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

[2018] SC EDIN 46

PN/1767/17

JUDGMENT OF SHERIFF PETER J BRAID

in the cause

MARGARET NORGATE

Pursuer

Against

BRITANNIA HOTELS LIMITED

Defenders

Pursuer: Forbes
Defender: Murray

Edinburgh, 7 August 2018

The sheriff, having resumed consideration of the cause, sustains the defenders' objections (a) to the evidence of David Wood, insofar as he purported to express an opinion on the questions of law which are for the court to decide; and (b) to the evidence pertaining to production 5/15 of process; thereafter, makes the following findings in fact:

[1] The pursuer is Margaret Norgate, designed in the instance. Her date of birth is 6 October 1931. On 20 July 2015, she was 83 years of age.

[2] The defenders are Britannia Hotels Limited, 253 Hale Road, Altrincham, Cheshire, WA15 8RE. On 20 July 2015, they were the owners and occupiers of Adamton Country House Hotel, Baird Road, Prestwick, KA9 2SQ ("Adamton House").

[3] On 20 July 2015, the pursuer and her husband, Jack Norgate, were staying at Adamton House. They were on a coach holiday.

[4] The pursuer had walking difficulties. Prior to arrival, she had requested a ground floor room due to those difficulties. A ground floor room was duly allocated to her, in the annex to the hotel, which at that time was not attached to the main building.

[5] Adamton House is a country house designed in Jacobean Revival style. It was built in 1885 for George Alexander Baird, MP. It was at one time accommodation for the US Airforce and British Aerospace personnel, but from 2002 it has been used as a hotel.

[6] Adamton House (excluding the accommodation wing) was designated as a category B listed building on 28 October 2014.

[7] The original entrance, on the principal or north-western façade, is by way of a Tudor styled porte-cochere. It is constructed of Ballochmyle red sandstone with segmental arches and is open on three sides, having sufficient space for a carriage or modern vehicle to enter.

[8] The porte-cochere contains a flight of four stairs constructed in a dark stone consistent with whin. Each step has a rounded bullnose front, with an indent below it. This is a traditional detail to accommodate the way that stairs are climbed and is part of the listed structure.

[9] Each stair has a rise of *circa* 150mm, going of 363mm and tread of 400mm ("tread" being the length of the step from front to back edge, and "going" being the length from the nosing to the vertical line projecting down from the next nosing). The width of the stairs is about 4,275mm.

[10] In July 2015, the treads of the staircase exhibited signs of wear and tear. The bullnoses on some steps were damaged and patchwork repairs had been carried out to the stonework in some areas. There were no contrasting indicators beyond the inconsistent colour of previous repairs. There was no handrail.

[11] Following their arrival at the hotel on 20 July 2015, the pursuer and her husband explored the hotel. They did so in the company of their daughter, Collette Strachan, who was also staying at the hotel.

[12] At about 4.45 pm they entered the main hotel building by the main entrance steps by the porte-cochere. After spending about 15 minutes there they left by the main entrance.

[13] Ms Strachan descended the steps first. She then waited on the tarmac area in the porte-cochere for her parents to follow. She did not have any concern that the pursuer would be unable to negotiate the steps.

[14] The pursuer's husband was next to descend the steps. On the second step he stopped and waited for the pursuer. The pursuer placed her right hand on his shoulder before she started to descend the steps.

[15] On descending each of the first two steps, the pursuer placed her right foot on the step below, before bringing her left foot down to the same step, level with her right foot. She was looking at where she was placing her feet.

[16] After placing her right foot on the third and penultimate step the pursuer looked up at her daughter. She believed that she had reached the final step. Instead of bringing her left foot down beside her right foot, as she had been doing, she brought it forward and placed it on the nosing of the step.

[17] The pursuer then lost her balance because of the position of her left foot. She was pitched forward, causing her hand to leave her husband's shoulder, and fell on her left side at ground level within the porte-cochere.

[18] The third and penultimate step, on which the pursuer lost her footing, was not worn. The part of the step where she fell had previously been competently repaired.

[19] Had there been a handrail, the pursuer would have used it.

[20] The change in level over the four stone steps was 600mm.

[21] The height of the stairs was such that the absence of a handrail was compliant with the Technical Handbook for Mandatory and Guidance Standards produced under the Building (Scotland) Regulations 2004.

[22] At the time of the pursuer's accident, the defenders were constructing an extension that was to contain the main hotel reception and have a ramped access.

[23] There were no previous recorded accidents on the stairs.

[25] Installation of a handrail would not have been a straightforward matter, due to the building's listed status. Architectural advice would have been required. Listed building consent would probably require to have been applied for. While listed building consent would probably have been granted in respect of a suitable design, the cost would have been at least several thousand pounds plus professional fees.

[26] The loss sustained by the pursuer as a result of her accident is reasonably estimated as £27,500.

Finds in fact and law:

1. The defenders exercised reasonable care.
2. There was no breach of duty at common law or under the Occupiers' Liability (Scotland) Act 1960 in respect of the pursuer's accident on 20 July 2015.
3. The pursuer did not fail to take reasonable care for her own safety.

