SHERIFFDOM OF LOTHIAN AND BORDERS AT EDINBURGH

IN THE ALL-SCOTLAND SHERIFF COURT

[2017] SC EDIN 55

PN2403/16

JUDGMENT OF SHERIFF KENNETH J MCGOWAN

In the cause

TAYLOR NEILSON BARRETT

Pursuer

Against

SPICE LOUNGE (SCOTLAND) LTD

Defender

Pursuer: Thomson, Advocate; Digby Brown
Defender: McGregor, Advocate; BLM

Edinburgh, July 2017

The Sheriff, having resumed consideration of the cause, assoilzies the defender from the first crave of the initial writ; reserves meantime all questions of expenses.

NOTE

Introduction

[1] This case concerned an accident which, although relatively mundane in its circumstances, led to the pursuer suffering serious and unpleasant injuries.

[2] At proof, I heard evidence from the pursuer; her mother, Tammy Leask; eyewitnesses Grace Paton and Rebecca Buckley; and Edward Larkin, a maxillo-facial surgeon. Daldip Singh, restaurant manager, gave evidence for the defender.

[3] A number of matters were agreed including quantum in a joint minute.

[4] In the course of submissions, I was referred to the following authorities:

a. the Occupiers Liability (Scotland) Act 1960 ("the Act");
b. *Dawson v Page* 2013 SC 432; and
c. *Stewart* v *Glasgow Corporation* 1958 SC 28.

[5] Having heard the evidence and submissions, I found the following facts to be admitted or proved.

Findings in fact

[6] At the time of the accident further referred to below, the pursuer was about 17½ years of age. She lived with her family at an address a few minutes' walk from the defender's restaurant premises ("the premises"). Prior to her accident, the pursuer had walked through a private roadway situated adjacent to the premises ("the roadway") a couple of times. On both of these occasions, it was daylight.

[7] On the evening of 7 February, 2015 the pursuer's mother, Tammy Leask, was at home holding a small party with her female friends. The pursuer and her two friends, Rebecca Buckley and Grace Paton present at the party. During the course of the evening between about 7:30 PM and midnight, the pursuer had a number of alcoholic drinks.

[8] Close to midnight, the pursuer, Rebecca and Grace all left the family home to meet two young men at the car park serving the premises.

[9] In order to reach the car park, the pursuer and her friends turned right out of her house; turned right into Craigmount Avenue North; crossed the road; turned left into Craigmount View and then turned right into the roadway.

[10] The car park which the pursuer and her friends were heading to is at the end of the roadway furthest from Craigmount View.

[11] To reach the car park, the pursuer could have continued down Craigmount Avenue North, which is a lit public street.

[12] At the entrance to the roadway, there is a sign which says "deliveries only" and gives directions to the car park: production 5/9/31. The pursuer had previously been aware of the sign but had not paid much attention to it.

[13] The initial part of the roadway is level; it then slopes downwards for a few metres before levelling out again. It is bounded on the left initially by a brick wall and then by the rear wall of the defender's restaurant building; and on the right by a strip of land on which trees and other vegetation are growing: productions 5/9/1 – 3. Close to where the roadway levels out there is a strip of stones running perpendicularly across it forming a drain: production 5/9/7 – 8.

[14] The surface of the roadway is not completely smooth. It has a number of relatively minor defects and indentations in it: productions 5/9/1, 2, 7, 10 and 12.

[15] Given the time of day and the season there was no natural light. There were street lights in Craigmount View and in the part of Craigmount Avenue North which runs adjacent to the roadway. There was also some lighting in the car park. There was a security light on the side of the restaurant building operated by a movement sensor: production 5/9/30. Even if the security light did not come on, the lighting in the vicinity was adequate for pedestrians to see where they were going.

[16] The pursuer and her friends began walking down the roadway. The pursuer paused to light a cigarette. Rebecca and Grace continued walking. The pursuer then followed a few steps behind them. The security light did not come on. Suddenly, and without warning, the pursuer lost her footing and fell heavily, sustaining a fractured arm and a triple fracture to her jaw.

[17] Rebecca and Grace were alerted by the sound of the pursuer falling. They assisted her to get up. They realised that she was injured. The pursuer thought that she had lost a

tooth and Rebecca and Grace switched on the torches on their mobile phones to examine her more closely.

