wrigley's pet - she was not a guard dog. The defender did not have any concerns about Khaleesi.

[27] In terms of the pursuer's accident, she had not been at the Park at that time but John Wrigley had mentioned it to her later. He told her that the pursuer had had the accident while walking Khaleesi and that he had not asked her to do so.

### **Submissions**

[28] Both parties lodged written submissions which were adopted and supplemented by oral submissions. I summarise parties' submissions as follows.

### *Pursuer's submissions*

[29] The pursuer sought decree for the sum of £345,890 inclusive of interest to 31 January 2023 together with expenses.

[30] It was not disputed that the pursuer had been walking Khaleesi on 7 June 2018 and that Khaleesi had bolted, pulling her off her feet, resulting in her sustaining serious injury. In terms of why she had taken Khaleesi for a walk that day, the pursuer's account had been consistent since the intimation of her claim. She had been asked to do so by her employer, John Wrigley, who had handed her Khaleesi's lead. That she might be asked to do so was consistent with the evidence of fellow employees. Whether or not Khaleesi should be viewed as the Park's guard dog was peripheral to the key issues under scrutiny. Khaleesi was a large, powerful Doberman Pinscher who had a nervous nature and a tendency to pull when being walked on a lead. When the pursuer was walking Khaleesi on the day in question, she was doing so on behalf of her employer and in the course of her employment. As such, the defender as her employer owed the pursuer a duty to take reasonable care for her and not subject her to unnecessary risk of injury.

[31] It was inconceivable that John Wrigley was unaware that his employees were walking his dogs either at his express request or on their own initiative during their hours of work at their place of work. Moreover, John Wrigley should have been well aware of the dangers posed by Khaleesi. It was therefore incumbent upon him to assess the risks that such a task entailed and take action to eliminate or reduce any risks found. It was clear that no risk assessment had been carried out. Had such an assessment been carried out, it would have identified the risk of injury to an employee of the physical stature of the pursuer walking a dog of the size, power and nature of Khaleesi and would have resulted in the pursuer being instructed not to walk her.

[32] Reliance was also placed on Regulation 4 of the Manual Handling Operations Regulations 1992. It was submitted that walking Khaleesi was a "manual handling operation" as defined by Regulation 2. The defender had not avoided the need for the

pursuer to undertake a manual handling operation which carried a risk of injury. Her engagement in walking Khaleesi ought to have been avoided. The defender was in breach of Regulation 4 and therefore in breach of her common law duty of care towards the pursuer.

[33] In terms of contributory negligence, there was nothing to suggest fault on the part of the pursuer. There was no evidence about whether or not the Halti collar had been used by the pursuer when she was walking Khaleesi that day. There was no evidence that the pursuer had been paying insufficient attention to Khaleesi while she spoke to the occupants of the car or if that would have made any difference to the outcome.

[34] While the defender's case included *volenti fit non iniuria*, this had not been put to the pursuer. In any event, it was unusual to see this plea in an employer's liability case, particularly against a background where there was no evidence that the pursuer had been expressly told not to walk Khaleesi.

#### *Defender's submissions*

[35] The defender sought decree of absolvitor.

[36] While it was accepted that Khaleesi had suddenly pulled away from the pursuer causing her to fall and land heavily on her back, it was not accepted that: the pursuer had been asked to walk Khaleesi that day as part of her employment duties; that Khaleesi was a nervous dog who spooked easily; that John Wrigley knew of the difficulties posed by Khaleesi's nature and disposition; and that John Wrigley knew or ought to have known that a person of the physical stature of the pursuer was at risk of injury when walking Khaleesi.

[37] The defender's primary contention was that it was the pursuer who had taken it upon herself to walk Khaleesi on the day in question. John Wrigley had not been present in

the office when the pursuer attended and took Khaleesi out for a walk. The pursuer had not been acting in the course of her employment when the accident occurred and the defender had no liability for the ensuing accident.