THEREFORE,

Grants decree of absolvitor in favour of the defenders; assigns 27 August 2018 at 10:00 a.m. within the Sheriff Court House, 27 Chambers Street, Edinburgh, as a hearing on expenses.

Note

Introduction

[1] This action arises out of an unfortunate accident sustained by the pursuer, when she was spending a short holiday at Adamton Country House Hotel, Prestwick in July 2015. The hotel is and was owned and occupied by the defenders. Shortly after arriving at the hotel, she fell while descending a short flight of stairs, sustaining relatively serious injuries. The action called before me for proof on 29 May 2018. Although ultimately the issues in the action were not complicated, for a variety of reasons the proof lasted four days. *Quantum* was agreed in the sum of £27,500 and the matters for determination were therefore liability and contributory negligence.

The issue

[2] Since, as will be seen, I have found that much of the evidence in the case was beside the point, it is worth highlighting at the outset what is, and what is not, germane to the issue before the court. Although the pursuer's case on record is also said to be founded upon fault at common law, in the event her case as it came to be presented is founded solely on section 2(1) of the Occupiers' Liability (Scotland) Act 1960 ("the 1960 Act"), which, insofar as material, is in the following terms:

> "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…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."

[3] The foundation for the pursuer's case on record, which is extremely brief, is found at statement 4 of the statement of claim, where it is averred:

> "The steps were worn. The pursuer was descending the stairs when she lost her footing and fell… Had the defenders fitted a handrail the pursuer would have used it and she would not have fallen".

[4] I discuss the approach to interpretation of section 2(1) below, but for present purposes it is sufficient to note that the particular state of the premises which the pursuer avers gave rise to the danger against which reasonable care ought to have been taken was the fact that the steps were worn, nothing more and nothing less. Accordingly, while a great deal of time was spent at the proof in considering the height of the stairs and whether or not they were in conformity with current building regulations and technical advice thereunder, it was no part of the pursuer's case on record that a handrail ought to have been fitted due to the stairs' height.

[5] Further, there was much discussion in evidence and during submissions of measures taken by the defenders to comply with their obligations under the Equality Act 2010 ("the Equality Act"), by constructing an alternative access to their hotel, complete with ramp, so as to allow disabled access. However, the pursuer's case is not that she was denied access to the hotel, or that the stairs *per se* were not suitable for her to use. Rather her case is simply that the defenders' failure to provide a handrail for these particular stairs, in their worn condition, constituted a breach of the defenders' duty under section 2(1); and that would have been the case whether or not alternative access to the hotel was available elsewhere (which it was not, at the time of the accident). Accordingly, I do not see the Equality Act as being relevant to the issue which must be resolved in this action. It follows that evidence about previous complaints about the absence of handrails in the hotel generally, which were directed towards disabled access rather than to the exercise or otherwise of reasonable care, are also irrelevant (even if there had been any record for such evidence, which there was not). Nor, in my view, is the fact that the defenders were in the process of constructing

another entrance, with a ramp, relevant to the question of whether, in relation to the stairs on which the pursuer fell, they exercised reasonable care. A hazardous entrance does not cease to be a hazardous entrance simply because there is another less hazardous entrance elsewhere. The position might be different if the alternative entrance in fact reduced the extent to which the hazardous one was used, thus diminishing the risk, but there was no evidence of that sort before me and, indeed, the evidence was that the steps are still in use today.

[6] The final preliminary point to note, and which should be borne in mind as this judgment is read, is that having complained on record that the stairs were a danger due to their worn condition, the pursuer's case is not that she lost her footing because of their worn condition. It was not in dispute that the step on which the pursuer fell was not worn. Rather, as will be seen, the pursuer fell because she thought she had reached the bottom step, when she had not.

The evidence

[7] Evidence was given by the pursuer, and by her husband, Jack Norgate, and daughter, Collette Strachan, who all spoke to the circumstances of the accident. Evidence was also led from David Wood, Health and Safety Consultant, who spoke to his report no 5/13 of process, and Peter Drummond, Architect. For the defenders, evidence was led from Gordon Gibb, Architect and Peter Dodds, Hotel Manager. The architects spoke to their respective reports, numbers 5/16 and 5/17 of process in the case of Mr Drummond, and 6/9 and 6/10 in the case of Mr Gibb. Certain evidence was heard under reservation of its admissibility, most notably, part of Mr Wood's evidence and evidence pertaining to

production 5/15 being certain Trip Advisor reviews lodged by the pursuer which were put to Mr Dodds in cross-examination.

[8] The three eye witnesses were all credible and reliable, as was Mr Dodds. There are no issues over the credibility of the respective expert witnesses although there are issues over the weight to be attached to their respective evidence, discussed more fully below.

Circumstances of the accident

[9] The accident, and the events leading up to it, were spoken to by the pursuer, her husband and her daughter and were also captured on CCTV (production 6/1). The pursuer and her husband booked their coach holiday through National Holidays. On arrival and while still in the coach, she and her husband were allocated their room, which was in the annex, and given a key. They did not require to go to reception. They duly went to their room to unpack, and then went for a walk around the hotel. They then met up with their daughter, who had separately booked to stay in the hotel, and went for another walk around the hotel in her company. They entered the main hotel building by the main entrance steps by the porte-cochere (described in paragraphs 13 to 15 below). After spending some 15 minutes in the main building, they left by the main entrance. Notwithstanding the pursuer's admitted walking difficulties, she had by that time been walking around the hotel for what must have been at least half an hour.