[18] They realised that she was badly injured and Rebecca ran back to the pursuer's house to alert the pursuers' mother.

[19] In the meantime, the pursuer began making her way back home. She was met there by her mother. She was alert but obviously injured and in pain.

[20] An ambulance was called and when it arrived the pursuer was attended to by the paramedics. A history was taken.

[21] The pursuer was conveyed to Edinburgh Royal Infirmary where she went through triage. The injury to her arm was diagnosed and treated. The pursuer was then transferred to St John's Hospital for treatment in respect of the injury to her face.

[22] The loss injury and damage sustained by the pursuer as a result of her injuries was properly valued at £38,000.00 on a full liability basis.

Submissions for pursuer

Circumstances of the accident

[23] Issues in dispute:

a. Whether alcohol consumption played a part
b. Whether running or walking
c. Where and why the pursuer fell
d. Whether lighting adequate

Alcohol

[24] The pursuer, mother, friends, all gave evidence that pursuer had consumed alcohol. Pursuer: working next day. 2 or 3 glasses of wine. Mother: couple of glasses, under her

supervision. Grace: (cocktail, glass of wine, another couple of glasses) – tipsy. Recalled pursuer was working next day. Rebecca: similar to Grace. No evidence at all that pursuer was drunk, stumbling, unsteady on her feet as a result of alcohol consumption. No evidence that alcohol consumption played a part in her fall. Wearing flat, rubber soled shoes.

Running/walking

[25] The only suggestion that pursuer was running is what is contained in medical records. Pursuer and friends all clear, walking not running. Often suggested witnesses playing down truth to help a friend; submit no basis for that suggestion here. Drifted apart. Fell out with Grace Paton. Grace was not slow to tell court pursuer was smoking behind mother's back and had lied about who she was going to meet. If pursuer had been running, Grace Paton would have told us so. No record of source of information in medical records. Should be borne in mind that any nursing or medical staff concerned first and foremost with pursuer's medical condition; would have been less concerned with whether running or walking: irrelevant to management of her injuries.

Where fell, and why?

[26] The pursuer: lost her footing on patch of uneven ground, on slope, in dark. Implicit criticism in cross of her inability to explain what she meant by losing her footing. Accepted did not slip, trip or twist. Pursuer can only give evidence of what she remembers and her evidence was perfectly clear – she lost her footing. It was dark and it happened quickly. She should not be criticised for her inability to say more. If anything, lends to her credibility that under searching cross examination she did not seek to embellish her evidence or try to fill in

the gaps. Very easy for her to come along and say she tripped on the broken tarmac. She did not, because she does not know what caused her to lose her footing.

[27] Defender will suggest, ran into wall. Again, comes from medical records. No evidence as to source(s) of information, other than Mrs Leask's evidence as to what the pursuer was able to say to her (fallen, arm, wall). Trying, as a concerned mother would, to make sense of these words, she made the assumption that her daughter had fallen against a wall; she was clear in cross examination that the pursuer had not told her that that was what had happened. She said that she may have said to the paramedics that her daughter had fallen against a wall. May take view that the three words uttered by pursuer – fallen, arm, wall – having been interpreted by her concerned and no doubt well-meaning mother, and having been filtered through the mind of the paramedic, have resulted in a record which, in the manner of a game of Chinese Whispers, bears little resemblance to the original statement. Mrs Leask clear that pursuer no fit state to give statement to paramedics – grey, shock, crying. "More than positive" that pursuer did not give account to paramedics. Grace Paton – gave paramedics brief explanation of what had happened. Mrs Leask was clear that, certainly during the time that she was at her daughter's bedside in the Royal, neither she nor the pursuer had been asked to recount the circumstances of her accident. And she had no recollection of either of them being asked to give a history at St John's. Nor does the pursuer have any recollection of giving a history to nursing or medical staff any point. What we are left with then is Mrs Leask's evidence of what the pursuer told her, the assumptions she made, and what she accepts she likely said to the paramedics. That explains the entry in the ambulance records about the wall. What then of the entries in the ERI and St Johns records? Very similar.