[38] The defender's secondary position was that even if the pursuer had been acting in the course of her employment, she had failed to prove any breach of duty of care on the part of the defender. While it was accepted that no risk assessment had been carried out in relation to walking Khaleesi, there was no evidence that such a failure was causative of the accident. While there was general evidence about Khaleesi's size and weight, there was an abundance of evidence about her friendly nature, limited evidence about her nervous disposition, and an absence of evidence that she constantly strained at the lead when being walked. Only the pursuer had spoken to Khaleesi being spooked easily but there was no evidence about what had caused her to suddenly pull away from the pursuer and no evidence that any of her traits had caused her to do so. Against that background, it was not reasonably foreseeable that an accident of the type that befell the pursuer might occur.

[39] In the event that liability was established, the court should find that contributory negligence was significant. The pursuer had been engaged in a conversation with the occupants of a car and had not been concentrating fully on Khaleesi. In the circumstances, contributory negligence should be assessed at 50%.

[40] If the pursuer established liability, the defence of *volenti non fit iniuria* was available on the basis that the pursuer had consented to the risk of injury by taking Khaleesi for a walk. This would potentially apply if the court held that the pursuer was acting in the course of her employment while walking Khaleesi but had not been asked to do so. The pursuer had walked Khaleesi on previous occasions. On that basis, she was aware of the risks of walking her and on the day in question she had voluntarily accepted those risks.

## **Decision**

### *Assessment of the evidence*

[41] Due to John Wrigley's death, the court only heard direct evidence from the pursuer and Grace Babcock in relation to the events in the office on 20 July 2018 prior to the pursuer taking Khaleesi for a walk. There were also conflicting accounts of staff involvement with Khaleesi at the Park and her behaviour prior to the accident. As a result, this case turns on the credibility and reliability of the witness evidence.

[42] The pursuer was clearly nervous when she gave evidence. This was no doubt due in part to the court experience as well as the ongoing symptoms of the serious injuries she sustained as a result of the accident. However, there were a number of inconsistencies in her evidence which call into question her reliability on certain key matters. She was also defensive and dogmatic at times and reluctant to make concessions. She was dismissive of Grace Babcock's role at the Park, stating "[I] think she appointed herself as the office manager". She accused her of "telling lies" in relation to her conflicting account of the pursuer's visit to the office to collect Khaleesi. She was dismissive of the suggestion that Khaleesi was simply a pet and not a guard dog, notwithstanding the weight of other supportive evidence. She asserted that "every member of staff" walked Khaleesi and that John Wrigley never walked her whereas both Andrew Slater and Martin Scobie, amongst others, spoke to John Wrigley walking Khaleesi at the Park.

[43] The pursuer's evidence about Khaleesi was peppered with inconsistencies. While seeking to assert that Khaleesi was a powerful dog with a very nervous nature, she also stated that she was a good natured dog who liked people. She had walked Khaleesi before

the accident and considered that Khaleesi had behaved herself on those occasions, notwithstanding that Khaleesi may have pulled while walking on her lead.

[44] She gave the impression that John Wrigley was an authoritarian employer as she “had to account for [her] movements on the Park”. She asserted that “I did what I was told... or [I] wouldn’t have a job”. This was at odds with the general impression I formed from other witnesses of the pet-friendly working environment at the Park.

[45] The pursuer maintained that in the weeks prior to the accident she had walked Khaleesi regularly when John Wrigley had been on holiday and Grace Babcock had been looking after Khaleesi. During that time, Grace Babcock had contacted her by radio about walking Khaleesi. She asserted that John Wrigley knew that Grace Babcock could not walk the dog. This was contradicted by Grace Babcock’s evidence.

[46] The defender highlighted a number of inconsistencies in the applications submitted by the pursuer for disablement benefits in 2019. The pursuer was referred to a letter sent on her behalf by Citizens Advice Bureau date 22 July 2019 (number 6/5 of process at page 323). She confirmed that she had met with the author of the letter before it was sent on her behalf. The letter stated: “She was pulled to the ground while walking the holiday park guard dog... The walking of the holiday park guard dog was part of [her] duties.”