[10] The pursuer's daughter, Collette Strachan, was the first to leave by the main door. She went down the steps and waited on the tarmac area for her parents to follow. A few seconds later the pursuer's husband paused and waited for the pursuer. She asked him if she could "hang on" to his shoulder, then placed her right hand on his left shoulder. They began to descend the steps together. Neither Mr Norgate nor Collette Strachan was

concerned that the pursuer would have any difficulty in descending the steps. The method of the pursuer's descent was as follows: she put her right foot onto the step below, looking at where she was placing her foot, and then brought her left foot down onto the same step, next to her right foot. She then repeated the process for the second step. When she came to the third step, she placed her right foot on the step but then, instead of putting her left foot next to it, she placed it on the nosing of the step. That caused her to lose her balance and she was pitched forward, letting go of her husband's left shoulder as she did so. She then fell, landing face down on the ground. There is no doubting that it was a nasty and unfortunate accident, which has had serious repercussions for the pursuer. The reason the pursuer gave for falling was that she thought she had reached ground level, when in fact she still had a step to go. Accordingly, she was no longer looking at where she was placing her feet and was looking at her daughter. That is entirely consistent with the manner in which she negotiated what was in fact the penultimate, not the last, step.

[11] It was common ground that there was no handrail for the pursuer to use. The pursuer said that if there had been a handrail by the steps she would have used it, and that was not disputed. She also gave evidence that if she had used a handrail it would have prevented her from falling. However, this was not explored with her in any detail. In particular she was not asked how she would have used it – whether she would have used it simply to steady herself or whether she would have gripped it tightly. In other words, the evidence did not explore whether her holding on to a handrail would have prevented her from falling, having already lost her balance by placing her foot on the nosing of the step.

[12] It was also not in dispute that the step on which the pursuer lost her footing was not worn, but had been the subject of a previous repair, which Mr Gibb described as competently carried out. That evidence was not challenged by the pursuer.

The premises

[13] Adamton House, a country house designed in Jacobean Revival style, was built in 1885 for George Alexander Baird MP. It was at one time accommodation for the US Airforce and British Aerospace personnel, but from 2002 it has been used as a hotel. The defenders purchased it in around April 2014 and were the owners and occupiers from that date to 20 July 2015, and beyond. The property (excluding the accommodation wing) was designated as a category B listed building on 28 October 2014. One of the features of the property is a Tudor arched porte-cochere, which is referred to in the description that follows the listing.

[14] A "porte-cochere" is the architectural term for a covered entrance porchway, usually open on three sides, sufficient to accommodate a carriage or a modern vehicle, Buckingham Palace being perhaps the most well-known example. This particular porte-cochere was constructed of Ballochmyle red sandstone with segmental arches and is indeed open on three sides.

[15] The porte-cochere contains a flight of four stairs on which the pursuer's accident occurred. They are constructed in a dark stone consistent with whin. There was a dispute as to the precise measurements and I come back to that below. As already noted, no handrails were provided. The treads showed signs of wear and tear and had previously been the subject of several repairs (in this regard, I prefer the evidence of Mr Gibb, whose description this was, to that of Mr Drummond who used the more pejorative term "dilapidated"). There were no contrasting indicators on the nosings of the steps, beyond the inconsistent colour of the repairs.

The architectural evidence

[16] It is unfortunate that the architectural evidence in this case spanned about a day and a half of court time. There were two main issues to which the evidence related, namely: (1) the height of the stairs (which, as I have indicated elsewhere, was essentially irrelevant to the pursuer's case, although the height was put in issue by the defenders) and (2) the ease or otherwise with which a handrail could have been installed, given the building's listed status. I discuss the evidence in a little more detail below but the need for evidence on the first of those issues (if indeed, on the pleadings, the evidence was relevant at all) could easily have been removed had the architects made a joint site visit to measure the height together; and, while there were undoubtedly differences in emphasis, ultimately, as I understood it, the evidence on the second issue was not significantly far apart given that both architects agreed that listed building consent could ultimately have been obtained. The difference between them was how easy, or otherwise, that would have been. (This may well have a repercussion in expenses, but that is an issue for another day.)

[17] As regards the measurement of the height of the stairs, counsel for the defenders described the evidence as unsatisfactory and it is difficult to disagree, on several levels. Mr Drummond and Mr Gibb each made two visits to the premises, between them employing four different methods of measuring the height of the steps. Mr Drummond attended first and, using a tape measure, measured each riser at 150mm (equating to 6"). Mr Gibb then attended and, also using a tape measure but adopting a slightly different method which involved lying on his stomach to obtain a line of sight to enable him to visually judge what to measure, obtained a measurement of 145mm per riser. Mr Drummond then returned and, using an assumed horizontal mortar bed as a datum, obtained an overall measurement of 625-630mm. He did not however use a spirit level to check whether the mortar bed was

indeed horizontal. Finally, Mr Gibb returned and using a laser instrument, which creates a visible datum which is known to be horizontal, obtained readings of 602, 601 and 600mm at different points on the stairs.