[28] Can only mean one of two things. Either the source(s) of information consistently gave the same account. Or the account given initially was copied over into subsequent medical records. No evidence about procedures for information sharing between SAS and ERI, and ERI and St John's. In absence of evidence that medical or nursing staff obtained a full and detailed history from pursuer or indeed her mother at any point, open to court to conclude information was simply passed from one institution to another. Reiterate – how pursuer came by injuries of no relevance to management of her injuries.

[29] Pursuer clear that she did not fall into or against a wall. Invite court to find her to be credible and reliable; gave evidence in straightforward way, without embellishment. When did not know or could not remember, said so. Something may be said about Grace Paton's evidence that she was smoking behind mum's back, and lied about who going to meet. Not put (not a criticism, would not have been known) but means court has heard only one side of that story. Even if accepted, untruths in context – 17 year old girl who did not want her mum to know she smoked and had made an arrangement to go out late at night with two young men. Does not cast doubt on credibility and reliability of her account of the accident.

[30] Lest there be any doubt as to the pursuer's credibility and reliability in relation to circumstances of her fall, test her evidence against evidence of Mr Larkin. "Guardsman's fracture". Laceration not to front or tip of chin but to underside. Single point of impact. Fractures in 3 places – chin, each side of jaw. Consistent with fall to ground; not pattern of injury he would expect to see if she had run into wall.

Lighting

[31] Pursuer, Grace, Rebecca – path unlit. Only light available was that cast from streetlights on main road and road parallel, and in car park at far end of path. Light seen in

production 5/9/28 was not lit. Very dark. Grace – enough light to walk by, but needed torch to examine pursuer's injuries after she fell. Rebecca – it was dark.

[32] Tammy Leask – Sunday, heated discussion with Spice Lounge Sunday night, walked along the path to verify whether lighting operative and found it was not. Said told broken following break in; showed her boarded up window. Ring of truth.

[33] Conclude: lighting was not operative; such borrowed light as there was, was inadequate. Ground uneven: witness evidence, photos. Combination of slope, uneven ground and inadequate lighting caused pursuer to fall.

The law

[34] The case is brought at common law and by reference to the Occupiers' Liability (Scotland) Act 1960.

[35] Section 1(1) provides:

> "The provisions of the next following section of this Act shall have effect, in place of the rules of the common law, for the purpose of determining the care which a person occupying or having control of land or other premises (in this Act referred to as an *"occupier of premises"*) is required, by reason of such occupation or control, to show towards persons entering on the premises in respect of dangers which are due to the state of the premises or to anything done or omitted to be done on them and for which he is in law responsible."

[36] Section 2(1) provides:

> "The care which an occupier of premises is required, by reason of his occupation or control of the premises, to show towards a person entering thereon in respect of **dangers which are due to the state of the premises or to anything done or omitted to be done on them** and for which the occupier is in law responsible shall, except in so far as he is entitled to and does extend, restrict, modify or exclude by agreement his obligations towards that person, be such care as in all the circumstances of the case is **reasonable** to see that that person will not suffer injury or damage by reason of any such danger."

[37] As was said by the Inner House in *Dawson v Page* 2013 SC 432 at 439: "The familiar concept of reasonable foreseeability clearly underlies fault in this context."

[38] Thus the pursuer requires to prove the presence of a danger; that the risk of harm was reasonable foreseeable; and that the defender failed to exercise such care as was reasonable in the circumstances.

[39] Also needs to prove occupation or control; matters of fact; although put to pursuer that path was on private property belonging to Spice Lounge. Clear from Signage that premises a restaurant run by defender.

[40] The pursuer's case is that:

a. the defender knew or ought to have known that the path was used by pedestrians;
b. the combination of an uneven surface and inadequate lighting constituted a danger;
c. in the circumstances, an accident such as occurred was reasonably foreseeable;
d. in exercise of reasonable care, defender ought to have ensured that the surface of the path was in a reasonable state of repair, and that the pathway was adequately lit.

Knowledge

[41] Path used as shortcut – pursuer, Tammy Leask; Mrs Leask had seen a mother with pram and toddler cut across path on morning she gave her evidence. Frequent occurrence.) Accept, then follows knew or ought to have known pedestrians using path. Gave access to car park, and restaurant, and used to "cut through".

