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

[2018] SC EDIN 20

PN1063/17

JUDGEMENT

of

SHERIFF KENNETH J McGOWAN

in the cause

LOUISE MCKEVITT

Pursuer

against

NATIONAL TRUST FOR SCOTLAND

Defender

Pursuer: Godden, Solicitor-Advocate; Blackadders
Defender: Tytler, Solicitor; Clyde & Co

Edinburgh, 20 February 2018

Introduction

[1] This is a claim for damages for personal injuries, said to have been suffered by the pursuer as a result of breach of statutory duty on the part of the defenders as occupiers of Geilston Garden, Cardross, Dumbarton ("Geilston").

[2] I heard evidence from the pursuer; Alison Hillas and Alison Farrell, respectively a volunteer and the head gardener at Geilston; and Sean Hanley, the defenders' Health & Safety Manager.

[3] The following authorities were produced though I was not referred to them all in the course of argument:

a. *Cowan* v *Hopetoun House Preservation Trust* [2013] CSOH 9;

b. *English Heritage* v *Taylor* [2016] EWCA Civ 448;

c. *Palfrey* v *Morrisons* [2012] EWCA Civ 1917;

d. *Dawson* v *Page* 2013 SC 432;

e. *Brown* v *Lakeland Ltd* 2012 Rep LR 140;

f. *Kirkham* v *Link Housing Group* Ltd 2012 Hous LR 87;

g. *Leonard* v *Loch Lomond and the Trossachs* [2015] CSIH 44;

h. *Sutton LBC* v *Inwards* [2016] EWCA Civ 1005;

i. *Tomlinson* v *Congleton Borough Council & Another* [2004] 1 AC 46;

j. *Darby* v *National Trust* [2001] PIQR P27;

k. *Graham* v *East of Scotland Water Authority* 2002 Rep LR 58;

l. *Staples* v *West Dorset District Council* [1995] PIQR P 439;

m. *Burgess* v *Napier University* 2009 Rep LR 55.

[4] I also considered the case of *Morton* v *Dixon* 1909 SC 807.

[5] Quantum was agreed on a full liability basis at £11,000.00 inclusive of interest to the date of proof.

[6] Having considered all the evidence and the submissions, I made the following findings in fact.

Findings in fact

[7] The defender operates about 130 sites across Scotland. One of these is Geilston. Formerly privately owned, the house and land comprises about 30 acres, of which 12 acres is the area open to the public, the remainder being agricultural land. There is a house, various

parts to the gardens and some woodland. The property was bequeathed to the defender and then opened to the public in 1998. The walled garden dates back to about the 17th century.

[8] One part of the grounds of Geilston is known as the kitchen garden. It in turn gives access to the orchard area. A path from the orchard passes through an archway in a hedge which leads onto another path across a wooded area: production 5/24. This path leads towards the main house: 5/22.

[9] This tarmac path is reasonably straight and level. A person walking along the tarmac path from the archway in the hedge has woodlands on their left and other buildings on their right: production 5/24. About 50m from the hedge, there is a junction. The tarmac path goes straight on. There is a grass path going left and another tarmac path leading to the buildings: productions 5/23, 5/24, 5/25 and 5/26.

[10] On the left hand side of the path is a large piece of stone. It is about 51cm long; 43cm wide; and 20cm high (about 1 ft 8in x 1ft 5in x 8 in). It is thought to weigh about 100kgs.

[11] The provenance of the stone is unknown. It may be a 'louping-on stone' (a step to make it easier to get onto a horse) or an old boundary marker. It has the appearance of having been *in situ* for a long time. Parts of it are covered in lichen and moss: productions 5/22; 5/25; 5/26. It has been located on the same tarmac path since at least 1992.

[12] The pursuer is a scientist in the pharmaceutical industry. She is now 60 years of age. She is not a member of the defender but is a member of The National Trust; the Historic Homes Association and Historic Scotland. She is an experienced "visitor" and enjoys visiting historic homes and gardens and photography.