[18] I prefer Mr Gibb's evidence of his second readings as the most likely to be accurate, for a variety of reasons:

1. The method he described, using a laser instrument to give a known horizontal datum line is the most likely to be accurate of the four used;
2. It coincides with Mr Drummond's initial, admittedly rough and ready, measurement;
3. It equates to 6" per riser, a measurement favoured in Victorian times, which is therefore likely to have been the design height of each riser.

[19] It follows that the staircase is in conformity with the Building (Scotland) Regulations 2004 and the Technical Handbook for Mandatory and Guidance Standards produced thereunder (5/12 of process). Section 4.3.17 of the Handbook states that "a handrail should be provided to both sides of any flight where there is a change of level of more than 600mm…". It was accepted by both parties that the regulations had no retrospective effect. Nonetheless they are relevant in assessing whether an occupier of a building has exercised reasonable care and the pursuer therefore cannot pray in aid the Regulations or the guidance thereunder in support of her case that the defenders ought to have provided a handrail.

[20] The other issue on which the court heard much architectural evidence was the building's listed status and how that would impact upon the feasibility of installing a handrail. The two architects gave conflicting evidence about the importance of the porte-cochere in the listed building status, Mr Gibb attaching more significance to it than did Mr Drummond. There is no doubting the expertise of both gentlemen, both having impressive CVs, and I accept that both have the necessary skill and experience to entitle them to give opinion evidence to the court. That said, Mr Gibb tended to give his evidence in a more

thoughtful and measured fashion, whereas Mr Drummond was at times more loquacious than an expert witness, doing his best to assist the court, need be, and he was perhaps more concerned than he need have been with trying to impress the observer with his breadth of expertise. Accordingly, in some areas, such as the approach to measurement of the steps and his more detailed description of the state of the steps, I have preferred the approach of Mr Gibb. However, I do accept that Mr Drummond has more experience in conservation architecture than Mr Gibb, and a lot of the differences between them at least narrowed when one removed the hyperbole from Mr Drummond's evidence. For example, when he said that he would simply tell the planners that listed building consent was not required, I did not take him to mean, when push came to shove, that he would simply bulldoze them into submission; rather he was describing what his tactical approach would be in putting across his point of view that it was not. On the likely approach of the planners as to the need for obtaining listed building consent, I tend to prefer the evidence of Mr Drummond, notwithstanding the criticisms I have expressed of the manner in which he gave his evidence, because he does have greater experience in conservation than Mr Gibb. However, I find it unnecessary to analyse and contrast their evidence in detail, because ultimately, as I have already observed, there was not a significant substantial difference between them, at least insofar as the provision of a handrail on the wall was concerned. Mr Drummond, for his part, accepted that listed building consent *might* require to be applied for (although his primary position was that he would try to persuade the planners that it was not necessary to do so) and he said that whichever design of handrail was adopted, the devil would be in the detail. His position was not, therefore, that any style of handrail could be installed without regard to the possible planning consequences. Mr Gibb, for his part, foresaw more difficulties in attaining the same result, but he, too, unequivocally accepted towards the end

of his evidence that ultimately a design could be arrived at which would satisfy the planners and *would* result in listed building consent being granted, which was in substance the same as Mr Drummond's position. Since neither architect had come up with a design which in fact they were able to say would satisfy the planners, it is not possible on either chapter of evidence to conclude with any certainty how much time, effort and expense would have been required to install handrails. On Mr Drummond's evidence the cost would likely be at least £3,000 plus professional fees. However, whatever view one takes of the architectural evidence, installation of a handrail on the wall is something which could have been done, and it is unfortunate that discussion between the two architects and parties' agents did not result in agreement of that key fact. It follows from the foregoing that the defenders' position on record in answer 4 – that "[i]t is very unlikely that Historic Scotland would have granted listed building consent for the installation of a handrail" has not been made out. Accordingly, and in summary, while I accept that it would not have been possible for the defenders, as occupier of the hotel, simply to have installed any handrail, it would have been possible for them to have done so after obtaining architectural advice, which would have come as a cost, of at least several thousand pounds, in addition to the cost of the handrail itself plus professional fees, the whole process being likely to have taken several months, at least.

The health and safety evidence

[21] I now turn to the evidence of Mr Wood, who describes himself as a health and safety consultant and who has been involved in the health and safety profession for over 40 years. For the first 15 of those he was employed by the Health and Safety Executive. He enforced health and safety legislation on agriculture, forestry, construction works and manufacturing.

In 1995, having resigned from the Health and Safety Executive, he established his own company, Plan Safe Solutions Ltd, which is now a multidisciplinary consultancy offering health and safety consultancy, asbestos surveying, health and safety training and engineer surveying. He has previously appeared as an expert witness in both criminal and civil cases arising out of industrial accidents, both north and south of the border. I do not doubt that he has relevant experience which entitles him to give opinion evidence on health and safety issues. However, it is also evident from his CV and the evidence which he gave, including the terms in which this report is couched, that the bulk of his experience is in an employment context.