[47] During cross-examination, the pursuer agreed that she had referred to Khaleesi as the Park owner’s dog in her initial benefits application. When this application had been refused, the pursuer had sought a review in which reference was made to Khaleesi being a guard dog. She denied that she had made that reference to bolster her claim for benefits.

[48] When looking at the evidence as a whole, I consider that there is an absence of reliable evidence that Khaleesi was a guard dog which therefore casts significant doubt on the basis for the pursuer’s suggestion to the contrary.

[49] In a separate document where the pursuer had been interviewed as part of the benefits review process in August 2019 (6/5 of process at page 332), the pursuer's statement in relation to the accident was recorded as follows: "The people in the car stopped and rolled down the window and said hello to me but this scared the dog and it ran off."

[50] During examination in chief, the pursuer stated that she did not know why Khaleesi had bolted. In cross-examination, she accepted that she had been engaged in a conversation with the occupants of the car before Khaleesi bolted but maintained that she did know why the dog reacted. Both accounts were at odds with her earlier statement.

[51] Against this inconsistent and unsatisfactory background, I have concluded that I am unable to rely on the pursuer's evidence except where it is supported by other evidence that I have found to be credible and reliable.

[52] Andrew Slater, Colin Parsons, Kevin Gallagher and the defender all gave their evidence in a straightforward manner and were doing their best to assist the court. I accept their evidence as credible and reliable.

[53] I regard the evidence of Nigel Allen as credible and reliable in giving his account of what Mr Wrigley told him at interview in December 2019.

[54] I found the evidence of Ann Hamilton to be unsatisfactory. She was a friend of the pursuer and I formed the impression that this friendship coloured the evidence that she provided to the court. She had been a resident at the Park for around 24 years yet maintained that she had never seen any other member of staff walking Khaleesi. This was in stark contrast to the weight of evidence that several employees had walked Khaleesi at the Park on a regular basis prior to the accident. She asserted that she had seen the pursuer walking a dog during the week immediately prior to the accident. She dramatically described what she had seen as "very wrong" as the dog had looked too powerful for the

pursuer. This was at odds with the pursuer's own evidence whereby she stated when she had walked Khaleesi prior to accident, Khaleesi had behaved herself. She did not provide any basis for her suggestion that the pursuer would not have walked Khaleesi of her own volition on the day of the accident. When taken together, I am unable to rely upon Ms Hamilton's evidence except where it is supported by other evidence I have found to be credible and reliable.

[55] While Martin Scobie was doing his best to assist the court when giving evidence, there were inconsistencies in his evidence. He asserted that Khaleesi was a big powerful dog who was very timid and scared yet attempted to maintain that she was a guard dog at the Park. His evidence in this regard was less than convincing. He was also adamant that he had been repeatedly told by John Wrigley to walk Khaleesi. He claimed to have been unable to refuse such requests because he had been expected to comply, echoing the authoritarian approach suggested by the pursuer. Again, this was at odds with other more reliable evidence about the working atmosphere at the Park. Against that background, I am only prepared to rely on Martin Scobie's evidence where it is supported by other evidence I have found to be credible and reliable.

[56] I consider that Grace Babcock gave her evidence in a straightforward and honest manner. She was no longer employed by the defender and had no interest in the case. She was clear in her recollection of the events leading up to the pursuer taking Khaleesi for a walk. John Wrigley had not been present in the office at that time. Her evidence that the pursuer felt sorry for Khaleesi, hence the reason to take her for a walk, was consistent with the evidence of Andrew Slater who referred to Khaleesi being ignored and not walked enough. Her evidence that Khaleesi was a pet rather than a guard dog was supported by

Andrew Slater, Colin Parsons and the defender, all of whom I have found to be credible and reliable.

[57] While the pursuer sought to criticise Grace Babcock in relation to her recollection of the timing of when other employees had walked Khaleesi, I did not consider that any such inconsistencies were of sufficient materiality to undermine the critical elements of her evidence. I therefore accept her evidence as credible and reliable.