[13] On 31 May 2014, she arrived at Geilston at about lunchtime. The weather was bright, sunny and warm. The pursuer was wearing polarised sunglasses. She purchased a ticket

and was provided with a laminated map of the grounds. Having had lunch in her car in the car park, she entered the grounds at about 2:35pm, turning left to go into the kitchen garden.

[14] Having spent about 25 minutes there, the pursuer made her way to an orchard area. Having spent some time there, she moved on to the orchard area, where there was a display of flowers. The pursuer wanted to photograph these. She went back to her car to collect her SLR camera and then returned to the garden, where she photographed the blue irises. She then spent some time looking around the orchard area.

[15] The pursuer then consulted the map and having noted that the main garden was some distance away, decided to walk there.

[16] The pursuer made her way through the arched gateway in the hedge and proceeded along the path, looking around as she did so.

[17] The pursuer arrived at the junction with the grass path on her left. She was still on the tarmac path. She stopped to consult the map. That indicated that the grass path led to a wooded glen. The pursuer decided to continue her progress along to the main house.

[18] The area was in dappled sunlight – a mixture of bright sunlight and shade from the trees. The pursuer did not notice the stone. In addition to the lichen and moss, the stone and the path had the remnants of cherry blossom lying on them which created a degree of camouflage: production 5/22.

[19] She took one or perhaps two steps forward and immediately fell over the stone, landing heavily onto her right side and sustaining certain injuries.

Submissions for pursuer

[20] The legal basis for the claim was the Occupiers Liability (Scotland) Act 1960 ("the Act"). In terms of section 2, two matters had to be established, namely (i) that there was a

danger due to the state of the premises; and (ii) there had been a failure to take appropriate care.

[21] On the basis of the case law, it was clear that generally an occupier owed no duty to protect persons entering onto land or into premises against obvious dangers.

[22] But if the danger posed by a permanent feature, whether natural or man-made, was unusual, unseen, concealed or in some way special then, as a general statement, the pursuer would succeed.

[23] Examples of this could be found in the cases of *Cowan*; and *English Heritage*. In the latter, it was noted that the court must take account of all the facts and circumstances: paragraph [30]. It was not enough just to deal with the issue of "obviousness". Account had to be taken of all of the relevant circumstances.

[24] It could hardly be controversial to say that a stone obstruction on a pathway constituted a danger. The real question in this in this case was whether it was reasonable for the defenders to do nothing about it.

[25] If, as was contended for the pursuer, the stone was not obvious, then it should have been removed, fenced or had attention drawn to it by signage or even by information on the map which had been given to the pursuer. These were cheap, easy steps which could have been taken.

[26] No doubt the defenders would argue that the stone was not a danger. But the pursuer in this case was a first-time visitor who had been looking around at the beauty of the gardens. That conduct on her part was absolutely normal and foreseeable.

[27] In the case of *Palfrey*, the obstruction was similar. The pursuer had succeeded in establishing liability and in that case, she had seen the obstruction. Paragraph [11] highlighted the striking similarities between the two cases.

[28] In the present case there was a low stone, which would not be in the line of sight of someone standing close to it. The pursuer's mind was not on where she was placing her feet, but instead on the surrounding garden.

[29] Other relevant factors were (i) that the pursuer had been handed a map and had stopped to look at it; (ii) she did not see the stone; (iii) she was wearing sunglasses; (iv) she had her camera and was taking photographs; (v) there was dappled sunlight; (vi) the remains of the blossom scattered on the path and the stone provided natural camouflage; and (vii) the pursuer was on a designated path constructed from smooth tarmac, with the result that her vigilance had gone down and she could not be expected to anticipate a lump of stone in the path.

[30] It had not been suggested that the pursuer was doing anything careless. She was not running and not walking backwards to take better photographs. She had not been behaving differently to any other visitor to the gardens.