[22] In his report (5/13 of process) Mr Wood refers, at paras 2.4-2.7, to the "current Building Standards for Scotland", in fact the Technical Handbook 5/12 referred to above, and the following words in the introduction in that section:

> "Half of all accidents involving falls within and around buildings occur on the stairways, with young children and elderly people being particularly at risk. This risk can be greatly reduced by ensuring that any change in level incorporates basic precautions to guard against accidents and falls".

[23] Mr Wood goes on to refer to standard 4.3.14, which states: "handrails to stair and ramp flights will provide support and safe passage" and, at para 2.6 to the requirement that a handrail should be provided on both sides of any flight where there is a change of level of more than 600mm. He then states at para 2.9:

> "Surely a reasonable employer, in assessing the risk to the safety of his employees, would identify that there was an increased risk of them falling when accessing and egressing to and from a building whose main entrance is situated at the top of a flight of stairs which has a cumulative rise of 600mm and an overall width of 4.27m, if that stairway is not fitted with suitable handrails. There is a wide body of opinion and advice that indicates the increased risk of slipping, tripping and falling on stairs where handrails are not provided. So clearly is this understood that the Building Standards (Scotland) makes particular reference to this risk. Surely therefore a reasonable employer and managing occupant (*sic*) of a hotel would see it as his duty to maintain such stairs in good condition and ensure that they were fitted with

> handrails in order to meet his duty under common law and the Occupiers' Liability (Scotland) Act 1960."

[24] In his evidence Mr Wood also referred to the fact that there was no delineation of the end of each step. After making reference to his own difficulties in negotiating stairs, he said that he would have expected a staircase "like this" to have some sort of a handrail even if attached to a wall. When asked by me to clarify what he meant by a staircase "like this" he replied: "It's so wide. The risers are not particularly high either. That can make it more difficult – you expect the risers to be higher". He was then asked whether the wear and damage had an effect, in response to which he observed: "It does. There is no delineation. It can be difficult to see delineation of one step. Any staircase 'like that', a handrail is vital".

[25] In cross-examination, Mr Wood accepted that he had never visited the premises. His report and evidence were based on having seen Mr Drummond's report (but not Mr Gibb's). He also accepted that some of the terminology in this report such as "occupant" rather than "occupier" was not particularly apposite. He accepted that the "rake" of the step was relatively shallow and that the steps were "not particularly high". Indeed, somewhat counter-intuitively, he thought that the steps would have been safer had they been higher, although paradoxically, and in apparent contradiction of his evidence-in-chief that one would expect the risers to be higher, he also accepted that the height was a standard size for external steps.

[26] At paragraph 3.8 of Mr Wood's report the following is stated:

> "It is not a matter that has been veiled in secrecy to appreciate the risk of tripping and falling on stairs of any kind, notwithstanding those where no provision has been made for handrails. It is not difficult to appreciate that handrails fitted to stairways are an efficient preventative measure in reducing the risk of falling and tripping".

[27] At section 4 of his report, Mr Wood gives his opinion. In summary, he states that a reasonable employer would have carried out a risk assessment of the stairway and

determined that the inclusion of handrails would have been a beneficial aid in terms of reducing the risk of falling; that a reasonable employer would have made such provision notwithstanding the listed nature of the building; that Britannia Hotels did not meet the standards he would expect of a reasonable employer and an occupant of a hotel; that, without wishing to usurp the powers of the court, their failures would be considered as negligent, particularly in light of the accident that befell the pursuer; that the pursuer was given no direction or indication to use another entrance to access and exit from the hotel premises; and that she had no alternative but to use the main entrance stairway to the hotel. In section 5 of his report Mr Wood reaches the conclusion that the defenders failed to adequately assess the risk to their guests from using the main entrance stairway without the benefit of fitted secured handrails and thereby breached their common law duty of care and their responsibilities under the Occupiers' Liability (Scotland) Act 1960 (section 2(1)).

[28] Even before coming to deal with the objection to much of his evidence, I find Mr Wood's report, and evidence, of little value. I do accept that he has the necessary experience to entitle him to offer the opinion that stairs can constitute a risk, if evidence of that is required. The real question is the magnitude of that risk, and whether a handrail ought to have been provided to guard against it. Beyond that I am unable to attach any weight to his evidence. In the first place, the language used in his report, at various places, was, as counsel for the defenders submitted, the language of persuasion and advocacy rather than that of an independent expert, so we have such phrases as "I cannot imagine…" (2.7); "Surely a reasonable employer…"(2.9; "Surely therefore a reasonable employer…" (ibid); and "It is not difficult to appreciate…" (para 3.8). While referring to paragraph 3.8, the first sentence, quoted above, is so opaque as to be unintelligible. An even more fundamental problem with Mr Wood's report is that he has attempted to import standards of care in

employment situations into the 1960 Act and the duties of an occupier. That is not a legitimate approach: *Donaldson* v *Hayes Distribution Services Ltd* 2005 1 SC 523.

[29] A further criticism of Mr Wood's report is that he clearly applied the benefit of hindsight in concluding that the defender had failed to exercise reasonable care, as evidenced by the concluding words of 4.3 of his opinion. Finally, despite the caveats in his report and in his evidence that he was not seeking to usurp the powers of the court, it is clear that at least some of the opinions expressed by him purport to do just that.