[58] In relation to the evidence of John Wrigley, the pursuer did not have the opportunity to cross-examine him on the content of the statement obtained by Nigel Allen or ask additional questions on issues not covered in that statement. In terms of assessing the weight that can be attributed to the statement, it would be appropriate to cross-reference its content with other evidence that I have accepted as credible and reliable. I therefore accept John Wrigley's evidence where it coincides with the evidence given by Andrew Slater, Colin Parsons, Kevin Gallagher, the defender and Grace Babcock.

### ***Liability***

[59] There was no dispute that the pursuer sustained serious injury while walking Khaleesi. It was accepted that the injury was caused when Khaleesi suddenly bolted, pulling the pursuer over and causing her to land heavily on her back. The critical factual aspect to her claim was whether she had been required to walk Khaleesi as part of her work duties in the course of her employment with the defender.

[60] The pursuer's averments in this regard are as follows:

"When the pursuer entered the office, she was told by Mr Wrigley that [Khaleesi] had not been walked. He then went and fetched a dog lead, fixed it to [Khaleesi] and handed the lead to her... The pursuer did not find this request unusual as she had been required to walk [Khaleesi] during the previous week while Mr Wrigley was on holiday at the behest of the office manager, Grace Babcock".

[61] For the reasons given above, I have accepted the evidence of Grace Babcock as credible and reliable and I am only prepared to rely upon the pursuer's evidence where it coincides with other reliable evidence. Grace Babcock's account of how the pursuer came to be walking Khaleesi at the time of the accident, namely that having finished her work duties early, the pursuer voluntarily took her out for walk when John Wrigley was not present in the office, falls to be preferred. This account is consistent with the information provided to the DWP by John Wrigley in June 2019 when he responded to a request for information in relation to the pursuer's application for benefits (page 315 of the Joint Bundle). In answer to the question "at the time of the accident, were they authorised for the purposes of work to be where the accident happened?", he had ticked "no". He had then added: "I had not requested Donna to take the dog for a walk. Walking the dog was not part of her duties."

[62] I note in passing that the pursuer's claim for damages had not been intimated at this time. The Pre-Action Protocol Claim Form was sent to John Wrigley by letter dated 14 October 2019 (6/15 of process).

[63] John Wrigley provided further detail to Nigel Allen when he was interviewed in December 2019. As per his signed statement (6/6 of process), John Wrigley stated:

"I did not ask the [pursuer] to take my dog for a walk that day. I am not aware that [she] had ever taken my dog for a walk previously. I have never instructed [her] to walk my dog."

[64] Grace Babcock's evidence is also consistent with the account given to the defender by John Wrigley regarding the pursuer's accident.

[65] The suggestion that John Wrigley would have instructed an employee such as the pursuer to walk his dog was also at odds with the evidence of the witnesses whose evidence I have accepted as credible and reliable. As detailed above, the impression I have formed of

the Park was that it was a pet-friendly place to work, where employees were allowed to bring their dogs to work with them. I am not persuaded that a culture existed whereby employees believed that they had to walk John Wrigley's dog or be in fear of losing their jobs.

[66] The pursuer has failed to prove on the balance of probabilities that she had been instructed by John Wrigley to walk Khaleesi on the day of the accident. It follows that at the time of the pursuer's accident, she was walking Khaleesi of her own volition.

*Dog walking as part of the pursuer's employment?*

[67] Khaleesi was one of a number of dogs present at the Park owned by those working there. Colin Parsons, Andrew Slater, Grace Babcock and Kevin Gallagher all spoke to walking either Khaleesi or John Wrigley's previous Doberman (Cleo) at the Park. They had all voluntarily agreed to walk those dogs. None of them supported the suggestion that John Wrigley had instructed them to do so. None of them viewed walking the dogs as forming part of their employment duties. All had enjoyed walking the dogs as they either owned their own dogs or enjoyed the company of dogs. Colin Parsons candidly referred to enjoying walking Khaleesi during working hours as it was a "good skive".