[31] In these circumstances, the stone was not as obvious as it might appear and the defenders' witnesses' evidence on this point was tainted by hindsight.

[32] It was accepted that the absence of other accidents before or since the pursuer's accident was a relevant factor, but it was not determinative.

[33] The cases relied upon by the defenders could be distinguished.

[34] In *Lakeland*, the pursuer was already on the steps when she fell. In *Sutton*, nobody quite knew how the plaintiff had come to fall. In *Graham*, it was not clear how the pursuer had fallen.

[35] It was clear that the stone was a tripping hazard. There was no need for the pursuer to spell out the types of precautions which might be taken, since these were a matter of common sense. The stone could have been moved. It could have been painted in a bright

colour. It could have been fenced. Attention could even have been drawn to it in the map issued to visitors.

[36] Given the statutory duty incumbent upon the defenders, it was surprising that the stone had just been left in the path.

[37] In the present case, the pursuer had simply not seen the stone c.f. *Palfrey* where the plaintiff had seen it, but too late.

[38] The case for the pursuer could be summarised thus:

a. the stone constituted a danger;

b. it was not obvious to the pursuer;

c. it was an unusual and, to an extent, a concealed feature;

d. the defenders knew all about the circumstances of the path (the presence of the sunlight etc.); and

e. the defenders had failed to remove or otherwise deal with it in some way and thereby diminish the risk which it presented.

[39] On that basis, the court was invited to grant decree in favour of the pursuer.

[40] On the question of contributory negligence, the question was: if this was not an obvious danger, then how can the pursuer have been careless in not seeing it?

[41] The present case could usefully be compared with *Palfrey*. The reasoning set out at paragraphs [17] – [18] should be followed and any deduction for contributory negligence should be of a low order.

Submissions for defenders

[42] There was no material dispute about the accident circumstances. Nevertheless, the court was invited to hold that the stone did not constitute a danger; if it did, it was obvious and no steps required to be taken by the defenders to guard against any risk created by it.

[43] The following factors were relevant:

a. there were no averments or evidence about what the defenders could or should have done;
b. the stone had been there for a long time – since at least 1998 and probably longer;
c. its original purpose was not known;
d. the path had been in place for at least the same period of time;
e. it was likely that the stone was of some historical significance;
f. about 8000 to 10,000 people visited Geilston each year; there were 11,500 visitors in 2017;
g. that represented about 200 visitors per day;
h. no additional measures had been taken in respect of the stone since the pursuer's accident;
i. there were no reported accidents since Geilston was opened to public;
j. the majority of these visitors would have gone past that stone (and others);
k. it was easy for visitors to avoid the stone;
l. there was ample time for the pursuer approaching from the archway to see it;
m. if the pursuer had been looking around properly, she would have seen it.

[44] The onus was squarely on the pursuer to satisfy the court that she had proved each of these essential elements.

[45] The law was conveniently summarised at *Lakeland*, paragraphs [35] and [36].

[46] In this case, there were simply no averments or evidence about the practicability of any steps which might have been taken to eliminate or minimise the risk of the pursuer's accident happening as it did. There was no evidence at all on behalf of the pursuer about what might have prevented it. It was incumbent upon the pursuer to show what could or should have been done.

[47] This had been considered by the Inner House in *Dawson* at paragraphs [5] and [6]; and by the Court of Appeal in *Sutton* at paragraph [42].

[48] It could not be said that there was knowledge of risk on the part of the defenders. Firstly, there had been no reported accidents at all. Secondly, the stone was "obvious". Mr Godden had himself used the word "massive".

[49] In terms of magnitude of risk, that was not high. The path was wide and the stone was clearly visible. This was not like a supermarket aisle. The stone was not hidden and there was a clear line of sight towards it on approach.

[50] As there had been no reported accidents, it was reasonable to infer that there had been no such incidents; or that if there had been such incidents anyone tripping over the stone had concluded that it was not worth reporting either because they had accepted that it was the own fault or any injuries had been minor.