[42] "Deliveries only" – presumably in vans; deliveries in working hours or if outwith, vans have headlights. Very fact that lighting there indicates defender aware that entrance used by pedestrians.

[43] "Deliveries only" sign, pursuer interpreted as being for benefit of car drivers, as it gave directions to the vehicular entrance to the car park. No signage making clear no pedestrian access; path gives access to restaurant itself (fire escape?). Point made, private property. Irrelevant. Significance of any distinction between invitee, licensee and trespasser removed by 1960 Act.

Danger

[44] *Dawson v Page* [2012] CSOH 33:

> "A thing with the potential to cause harm may only be a danger at certain time and under certain conditions. A person may trip over a step, but that without more does not mean that the step was a danger requiring precautions to be taken, at least during the day or when the place was well lit. But if the step was hidden, or in an unexpected place, or if it might be foreseen that people would be walking around there in the dark, then it might constitute a danger. Irregularities in the ground might be obvious in daylight, and therefore constitute no danger, but at night the position might be very different. If it were otherwise, every staircase and every other obstruction of any kind would constitute a danger against the risks of which there would be a duty to take precautions. That is not the law. All will depend on the facts."

[45] Submit uneven surface, on slope, rendered dangerous by inadequate lighting.

Reasonable foreseeability

[46] It was reasonably foreseeable that a person "cutting through" to the car park in the dark may lose their footing on the uneven ground.

Reasonable care

[47] Reasonable to ensure surface even. Reasonable to provide lighting. Indeed lighting was provided – must have been some recognition necessary – not working.

[48] Defects patent, not latent. If evidence of Mrs Leask accepted, lighting broken two weeks previously, and defender aware.

Contributory negligence

[49] If court satisfied that alcohol did not play a part, pursuer was not running, and that she did not run into a wall, contributory negligence falls away.

[50] If the lighting was inoperative, then the pursuer walked onto a path she could see to be unlit. Defender does not advance a case that in doing so the pursuer was contributorily negligent (or that the statutory defence in section 2(3) is made out).

[51] In conclusion, invite court to accept evidence led on behalf of pursuer as credible and reliable; that liability is established for reasons previously given; and to reject plea of contributory negligence.

Submissions for defender

[52] The defenders should be assoilzied.

[53] The pursuer had failed to prove that the accident was caused by the defenders' breach of statutory duty under section 2 of the Occupiers Liability (Scotland) Act 1960 or at common law. In the alternative, the pursuer should be found to have contributed to the extent of 85%.

[54] Section 2 of the 1960 Act largely reflects the common law position and accordingly for all intents and purposes they are the same. The Act regulates the duty of the person

> "…occupying or having control of land or other premises towards persons entering on the premises in respect of dangers due to the state of the premises or to anything done or omitted to be done on them and for which he is in law responsible…": Section 1.

[55] The duty in terms of section 2 is to take reasonable care to see that a entering the premises will not suffer injury or damage by reason of any such danger.

Primary submission

[56] The pursuer has failed to establish a crucial fact, namely how her accident happened and this inevitably prevents the court from beginning the process of determining why it happened and thereafter whether or not section 2 has been breached. In short, the pursuer has failed to establish in evidence what the danger was with reference to her accident and more particularly how and why she suffered injury by reason of that danger.

[57] The pursuer avers in statement of claim 4 that she was "descending the slope when she fell on an uneven patch of ground on the slope." During her evidence in chief, the pursuer offered little if any detail of the mechanics of her fall or more particularly what caused her to fall. At its highest she is not noted as saying "my foot just went".

[58] However, she was afforded such opportunity to explain under cross-examination. It was specifically put to her that she did not trip, slip or twist her foot or ankle, all events that could or would expect to be a crucial element of deciding whether her ultimate fall might be due to the state of the premises. She denied all of these specific events. The pursuer could only say that she "lost her footing". There was no more explanation than that.

[59] It was submitted that that was is insufficient to even contemplate the process of assessing whether that was due to the state of the premises. Yes, her evidence was that it was dark and she has produced photographs showing the state of repair of the road.