[30] Insofar as counsel's objection to the admissibility of his evidence is concerned I sustain that objection in so far as Mr Wood did seek to express an opinion on the matters which this court has to answer, which renders much of his evidence inadmissible. It does not follow that his entire report and evidence are inadmissible but it will be evident from the foregoing that that is largely academic since I attach no weight to the admissible parts of the report. It may also be observed that Mr Wood fails adequately to explain why a reasonable occupier would provide a handrail by reason of the change in level, when the regulations apparently did not require that that be done (at least by reason of the height of the stairs).

[31] It follows that I do not attach any weight to Mr Wood's evidence that a handrail should have been provided, whether by reason of the lack of a contrast strip, or difficulties of delineation (which was not evidence given by anyone else nor did such a statement find any support in the technical standards) or indeed by reason of any other factor.

The Trip Advisor reviews

[32] This is a convenient point at which to deal with the defenders' objection to the admissibility of the Trip Advisor reviews. Two objections were taken to this evidence. First, that there is no record for any complaints being made to the defenders or their employees

about the absence of handrails at the locus and, second, that the evidence is in any event inadmissible hearsay. As far as the first of these is concerned, I allowed the production to be lodged (in part: I disallowed pages which post-dated the pursuer's accident) so that it could be put in cross-examination to the manager of the defender's hotel, Mr Dodds, in relation to the defenders averment on record that "The hotel welcomes nearly 3000 visitors a week and there have been no other reported falls as a result of no handrails". I thereafter allowed questions to be put to Mr Dodds under reservation of the relevancy of the evidence.

[33] In the event, the evidence given under reservation was to the following effect. Mr Dodds was asked if he was aware of any complaints regarding accessibility. He said that he had been told that the hotel was not friendly to those with mobility issues. He initially said he was not sure of any complaints on Trip Advisor regarding the lack of handrails but was then referred to the review on Trip Advisor dated 28 June 2015 (see 5/15 of process). That review stated that handrails were missing. He accepted that he must have been aware of that review because he had responded to it. He could not recollect another review, of 2 July 2015, which stated that "A lot of steps had no handrails".

[34] I have come to the view that that evidence is not relevant, and is therefore inadmissible. There is no foundation for it on record. A complaint about an absence of handrails which relates more to accessibility issues is not the same as a complaint that by reason of the absence of handrails, the steps were unsafe, or that accidents had occurred. Had the issue been whether the defenders knew that there were no handrails, then the evidence may well have been relevant; but their state of knowledge of that fact is not in issue and the Trip Advisor reviews, as well as being irrelevant, in any event add nothing. I will therefore sustain the objection.

[35] It is unnecessary to express a concluded view on the second ground of objection which was that the statements in the Trip Advisor reviews were inadmissible hearsay. The pursuer was not seeking to rely on the reviews as evidence of the truth of their contents, but if she had been, the defenders' objection raises an interesting point. The essence of it was that the evidence was inadmissible because of section 2 of the Civil Evidence (Scotland) Act 1988 which states:

> "A statement made by a person otherwise than in the course of the proof shall be admissible as evidence of any matter contained in the statement of which direct oral evidence by that person would be admissible".

[36] The defenders' submission was that in order to give admissible evidence the person who made the statement must be a competent witness. Since the identities of the persons to whom statements were attributed on Trip Advisor were unknown, and indeed, they may all be one person, the court could not begin to assess the competency of the makers of the statements.

[37] I am not persuaded that that is necessarily correct since it seems to me that section 2 focuses on the character of the evidence rather than the competency of the maker of it. It is possible to imagine many scenarios where evidence may well be admissible by virtue of section 2 even though the identity of the maker of the statement was unknown. Suppose for example a witness gave evidence of a statement by an unknown person who had just witnessed a road accident but who had then vanished before giving his details. As a matter of principle, I do not immediately see why such evidence should be inadmissible. The weight to be attached to such evidence is an entirely different matter. For what it is worth, even had I ruled that the statements of the Trip Advisor reviews were relevant and even had the pursuer sought to rely on them as evidence of the truth of their context, I would have attached no weight whatsoever to them, in the absence of any opportunity to cross-examine

the makers of the statements as to their credibility and reliability. Before leaving this topic, my final observation is that the reviews are not all entirely anonymous; rather it is not easy to identify the makers of the statements from the names or "handles" given, which is not quite the same thing.

Submissions

Pursuer's submissions

[38] Counsel for the pursuer referred to section 2(1) of the 1960 Act. She submitted that the court in assessing what a reasonable person would do uses a calculus of risk: *Phee* v *Gordon* [2013] CSIH 18 at paras 26-29. That entailed weighing up the likelihood of causing injury, the seriousness of that injury, the difficulty, inconvenience and cost of preventative measures and if necessary the value of the activity that gave rise to the risk. The test was objective and the risk must be reasonably foreseeable. The steps in the porte-cochere were in a dilapidated condition with damaged nosings, poor repairs and poor delineation between the steps. Although the Building Regulations were not applicable due to the age of the building, if the steps were assessed in light of the Building Regulations they would not comply. They created a foreseeable risk of injury. In the exercise of reasonable care the defenders ought to have provided a handrail on either side of the steps prior to the accident. The defenders had opened the hotel to the public by inviting guests such as the pursuer to come and stay. There was nothing to indicate to persons such as the pursuer that the building was not suitable for elderly guests. The fact that there was no evidence of previous accidents on the steps is not determinative. The defenders could have fitted a minimal handrail on either side of the steps within a relatively short period of time at a minimal cost. It was of little moment that they were building an alternative entrance to comply with

disability legislation. The calculus of risk demonstrated that they failed to take such care as was reasonable in the circumstances. But for that failure the pursuer's accident would not have occurred. As far as contributory evidence was concerned it was difficult to see how the pursuer could have taken more care for her own safety.