[51] The risk of tripping over the stone could have been avoided by the exercise of ordinary care.

[52] There were no averments about steps that might have been taken; and it was not practical to fence off or warn of all dangers in heritage sites.

[53] Decree of absolvitor should be granted.

[54] If the pursuer was successful, contributory negligence should be assessed at a high level. In *Cowan*, it had been assessed at 75%.

Discussion

Credibility and reliability

[55] I formed the view that all the witnesses gave honest evidence. There were no issues of reliability which were material.

[56] Mr Godden suggested that the defenders' witnesses' view of the risk was tainted by their knowledge of the pursuer's accident. In my view, that could equally be said about the pursuer's evidence.

The Act

[57] It is, I think, accepted that the Act was substantially a codification of the common law position, as it had been understood prior to the decision in *Dumbreck v Addie & Sons*, 1929 SC (HL) 51.

Was the stone an 'obvious danger'?

[58] It is clear from the authorities that an occupier does not have to take steps such as fencing or signage to draw attention to 'obvious dangers'. It was submitted for the defenders that that was the position in relation to the stone and it was suggested, as I understand it, that that was a complete answer to the claim.

[59] In my view, it is necessary to consider whether the stone in this case is in the same class as those things categorised as 'obvious dangers' in the case law. In *Tomlinson*, the hazard was a lake in a quarry. In *Graham*, it was a reservoir. In *Leonard*, it was a stony mountain path

[60] Thus, it appears to me that to be categorised as an 'obvious danger', there are two aspects of 'obviousness' which must be considered. First, the feature in question must be physically obvious. In other words, is it apparent from the senses that the feature is where it is? Secondly, it must be obvious that it presents a 'danger'.

[61] I do not think that the stone in this case is an obvious danger in the foregoing sense. In particular, there is a factual dispute as to how visible the stone was. Accordingly, the defenders' primary argument that as such, there was no duty to fence or otherwise draw attention to it, falls to be rejected.

[62] I now turn to consider the second question, namely what precautions, if any, should the defenders have taken?

Was there a duty on the defenders to take precautions in respect of the stone?

[63] The standard of care is that of the reasonable prudent man. The degree of care is "such care as in all the circumstances of the case is reasonable": Section 2 of the Act.

[64] Mr Godden invited me to approach the issue of 'danger' and 'reasonable precautions' as discrete issues. That is not necessarily wrong but it appears to me that the question of whether something constitutes a danger is not a binary one, to be determined in isolation. There may be cases where a case can be decided on that issue alone (i.e. no danger, therefore no duty arises). But usually the question of 'danger' and 'reasonable precautions' will be closely interlinked, in the sense that what precautions should have been taken will be informed by the nature of the risk presented. Thus, it will often not be so much a question of 'danger/no danger', but rather 'how much danger?' and 'what are the reasonable precautions to eliminate or reduce it'?

[65] As the question (and the evidence) about the nature of the danger is relevant to both elements, it seems to me that it is more straightforward to proceed on the basis that virtually

any feature of land or premises can constitute a potential hazard and to focus on the issue as to whether there was a breach of duty in the circumstances of the case. That exercise encompasses looking at all the relevant circumstances.

PROBABILITY OF HARM: FORESEEABILITY

[66] Proceeding on the assumption that the location and size of the stone meant that there was *some* risk of somebody not noticing it and tripping over it, it is necessary then to quantify that risk.

[67] The first issue to consider is the likelihood of somebody tripping over the stone. In other words, was it foreseeable?

[68] The evaluation of that must be assumed to be being undertaken by the 'reasonable occupier' of Geilston, at a point in time just before the pursuer's accident, seised of all relevant information.

[69] I deal first with the question about how visible the stone was.