However, unless the pursuer could say what she meant by "lost her footing", then it was impossible to analyse whether this was due to the state of the premises. The pursuer did not even offer which foot had lost footing so to speak.

[60] "Lost her footing" was a nebulous phrase and was perhaps employed precisely because the user of that phrase does not know why he or she fell. For example, if I was descending steps and lost my footing and fell down steps, it still begs the question why? Did I slip on a substance, trip on an object or simply miss a step? The first two might form a basis for fault but the latter could simply be due to a human functional error.

[61] In the present case, the pursuer relied on this phrase to conceal that she has no recollection of why or how she fell, something which is supported by the evidence of her mother who spoke in cross examination to the effect that after all the discussions that had been had with the pursuer, they were not to this day aware of why she fell. This was echoed in the evidence of Rebecca Buckley who explained that she though the pursuer realised that she did not know what had happened.

[62] If it was accepted that by failing to establish whether by direct evidence or otherwise how she fell, then the pursuer had failed to prove a fact crucial to her case, referred to as an 'essential fact' by the Lord President (Normand) in *Stewart* v *Glasgow Corporation* 1958 SC 28 at page 45. Consequently that was an end to the matter.

[63] It was fundamental to the process of determining whether the accident was due to the state of the premises or anything done or omitted to be done thereon. Without it there is no case. That being so, it was unnecessary for the court to reach any conclusion about the inconsistencies in the medical records and the pursuer's denial that she was running or collided with a wall, or indeed with the evidence of other witnesses in particular her former friends, Grace and Rebecca.

[64] In relation to that latter point, there were two matters arose which were important to the extent that they call into question the veracity of the pursuer's evidence. Firstly there is the issue of who they were going to meet in the car park. If Grace and Rebecca are correct, and in my submission it is not clear why they would have a reason to lie (although that certainly was not put to her), then it is clear that the pursuer has not only fibbed to her mother about who she was meeting but more significantly she has under oath told a lie. That also applies to Grace's reference to the pursuer lighting up a cigarette - she said this was the reason the pursuer was behind her and Rebecca. Under cross-examination, it was put to the pursuer whether she had anything in her hand at the time of her accident, which she denied. All of this evidence from Grace and Rebecca was obtained during examination in chief. They were witnesses for the pursuer.

[65] Which brings us to the medical record entries. It was accepted that on occasion it is possible for an initial account of an event to be repeated in subsequent correspondence, with the risk that any error in the initial account is simply repeated. However, there are entries in these medical records from four separate sources - the ambulance crew, A&E triage at the Royal Infirmary of Edinburgh, orthopaedics at the RIE and St. John's Hospital.

[66] The pursuer has no recollection of telling anyone anything. Her mother seemed overly keen to say that her daughter had only three words about what happened – "fallen, wall, arm" - and that this was communicated to her, and that she was the one who then conveyed this to the ambulance staff. She did not accept that her daughter told any other subsequent medical staff what happened or, as I understood it, was she in fact asked about its details by other medical staff

[67] It would be extraordinary for the pursuer not to be asked what happened at some point by staff at each of the medical institutions whose staff were tending to her. And while

on the mother's approach that just might explain the basis for the reference to the wall, it does not explain the references to breaking into a run or using her arm.

[68] The importance of this is that if the court was not with the defenders in relation to the pursuer's failure to prove crucial fact, the evidence contained within the medical records is the only explanation presented as to why the accident happened. More importantly, it runs contrary to the pursuer's account in the witness box.

[69] Bearing in mind the conflict in evidence with Grace and Rebecca, and the anomaly of the medical record entries, and the overall presentation of the pursuer's evidence, the court should find that the pursuer was lacking in both credibility and reliability in her evidence.

[70] This may derive from her relationship with her mother and perhaps what she did not want her to know rather than primarily for financial gain although obviously there is a consequent impact in that regard. In relation to the mother, the court should find that she lacked credibility and reliability with particular reference to how the accident was reported to the medical staff or not as the case may be. Again, it is not suggested that there is anything malicious behind this beyond a mother wanting to do her best for her daughter.