[68] Martin Scobie was the only employee to provide support for the pursuer's assertion that there was a requirement to walk Khaleesi as part of employment at the Park. I do not consider his evidence to be reliable in that regard and I am satisfied that walking Khaleesi did not form part of the pursuer's employment duties.

[69] In any event, the pursuer's case is predicated on her proving that she had been instructed to walk Khaleesi on the day of the accident, a request that she felt unable to refuse standing the employer/employee relationship. The pursuer has failed to do so.

Accordingly, it follows that the pursuer has failed to prove on the balance of probabilities that she was acting in the course of her employment when the accident happened and the defender is entitled to decree of absolvitor in her favour.

*Duty of care/risk assessment*

[70] If I am wrong, and the pursuer was acting in the course of her employment when walking Khaleesi on the day of the accident, the duty of care incumbent upon the defender falls to be considered. The defender, as the pursuer's employer, owed her a duty to take reasonable care for her safety and not to subject her to unnecessary risk of injury. As part of that duty, the defender ought to have carried out a suitable and sufficient risk assessment in relation to the risks posed by walking Khaleesi. The defender accepted that no risk assessment had been carried out but submitted that this failure was not causative of the accident.

[71] A failure to carry out a risk assessment can only give rise to liability at common law if a suitable and sufficient risk assessment would probably have resulted in a precaution being taken which would probably have avoided the injury. This is in line with the frequently cited passage in the case of *Uren v Corporate Leisure (UK) Ltd* [2011] EWCA Civ 66:

“[39] It is obvious that the failure to carry out a proper risk assessment can never be the direct cause of an injury. There will, however, be some cases in which it can be shown that, on the facts, the failure to carry out a proper risk assessment has been indirectly causative of the injury. Where that is shown, liability will follow. Such a failure can only give rise to liability if a suitable and sufficient assessment would probably have resulted in a precaution being taken which would probably have avoided the injury. A decision of that kind will necessitate hypothetical consideration of what would have happened if there had been a proper assessment.”

[72] What amounts to a suitable and sufficient risk assessment will vary according to the circumstances. In this case, the activity in question was walking Khaleesi, about whom the pursuer made the following averments:

“The dog was a large female Doberman Pinscher. It was a strong, heavy dog only a little lighter than the pursuer. It weighed around eight stones. It was of a nervous nature and disposition, spooked easily and constantly strained against the lead when being walked. The pursuer experienced difficulties controlling it... Mr Wrigley knew of the nature and disposition of [Khaleesi] and the difficulties posed walking it on a lead. He was aware of the size and strength of the dog. He knew or ought to have known that a person of the physical stature of the pursuer would have difficulty controlling the dog and was at a risk of injury.”

[73] Only the pursuer spoke to Khaleesi weighing 8 stone (around 50kg) which she equated to her own weight at the time. Colin Parsons estimated Khaleesi’s weight at around 30kg, which is significantly lighter. The court heard that Khaleesi had died prior to the pursuer’s claim being investigated so there had been no opportunity to assess her weight or behavioural traits. Based on the evidence that I have found to be credible and reliable, I am satisfied that Khaleesi was a good natured and friendly dog. She could be nervous or excitable at times. While she had a tendency to pull when being walked on the lead, there was evidence from John Wrigley, Grace Babcock and Martin Scobie that a Halti collar was used to control her. There was no reliable evidence that she weighed as much as 8 stone, that she was easily spooked or that she constantly strained against the lead when being walked. Significantly, there was an absence of evidence that her behaviour while being walked on a lead had posed any particular difficulty to those walking her and no evidence that she had bolted while on her lead prior to the accident. Even the pursuer’s husband expressed surprise that the pursuer had been pulled over by Khaleesi. There was similarly an absence of any evidence that any concerns had been expressed to John Wrigley about Khaleesi’s behaviour, either when being walked or while she was at the Park generally.