[70] The pursuer's photographs were taken at about 9pm. There was no evidence about the weather conditions at the time, but it appears to have been dry and reasonably clear. The photographs taken in the evening suggest that the sky was more overcast than earlier: compare 5/22; 5/23; and 5/24 with 5/28. In any event, it is within judicial knowledge that the angle of the sun by that time would be substantially different from mid-afternoon. Accordingly, it cannot be assumed that these photographs accurately reflect the 'lighting conditions' at the time of the pursuer's accident.

[71] None of the photographs to which I was referred had a view of the stone on approach from the hedge archway. (Production 5/22 is taken from that aspect, but the photographer (the pursuer) was very close to the stone, looking down onto it at an angle.)

[72] The pursuer said that she did not see the stone. I accepted that evidence. But it seems to me that I cannot say that she failed to see it as she *approached* the junction because it was in some way obscured. It may simply have been that she was not paying much attention to what lay further ahead. The stone is a different colour to the tarmac surface of the path and has light spots of lichen on the face which would have been pointing towards a person approaching from the hedge archway. In my view, the stone would have been noticeable to a path user approaching from that direction paying reasonable attention to what was ahead of them: productions 5/26 and 5/27.

[73] I accept that the presence of lichen and moss (on the top surface of the stone) and remnants of cherry blossom (on the top surface of the stone and the tarmac path) made the stone less obvious, particularly to somebody standing close to it, than it might have been at other times of the year: production 6/3/8.

[74] But the very combination of conditions relied upon by the pursuer bring the issue of foreseeability into sharp focus.

[75] To explain this, it is necessary to consider the mechanism of the accident in more detail. As already noted, the pursuer said she did not notice the stone. I accepted that evidence. But in my view, it is likely that it was reasonably visible to a person approaching from the hedge archway. In other words, if the pursuer had looked ahead at the path as she walked along it, I think she would have seen the stone. But I accept that she did not because her attention was elsewhere and I do not criticise her for that.

[76] Her evidence was that on reaching the junction, she stopped to look at the map. That taken with her evidence that she took only one or perhaps two steps when she set off again before she fell over the stone suggests that she had stopped close to the stone and just short of it.

[77] Accepting that from that sort of location that the stone was less obvious than from further away (for the reasons given above), did that give rise to a duty on the defenders to do something to (remove, fence or sign or otherwise draw attention to the stone) to eliminate or reduce the risk thereby created?

[78] In my view it did not, because the risk of harm was not foreseeable. The pursuer's case is based on the dimensions and location of the stone; the presence of vegetation; and the ambient lighting, which taken together are said to have made the stone difficult to see. In my view, the stone only became more difficult to see – and therefore gave rise to a risk of somebody falling over it – if all of the foregoing conditions existed *and* if a person was standing so close to it that the main aspect was the top surface. In other words, the occupier would have to be taken to have anticipated and guarded against the possibility of an accident happening because all these circumstances came together.

[79] Given that such a combination of factors would be required to come together to bring about a material risk of tripping (because the stone was more difficult to see than normal) the reasonable occupier would be entitled to treat such a risk as negligible and therefore discount it. In other words, the standard of care (reasonable) did not require that steps be taken to guard against something which was only a remote possibility (i.e. very unlikely).

[80] In this case, there is evidence which underpins the conclusion that the risk of somebody tripping over the stone was low. The unchallenged evidence was that Geilston is open 7 days per week from Easter to 31 October. Depending on when Easter falls, that is about 7 months. Visitor numbers fluctuate between 8000 – 11,500 per year. I have not been able to reconcile these figures with the suggestion that there were 200 visitors per day, but visitor numbers are substantial. It is reasonable to infer that many of these visitors will have walked along the path in question past the stone. Since Geilston opened in 1998, there is no

record of anyone tripping over the stone before or since the date of the pursuer's accident. Naturally, that is not proof positive that nobody else has tripped, but it does strongly support the conclusion that the risk of tripping was very low, as a matter of probability.

EXTENT OF HARM

[81] The question here is: how serious might the harm be if the identified risk does give rise to an accident?