[71] If it is accepted that the entries in the medical records reflect more probably what happened on the evening - and Mr Larkin was not in a position to explain the what he termed and described as the pursuer's "unusual" (in the context of a 'guardsman's chin' injury) and additional injury of the broken arm - then in there is nothing therein that permits a finding that the defenders have been in breach of section 2 of the 1960 Act.

[72] The primary submission rendered the issue of lighting as a red herring. However, if the court was against the defenders in relation to a breach of section 2 of the 1960 Act, then there were a number of factors of relevance in considering whether and what level of contributory negligence on the part of the pursuer arises. On the pursuer's evidence, she had

walked this route previously, twice. She was aware of the sign that indicated "deliveries only". It was submitted that the sign could not be more clear - this was not a pedestrian route to the restaurant. It was only for deliveries.

[73] Further, there is the pursuer's evidence was that it was dark. The pursuer accepted that she could have continued to walk along Craigmount Avenue which she turned into from the street her house was on and reached the car park. It had a pavement and was lit. The pursuer accepted she had taken a detour and if there was any time to be saved it was a matter of seconds only. In opting for an unlit route on a slope when an alternative is available then in the event that the defenders were in breach of duty, the pursuer should be found to be 85% contributorily negligent.

[74] However, this fall-back position is not intended to dilute the primary position which is the pursuer has not presented sufficient evidence to allow the court to consider whether or not there has been a breach of the section.

Discussion

Has the pursuer proved the mechanics of her fall?

[75] I consider first of all whether the pursuer has proved, on the balance of probabilities, the immediate cause of her fall. (I emphasise that at this stage I am considering only the precise mechanics or physical reason for her falling – not the question of other factors which may have contributed to it or legal causation which I shall deal with later.)

[76] It was submitted on behalf of the defender that the pursuer was unable to say exactly why or how she had fallen; and that the reason for the fall remained a mystery to this day.

[77] In my view, it is not surprising that in the circumstances the pursuer was not able to say precisely what had happened. It is clear that this was a sudden and unexpected event; and the pursuer, although she may not have realised it at the time, was seriously injured.

[78] But in my opinion, that cannot be the end of the matter as far as this issue is concerned. If that were so, a person working alone who suffered an accident as a result of which he was rendered unconscious and suffered amnesia (for example) would never be able to succeed in in a damages claim.

[79] The court is entitled to look at all the available evidence; and the pursuer need only establish crucial facts on the balance of probabilities.

[80] In addition to the pursuer's evidence about the manner of her fall, we also have the evidence of Grace and Rebecca who spoke of it happening suddenly and the former's description of the pursuer's body position when they turned to look at her: "She fell on her tummy".

[81] In addition, there was the evidence of Mr Larkin. Obviously, he could not say exactly what happened but he did describe the pursuer's facial injuries as being typical of the type of injury suffered by a Guardsman who passes out on parade. The tendency is to fall forward and for the first point of contact with the ground to be a person's chin. (He also something to say about the fracture to the pursuer's arm which I shall return to later.)

[82] As for the content of the medical records, even taken at face value, these may provide some context for the reason for the fall but in my view they do not assist in relation to the precise mechanism of it.

[83] The pursuer plainly went down suddenly; face first; and her chin hit the ground hard.

[84] Understandably, neither the pursuer nor Grace or Rebecca could be completely accurate as to the precise location of the pursuer's fall. The pursuer herself said that she had fallen just beyond the line of stones forming the drainage channel: production 5/9/2. Rebecca said that when the pursuer fell she was "beyond the beige wall but not as far as the pale wall": production 5/9/3. Grace said that she fell near a patched area: production 5/9/7.

[85] In my opinion, it is clear that the surface of the roadway in that area was uneven, with a number of cracks, indentations, rough areas and loose stones. Although the evidence of the pursuer and the two eyewitnesses varied slightly, they all placed her in the same general locality, at or near these defects. Given my view on the mechanism of the fall, I have concluded that the immediate physical cause of a loss of footing was caused by the uneven condition of the roadway.

Existence of duty

[86] It was accepted that the defender was the occupier of the roadway, as part of the overall restaurant premises, and that accordingly the 1960 Act was engaged. There is a question as to whether it is appropriate to deal with the existence of a "danger" before dealing with what (if anything) should have been done in fulfilment of the obligation of "reasonable care": the Act, section 2; *Dawson* v *Page* 2013 SC 432, paragraph 13. Nevertheless, in the present case I find it helpful to approach the matter in that way.