[74] The activity concerned involved walking a dog, something that the pursuer had done on at least two occasions prior to the accident without incident. Khaleesi had been well behaved at that time. The pursuer's evidence at proof was that she did not know what caused Khaleesi to bolt that day. Several other employees had walked Khaleesi on previous occasions. None of them had experienced any particular difficulties walking her and none of them had raised any concerns about Khaleesi's behaviour with John Wrigley.

[75] Against that background, when carrying out the hypothetical consideration of what would have happened if there had been a suitable and sufficient assessment, I conclude that such an assessment may have included the stipulation that a Halti collar should be used when walking Khaleesi on the lead to take account of her tendency to pull. However, I do not consider that there is sufficient reliable evidence that would support any additional measures being required, such as the suggested ban on employees of a smaller physical stature from walking Khaleesi.

[76] Applying such a risk assessment to the circumstances of the pursuer's accident, it is not known if the pursuer was using the Halti collar at the time of the accident. Moreover, there was no evidence about whether or not the use of a Halti collar would probably have avoided the accident. As such, even if there was a failure to conduct a suitable and sufficient risk assessment, the pursuer has not proved on the balance of probabilities that such a risk assessment would have resulted in a precaution being taken that would have probably avoided the injury. I therefore conclude that the pursuer has failed to establish any breach of duty on the part of the defender arising from her failure to conduct a suitable and sufficient risk assessment and would have granted decree of absolvitor in favour of the defender in this regard.

[77] The pursuer also placed reliance on the duties contained within the Manual Handling Operations Regulations 1992. The pursuer submitted that these Regulations were relevant on the basis that the pursuer's activity at the time of the accident should be categorised as a manual handling operation at work. Reliance was placed on Regulation 2 of the 1992 Regulations where a manual handling operation is defined as: "any transporting or supporting of a load (including the lifting, putting down, pushing, pulling, carrying or moving thereof) by hand or by bodily force."

[78] In terms of Regulation 2, a "load" includes "any person and any animal". The pursuer submitted that walking Khaleesi involved the transporting or supporting of a load at work. As such, the 1992 Regulations were engaged. I disagree. The pursuer has not proved on the balance of probabilities that she was at work at the time of the accident. Even if she was at work, by taking Khaleesi for a walk, I do not consider that the pursuer was either lifting, putting down, pushing, pulling, carrying or moving her. The pursuer was therefore not undertaking a manual handling operation. The 1992 Regulations have no application.

### *Contributory negligence*

[79] The onus lies on the defender to prove that the pursuer's actions fell below the standard of a reasonable person in the position of the pursuer.

[80] There was no evidence that John Wrigley expressly told his employees not to walk Khaleesi. While there was evidence that a Halti collar was used to control Khaleesi's tendency to pull when walking on a lead, there was no evidence about whether the pursuer was using such a collar at the time of the accident. There was no evidence about what

additional steps the pursuer might have taken to have avoided being pulled off her feet when Khaleesi bolted.

[81] Had I found the defender at fault for the pursuer's accident, I do not consider that any reduction for contributory negligence would have been appropriate.

### ***Volenti Non Fit Inuria***

[82] If the maxim *volenti non fit inuria* applies, it is a complete defence to the pursuer's claim. As recently detailed in *Raybould v T&N Gilmartin (Contractors) Ltd* [2018] SAC (Civ) 31 at para [16]:

“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*).”

[83] Had I found that the defender was in breach of the duty of care owed to the pursuer as an employee, this maxim has no application here. There was no evidence that she deliberately ignored any instructions not to walk Khaleesi. There was no risk assessment in place that highlighted any risks involved in walking her. There was no evidence of previous analogous incidents involving Khaleesi. I do not consider that the pursuer was either *sciens* or *volens*.

### **Conclusion**

[84] Decree of absolvitor is granted in favour of the defender.

[85] At the request of parties, expenses are reserved. The sheriff clerk will fix a hearing on expenses.