[82] While I do not suggest that the pursuer's injuries were insignificant, the risk of a fall caused by a trip is, in my view at the lower end of the scale.

BURDEN OF PRECAUTIONS

[83] There was no specific evidence about the cost and/or difficulty associated with the precautions mentioned by Mr Godden such as removal, fencing, signage or painting. I accept that broadly speaking, it seems unlikely that the financial costs or technical difficulties would be prohibitive. Although Mr Godden suggested that this was 'just a stone', the issue of social value was not explored to any extent in evidence or submissions. But Geilston is a historic garden. Such places have all sorts of features. People visit them for all sorts of reasons, but presumably one such reason is to see things in their undisturbed state. For all I know, visitors may derive pleasure from seeing old artefacts, even if their provenance is uncertain. The presence of a lichen covered stone may be regarded as an attractive feature which is thought to add interest to an otherwise straight tarmac path, which visitors might otherwise find too clinical.

[84] The point is that 'social value' is recognised and must be taken account where it is a relevant circumstance, even if it does introduce risks which might otherwise be avoided: *Congleton*.

COMMON PRACTICE

[85] The pursuer's case is effectively one of negligent omission. Before dealing in more detail with the substance of the precautions which were canvassed, it is necessary to deal with a preliminary issue in relation thereto.

[86] When attempts were made to lead evidence about 'precautions', objection was taken on the basis of no record. Ms Tytler's position was that the pursuer could not lead evidence about precautions absent averments to that effect, whereas Mr Godden submitted that there was no need to foreshadow such in the pleadings and that it was a matter of common sense. The matter was re-visited in the submissions.

[87] So the preliminary issue is this: insofar as there was evidence about precautions, should that be admitted and considered by me?

[88] In my view, where the case is one of alleged negligent omission, it is for the pursuer to prove what steps should have been taken: that is a key part of showing negligence and it is for the pursuer to prove such.

[89] Demonstration that a desiderated omission amounts to fault can be achieved in two ways:

> "I look upon this matter as one of great importance not merely for this particular case, but for cases of this sort generally. Where the negligence of the employer consists of what I may call a fault of omission, I think it is absolutely necessary that the proof of that fault of omission should be one of two kinds, either – to shew that the thing which he did not do was a thing which was commonly done by other persons in like circumstances, or – to shew that it was a thing which was so obviously wanted that it would be folly in anyone to neglect to provide it.": *Morton* v *Dixon* 1909 SC, per the Lord President at page 809.

[90] Pleadings in personal injuries cases are nowadays relatively short but there remains a requirement to give fair notice.

[91] Applying that approach to the present case, I am inclined to the view that where evidence is to be led showing that a specific precaution was taken in other like situations (whether by the defenders themselves or other occupiers of like premises), that fact (that specific precautions were ordinarily taken in like circumstances elsewhere) needs to be averred as a matter of fair notice.

[92] If no such notice is given, the pursuer will be not be permitted to lead evidence of examples of what is done elsewhere and be limited, instead, to arguing that the precaution was something which was "so obviously wanted".

[93] In this case, the evidence about what happened elsewhere was very limited. The pursuer's evidence was that as an experienced visitor, she had never seen a feature of this type unprotected anywhere else on her visits to other sites; Mr Hanley's evidence was that there were examples of other such features left 'unprotected' in sites operated by the defenders. Since there was no specific evidence about how other features identical (or similar) to the stone in this case are dealt with by other occupiers, I am not able to make any finding in fact about such. If such evidence had been led, I would not have admitted it.

[94] In the event, Mr Godden restricted his submission to saying that precautions were matters of common sense.

[95] That being so, I conclude that on the issue of admissibility, there was no requirement for specific averments about precautions because the case appears to me to be periled on the second method suggested by the Lord President in *Morton.*

[96] But that is not the end of the matter, because it is important to note that before being satisfied that omission of a desiderated precaution was negligent, the pursuer needs to show (and I would need to be satisfied) that, in the words of the Lord President, the precaution

which was omitted was "… a thing which was so obviously wanted that it would be *folly* in anyone to neglect to provide it." (My emphasis).