Defenders' submissions

[39] Counsel for the defenders also referred to section 2(1) of the 1960 Act. He submitted that the practical effect of that provision was that each case turned on its own facts. The standard of care was reasonable care in all of the circumstances: *Walker on Delict, 2nd Edition* Page 588. The question was whether the stairs (without the handrail) were a danger or a hazard to visitors such as the pursuer. The following authorities were relied upon: *Wheat* v *Lacon* [1966] AC 552; *Bourhill* v *Young* [1942] SC (HL) 78 per Lord Thankerton at 88; *Dawson* v *Page* [2012] CSOH 33; *McCrindle* v *Gala Casinos* [2007] CSOH 35; *Brown* v *Lakeland* [2012] Rep LR 140; *Murphy* v *East Ayrshire Council* [2012] CSIH 47; *Jackso*n v *Murray* [2015] SC (UKSC) 105; *Ghannan* v *Glasgow Corporation* 1950 SC 23; *McCluskey* v *Aberdeenshire Council* [2007] GWD 11-228; *Ward* v *The Ritz Hotel (London) Ltd* 1T IQR 315; *Green* v *Building Scene Ltd and Anr* 1994 PIGR P259; and *Martin* v *Greater Glasgow Health Board* 1977 SLT (Notes) 66.

[40] Counsel also submitted that the stairs themselves were not hazardous: they could be safely negotiated by anyone taking reasonable care for their safety (*Wheat*; *Dawson*). The absence of any other accidents was persuasive evidence that the stairs did not constitute a hazard to users. The absence of a handrail was not in contravention of the prevailing Building Standards. Compliance with the Building Standards, if not determinative of whether the stairs were safe, was a very strong indication that common law and occupiers'

liability duties had been met. If the court did find liability established, a deduction in respect of contributory negligence should be made.

Discussion

[41] As is often said, each case turns on its own facts. Accordingly, previous reported cases are of limited assistance. Regard must be had to the particular stairs in this case, and to the fact that they were in a listed building.

[42] As stated at the outset of this note, the pursuer's case is predicated on section 2 of the Occupiers' Liability (Scotland) Act 1960, the terms of which are set out above. Somewhat remarkably, nearly 60 years after the enactment of section 2, it still appears to be an open question as to how that section falls to be interpreted. In *Dawson* v *Page*, Lord Glennie adopted a linear approach, first considering whether the wet plank (on which the pursuer in that case had slipped) constituted a danger, before considering the separate question of whether reasonable care had been shown by the occupier. That decision was reclaimed (*Dawson* v *Page* 2013 SC 432) but the Inner House found it unnecessary to consider whether a linear approach was essential. However, at paragraph 16, the court did express the view that the Lord Ordinary's alternative approach, whereby he made the assumption that the wet plank was to be treated as a danger and considered whether the defender was at fault, was on any view consistent with a proper application of the section.

[43] Section 2 of course refers not just to dangers, but "dangers which are due to the state of the premises". As I have pointed out, the pursuer's case is that the steps were worn. That is therefore the particular state of the premises which she avers gave rise to a danger, *viz* the risk of tripping or falling; and the reference to "such" danger, at the end of the subsection, makes it clear that the pursuer's case is that it is that danger – the danger of tripping or

falling due to the worn steps – which the defenders, as occupiers, ought to have taken reasonable precautions to guard against. If a linear approach were the correct one, I would have been prepared to hold that the worn steps did give rise to such a danger.

[44] However, the pursuer's case under section 2(1) immediately runs into an insurmountable difficulty, since it was not a worn step which caused her to fall; but the fact that she thought she was on the bottom step when she was not. Accordingly, even if the defenders ought to have installed a handrail to reduce the risk from the danger created by the worn steps, it was not their failure to do so which caused the pursuer's accident. The pursuer must fail on that simple basis if no other.

[45] However, lest I am wrong in holding that, and out of deference to the submissions made, I will consider, for completeness, whether the pursuer would have succeeded in making out a case that due to the condition of the stairs, including their height and lack of delineation, the defenders ought to have installed a handrail in discharge of their reasonable care under section 2(1) of the 1960 Act and if so, whether such failure caused the pursuer's accident.

[46] Again, the pursuer's case runs into several difficulties, not the least of which is that she did not say in her evidence that the reason she thought she was on the bottom step was because of a failure to distinguish one step from another. She did not say that she was unable to see the nosing of the step that she was on, or that she found it difficult to tell where one step ended and another began. This was simply not explored with her. There were only four steps, which she had climbed a short time before. There are other possible reasons as to why she thought she was on the bottom step. In her mind, there may only have been three steps; or it might have been due to the relative shallowness of the steps (at

least on Mr Wood's evidence); or it might simply be that she was not paying attention. We simply do not know.