Was there a danger due to the state of the premises?

[87] It was accepted that the pursuer's case was that the danger arose from the combined circumstances namely, rough underfoot conditions; slope; and inadequate lighting.

[88] As I understood it, it was also accepted that the first two elements taken individually or together could not be said to give rise to a danger i.e. it was accepted that the roadway did not constitute a danger during daylight hours. In addition, it did not appear to me from the evidence that the slope contributed in any meaningful or material way to the pursuer's accident and I think it can safely be left to one side.

[89] The question then is whether, in the manner described by Lord Glennie in *Dawson*, the condition roadway presented a danger during hours of darkness (thereby giving rise to an obligation to provide lighting).

[90] This particular point is focused in averments in Statement 4, viz. "The pursuer could not see where she was walking. The defender had failed to light the premises… It was the defender's duty to provide adequate lighting to persons such as the pursuer entering onto the premises."

[91] Thus, it is a crucial part of the pursuer's case to prove that, on the balance of probabilities, it was so dark that she could not see where she was walking.

[92] In my opinion, there are two separate issues to be dealt with in relation to the lighting. Firstly, there is the issue about whether the security light located at the corner of the restaurant building was working at the time: production 5/ 9/30.

[93] There was an evidential dispute about whether that light was working at the date of the pursuer's accident. On balance, I preferred the evidence of Mr Singh as to (i) what was discussed with the pursuer's mother when she visited the restaurant on the Sunday evening; and (ii) the question as to whether the light was in fact working. In relation to the former, Ms Leask, on her own evidence, was angry and felt that the restaurant was to blame. I accept that something about an earlier break-in was discussed but I preferred Mr Singh's evidence about what was discussed and when that break-in had happened.

[94] In addition, I preferred to his evidence on the question of whether the light was working. Ms Leask did say that she had been back to look at the earlier and the light had not been working, but she did not see how close to it she went. Mr Singh's undisputed evidence was that it was operated by a movement sensor, and Ms Leask did not say whether she had gone sufficiently close to it to check whether or not the light came on in response to her presence. Therefore, in my opinion, it is more likely than not that it was operative and that the reason why did not come on is because the route taken down the roadway by the three girls meant that they were beyond the range of the sensor.

[95] But in my view, none of that is material given the other conclusions which I have reached and to which I now turn.

[96] The clear evidence of the pursuer and the two eyewitnesses was that that light did not come on as they were walking down the roadway. Accordingly, in relation to the actual lighting conditions at the time, I am satisfied that the security light can be ignored.

[97] Given the time of day and the season, it is clear that there would have been no natural light. What, then, was the evidence about the light level in the roadway without the benefit of the security light?

[98] The pursuer's own evidence was that there was no lighting in the area. The nearest lights were street lights at the top of the roadway and at the other end. There was a tall lamp post in the middle of the car park. There was no light on the path which was quite enclosed and she had not been able to see where she was going.

[99] Ms Leask's position was that it was 'pitch black'. In my view, her evidence in that respect cannot be right. Firstly, there is the evidence of street and other lighting in the vicinity. Secondly, there is the evidence of the two eye witnesses (see below). Thirdly, I had the impression that Ms Leask was angry from the outset and felt that somebody was to

blame for the injuries which her daughter had suffered. While that is a natural enough reaction, in my view it calls into question her objectivity.

[100] Grace Paton described the existence of other light sources in the vicinity, namely a streetlight in the street at the end of the roadway they had entered and in the street adjacent to the roadway. She went on to say "There must have been light on the pathway. I don't recall having any problems. We didn't need the lights on our phones on."

[101] Rebecca Buckley also spoke of the lamppost at "the top of the street" and said that there was light from the car park. She agreed that there was no light on the pathway – which I took to mean no dedicated light source there. She also said "We arrived about 11:15 PM. It was dark. I was able to see the area around me. It was not pitch black."

[102] Earlier in her evidence, Ms Buckley was asked about the condition of the roadway. She said "It was uneven. There were a lot of stones as well. We had to be extra careful. It was not steep." That suggests to me that Ms Buckley was aware of the underfoot conditions as she walked down the roadway; and that suggests that she could see the surface of it.