[97] In my opinion, this is a high test. Thus, it does not do to show that something *could* have been done: rather, it is necessary to show that it *should* have been done, in the exercise of reasonable care.

[98] Taking account of the evidence concerning the likelihood of harm and gravity of risk, I hold that it is not obvious that any absence of the precautions argued for by the pursuer showed folly on the defenders' part.

Causation

[99] The onus is on the pursuer to establish causation: *Delictual Liability,* Thomson, 5th edition, 6.1.

[100] Applying that approach to the present case, there seem to me to be two points to be made. Firstly, this emphasises the point that it is for the pursuer to aver and prove the putative steps which are said to have been necessary in fulfilment of the duty of reasonable care. Second, once such steps or precautions are identified, it is necessary for the pursuer to prove, on the balance of probabilities, that but for the absence of those precautions, the accident would not have happened. That means that a degree of precision is required in asserting the precautions desiderated.

[101] This can be illustrated in the following way. I accept that if the stone had been removed from the path, then the risk of the pursuer tripping over it would have been eliminated. But in my view, on the evidence, the position is much less clear when one begins to talk about fencing or highlighting the stone in some way. Would a small fence have drawn the pursuer's attention to the stone when it was 'below her line of sight' as I was invited to find? Furthermore, as Mr Godden recognised, a low fence would have created a

tripping hazard in its own right. A large fence might have drawn her attention to it, but that would have had consequences in terms of monetary and social value – see above. The same applies to painting or signage. Would discreet painting or signage have drawn the pursuer's attention to the stone? If something more blatant was needed, that again would have financial and social value implications. Where is the evidence that if the location of the stone had been marked on the map, the pursuer's accident would not have happened?

[102] So it is not necessarily just as simple as saying that the precautions were 'common sense'. A precursor to establishing causation is proof of the particular nature of the precautions which are said to have been appropriate, specified with an appropriate degree of accuracy.

Conclusion on liability

[103] It is trite, I think, to say that the fact that a single person has suffered injury due to some feature of premises, is not, without more, proof that the premises were unsafe.

[104] On the other hand, the absence of previous (reported) accidents does not necessarily mean that the defenders were not in breach of duty. It is but one factor, albeit an important one, in the factual matrix of the case.

[105] The question as to whether allowing a stone of this size and colour to remain where it had apparently been located for a long time created a tripping hazard which the defenders should have taken further steps to guard against is a matter for the court to consider in all the circumstances. For the reasons set out above, the pursuer has not proved that the duty of reasonable care incumbent on the defenders required them to do more than they did. It follows that the pursuer's case must fail.

Contributory negligence

[106] Had I required to determine the issue of contributory negligence, I would have preferred Mr Godden's approach. To justify a deduction for contributory negligence, I would need to be satisfied that the pursuer was blameworthy. If liability was established in her favour that would necessarily mean that the stone (and hence the risk that it generated) was one which the reasonable occupier should have anticipated and guarded against. But the very risk to be guarded against was the unwary or unsighted visitor falling over it.

[107] Some criticism might be levelled at the pursuer for not more carefully checking ahead that her route was clear after she had consulted her map. But in my view, she cannot be strongly criticised for such where she was on a path. Had I had to determine the issue, I would have made a 10% deduction to the award of damages.

Disposal

[108] I shall pronounce an interlocutor absolving the defenders from the first crave of the writ. I reserve meantime all questions of expenses. If parties are able to resolve these privately, good and well. If not, they should make arrangements for a hearing on expenses before me through the Sheriff Clerk's office.

[109] Finally, can I express my thanks to Mr Godden and Ms Tytler for their efforts in ensuring that those matters which could be agreed were agreed, thereby allowing the proof to be focussed on the matters in dispute.