[47] The next difficulty that the pursuer faces is that the only evidence which was given that the condition of the stairs, including the lack of delineation, should have led the defenders to install a handrail, was given by Mr Wood. I have already explained why in general I am unable to attach any weight to his evidence. However, even apart from those criticisms, his reasoning in support of his view that a handrail ought to have been provided was unconvincing. When referring to "stairs like these", he referred not only to the lack of delineation but to their width. However, it is hard to see why width alone should lead to the installation of a handrail. One can well see why, on a wide staircase which required a handrail for some other reason, for example, because of its height, there should be a central handrail as well as one at either side, but that is a very different proposition from saying that the width itself should lead to a central handrail being installed, if there was otherwise no reason rendering any handrail necessary. Suppose for example there was only one very wide stair of normal height: why should it require a handrail? Further, whereas the technical advice was that, at least in new staircases, handrails were required above a certain height, Mr Wood's evidence appeared to be that a staircase "like this" should have had one because the risers were not as high as one would expect. Accordingly, I simply cannot find that Mr Wood's evidence is a basis for holding that this staircase ought to have had a handrail because of its condition. None of the other witnesses said that a handrail should have been installed because of a lack of delineation, although there was evidence from Mr Drummond that contrast strips would not have been permitted, because the building was listed.

[48] The next difficulty that the pursuer would have faced was that even if a handrail had been provided, I would not have been satisfied on a balance of probabilities that it would have prevented her from falling. I accept that she did give general evidence to that effect. However, as I have observed, it was not explored with her how she would have used it, or how it would have prevented her from falling where she had simply misjudged the step. She might have gripped it tightly, or she might not. She might just have used it to steady herself against unevenness in the surface, to prevent her from losing her balance in the first place, much in the way that she was using her husband's shoulder. That is different from using it to arrest a fall caused by her being pitched forward through having put her foot where she ought not to have put it – and the handrail would not have assisted by preventing her from doing that. I simply do not know whether the pursuer, an 83 year old woman, would have had the physical strength to have held on to the handrail in those circumstances; and I do not consider that is something I am entitled to assume.

[49] Insofar as the height of the stairs is concerned, I have already dealt with this above. For the reasons given above, I have found that the overall height was 600mm and as such the stairs were not of a height which would have required a handrail even in a new building. The pursuer could not therefore have pointed to the Regulations, or the guidance thereunder, in support of any case that the height in itself should have led the defenders to install a handrail, which may be why no such case was advanced. Even had the staircase contravened the Regulations, of course, that would merely have been a factor to have taken into account: *Green* v *Building Scene Ltd.* The pursuer's counsel did seek to run an argument that the Regulations had been breached in other respects, since there was an obligation to provide a safe means of access, but I do not consider that that adds anything material to the duty to take reasonable care. Since the Regulations deal with new buildings, they do not

cater for wear and tear. A further, perhaps more reliable, indication that the steps did not pose a particular hazard to the pursuer was that neither her daughter nor her husband was concerned about her ability to negotiate them without a handrail.

[50] Further, although not conclusive, it is relevant that there were no prior reported accidents on the steps. On the evidence which was led, I have been unable to make any finding as to the precise number of visitors who stayed at the hotel but it was clearly a significant number, many of whom would have been elderly.

[51] Accordingly, apart from wear and tear, the pursuer has failed to establish that the general condition and nature of the steps constituted a danger against which the defenders ought to have taken precautions. Even if it did constitute such a danger, the next question is whether it would have been reasonable for the defenders to have installed a handrail. That in turn raises the question of how difficult it would have been for them to have done so. I have discussed this at paragraph [20] above. In summary, it would not have been a straightforward exercise and it would have caused the defenders some expense and taken some considerable time.

[52] While the phrase "calculus of risk" may not be one which has been used often, it is a useful shorthand means of describing the process of assessing what steps a reasonable person would take in a given situation, since it involves weighing up the likelihood of causing injury on the one hand against the seriousness of the injury and the difficulty and inconvenience of cost of preventative measures. The pursuer did not rely on the fourth factor being the value of the activity that gives rise to the risk. In my view the calculus of risk does not favour the pursuer. The likelihood of causing injury was small (having regard to the absence of previous accidents). As regards the seriousness of injury, notwithstanding the consequences of the pursuer's fall, it was not foreseeable that injury suffered by someone

who did trip or lose their footing would necessarily be severe. Finally, it was not a straightforward matter to take preventative measures given the listed status of the building. In those circumstances it was reasonable for the defenders not to install a handrail.

[53] Accordingly, even if the pursuer had pled a case based upon lack of delineation of the steps, I would not have found, on the evidence, that the accident was caused to any extent by any breach of duty on the part of the defenders.

[54] I have therefore granted decree of absolvitor.

[55] Had I found for the pursuer, I would not have blamed her to any extent for not looking where she was placing her feet, given that the reason for that was that she believed that she was on the bottom step.

[56] I have assigned a hearing on expenses.