[103] The two eyewitnesses were called as witnesses by the pursuer; the foregoing evidence was elicited in evidence in chief; and I was invited to treat both witnesses as credible and reliable.

[104] On the basis of their evidence, I am unable to hold it proved that the light level on the roadway at the time when the pursuer was walking down it was so poor that she could not see where she was going. Accordingly, the pursuer has failed to prove a matter crucial to establishing the combination of conditions said to constitute a danger in this case.

Breach of duty

[105] If the existing light level was sufficient for pedestrians to be able to see - and in my

view that is the only conclusion which can be drawn from the evidence of Rebecca and Grace referred to above - then there was no duty on the defender to provide additional light.

[106] That point can be emphasised by the other evidence led on behalf of the pursuer designed to show knowledge on the part of the defender that the roadway was regularly used by pedestrians. There was no specific evidence about how frequently it was used in that manner during the hours of darkness, but Ms Leask did suggest that pedestrians used it a lot. Accordingly, in my view it can be inferred that it was used on occasions by pedestrians during the hours of darkness. Yet there was no evidence of any prior accidents.

[107] In addition, as well as the evidence from Rebecca and Grace about what they could see, the fact is that they were ahead of the pursuer and both managed to make their way down the roadway without incident.

Other matters

[108] In view of my conclusion above, I can deal fairly shortly with certain other matters which were raised.

Alcohol and angle of roadway

[109] As already noted, I do not think that alcohol or the slope of the roadway have any relevance to this case.

Who were the girls meeting?

[110] I preferred the evidence of Rebecca and Grace as to who they were going to meet. It follows that the pursuer was not honest with her mother or with the court about this issue. Nevertheless, my impression was that in her evidence about the accident circumstances, she

was doing her best to give a true account (though I rejected as unreliable her evidence about the lighting levels at the locus: see above).

Cigarette

[111] I preferred Grace's evidence about the pursuer pausing to light a cigarette. I can understand why, even now, she would prefer her mother not to know about that. In my view, it does not undermine her credibility (though my finding of fact that she was holding a cigarette potentially may have been of relevance to the issues of causation and contributory negligence, had I required to determine them).

Medical records

[112] My impression is that in the immediate aftermath of the accident, the atmosphere at the pursuer's home was one of concern and confusion. The pursuer must have been in extreme pain.

[113] Therefore, I am not surprised if none of the pursuer, Rebecca or Grace were able to say clearly and exactly what happened and if in the aftermath, communications became confused.

[114] I am not prepared to speculate on whether the hospital procedures would have involved a fresh history being taken at each stage or the initial history being passed on.

[115] The reference to a wall remains a mystery. Even if I had held that the pursuer was running, that would have made no difference to the issue of primary liability, had I held that there was a breach of duty.

[116] The pursuer plainly did injure her arm - though Mr Larkin thought that a little unusual. Nevertheless, in my view it would be to risk speculating to read too much into that.

Contributory negligence

[117] Lest I am wrong on the issue of primary liability, I should say something about how I would have dealt with contributory negligence, had that been necessary.

[118] On the pursuer's hypothesis of fact, the roadway was ill lit and very dark. The time advantage by using the roadway as a "shortcut" was negligible. There was a lit public road which would have taken the pursuer to the car park almost as quickly.

[119] Accordingly, in my view, if the roadway was as dark as the pursuer contends, then she should have known that by entering into it, there could be any kind of unseen source of danger. In my opinion, in courting that risk, the pursuer was blameworthy, especially given the presence of an alternative and safer route nearby. If having taken the decision to go down and ill lit roadway, the pursuer was smoking, rather than concentrating on where she was placing her feet and/or running, that might have a bearing on the level of contributory negligence.

[120] In the circumstances, I have concluded that had I found for the pursuer, I would have reduced for damages by 70%.

Disposal

[121] I shall assoilzie the defender from the first crave of the writ. I reserve meantime all questions of expenses. If parties are able to resolve these between themselves, then that is all to the good. If that cannot be achieved, parties should contact my clerk with a view to arranging a hearing.