SHERIFFDOM OF LOTHIAN AND BORDERS

IN THE ALL-SCOTLAND SHERIFF PERSONAL INJURY COURT

[2019] SC EDIN 9

PN445/18

JUDGMENT OF SHERIFF R B WEIR QC

in the cause

BARTHOLOMEW HORGAN

Pursuer

against

RODGER LUKE ALEXANDER, trading as The Inn at Ardgour

Defender

Pursuer: McWhirter; Slater + Gordon
Defender: Davidson; Clyde & Co (Scotland) LLP

Edinburgh, 13 February 2019

The Sheriff, having resumed consideration of the cause:-

FINDS IN FACT:

[1] That the pursuer is 25 years old and is employed as a maintenance engineer.

[2] The defender owns and operates the Inn at Ardgour ("the hotel"). The hotel is situated in the village of Ardgour, overlooking the Corran Narrows in Lochaber, Inverness-shire.

[3] In December 2016 the defender's sister, Sophia Thacker, was the assistant manager of the hotel.

[4] The pursuer and his girlfriend, Megan Riley, booked into the hotel for a weekend break between Friday 9 and Monday 12 December, 2016. They travelled north from the

Burnley area on 9th December, accompanied by their pet dog, and arrived at some point between 4 and 5pm.

[5] The room allocated to the pursuer and Ms Riley was room 8.

[6] Access to room 8 was initially by way of the main hotel staircase. At the top of the staircase the route to room 8 took a left turn along a carpeted landing, followed by three rising steps. It was then necessary to double back along a further carpeted corridor, from which the door to room 8 was reached by ascending two further, carpeted, steps perpendicular to the corridor.

[7] Shortly before 2030 hours on the Friday evening the pursuer left the bar area and returned to room 8 in order to retrieve his phone charger.

[8] By the time he left the bar area to go upstairs the pursuer had probably consumed not more than three pints of lager since arriving at the hotel.

[9] Ms Riley and the dog remained in the bar area whilst the pursuer made his way upstairs.

[10] At about 2030 hours, whilst returning to the bar area, and somewhere in the vicinity of the steps immediately outside room 8, the pursuer sustained a fall whereby he suffered a grade 2 sprain to his right ankle.

[11] Ms Riley called for ambulance assistance at about 2050 hours, and an ambulance was in attendance at the hotel at 2149 hours. The pursuer was conveyed to Belford Hospital, Fort William, arriving there at 2344 hours.

[12] The pursuer was seen in the Accident and Emergency Department of Belford Hospital at 2351 hours. His right ankle was placed in a cast and he was administered analgesics.

[13] The pursuer and Ms Riley returned from Belford Hospital to the hotel by taxi.

[14] Upon their return to the hotel Ms Riley took photographs and snapchat pictures of a tear in the carpet below the flight of stairs outside room 8.

[15] That tear was likely to have been present, in some form, at the time when the pursuer befell his accident.

[16] It was only after their return to the hotel that the pursuer noticed the tear in the carpet at that location.

[17] An immediate consequence of the pursuer's accident was that he was restricted in his ability physically to manoeuvre. He was unable to go out for walks with the dog. He suffered from a loss of enjoyment of his holiday with Ms Riley and their pet dog.

[18] The pursuer's brother was enlisted to assist in driving the pursuer and Miss Riley back from Ardgour to Burnley on Sunday 11 December 2016.

[19] Prior to his departure on that date the pursuer signed an accident report form (no. 5/6 of process). The accident report form described the accident locus as being on "stairs x 3 by rm 7 + 8 corridor". It also provided a description of how the accident happened in the following terms: "turned ankle when descending two steps in corridor upstairs. Likely sprain/ligament damage. Ambulance called as a precaution. A&E said ligament damage + x-ray when reduced swelling. Ice to reduce swelling."

[20] At no point prior to their departure did either the pursuer or Miss Riley mention any defect in the upstairs corridor carpet as having been a cause of the pursuer's accident. Nor did Ms Riley share with the management of the hotel the photographs or screenshots which she had taken.

[21] On 12 December 2018 the pursuer's plaster cast was removed at Bury General Hospital.

[22] While his ankle was in a cast the pursuer required the assistance of Ms Riley in dressing and showering. Thereafter, she assisted him for a time getting up and down the stairs. For a period of about one week the pursuer's brother assisted him with lifts as the pursuer was unable to drive.

[23] The Belford Hospital records, nos. 5/2 and 6/2 of process, contain extracts from the pursuer's medical records.

[24] The entries in the Belford Hospital records were written by the individuals who purport to have written them on the date or dates on which they purport to have been written.

[25] The Belford Hospital records are the equivalent of the oral evidence that would have been given by the said individuals at proof.

[26] The Belford Hospital records include a Scottish Ambulance Service Patient Report Form relative to the occasion when an ambulance was called to assist the pursuer at 2050 hours on 9 December 2016. In that Form it is reported that the pursuer "twisted on stairs, heard crack" and that he was unable to bear weight.

[27] The Belford Hospital records include an attendance note for the Accident and Emergency Department, in which the presenting complaint is recorded as "RIGHT ANKLE INJURY – SLIPPED DOWN STAIRS".

[28] The Belford Hospital records include a set of nursing notes, in which the attending nurse practitioner recorded the pursuer as having told her that he "fell from a couple of stairs this evening".

[29] The report comprising no. 5/5 of process is a medico-legal report by Mr Damon J Simmons FRCS dated 14 November 2017.

[30] The contents of the report by Mr Simmons are the equivalent of the oral evidence which would have been given by the said Mr Simmons at proof.

[31] Within his report, Mr Simmons recorded a history of the pursuer having "missed the last step landing on a flexed ankle".

[32] The carpet in the upper corridor of the hotel, outside room 8, has not been replaced since the time of the pursuer's accident.

FINDS IN FACT AND LAW

[33] The defect in the carpet in the upper corridor of the hotel, outside room 8, was not of a kind which, in the ordinary course of events, would not have been present had the defender acted with due care.

THEREFORE:

(i) Assoilzies the defender from the craves of the initial writ;

(ii) Reserves meantime the question of expenses, and appoints parties to be heard thereon at Edinburgh Sheriff Court on a date to be afterwards fixed.

NOTE:

Introduction

[34] On Friday 9 December 2016 the pursuer travelled north from the Burnley area with his girlfriend, Megan Riley, and their pet dog, intending to spend a long weekend at the Inn at Ardgour ("the hotel"). During the course of that evening the pursuer suffered a fall near his bedroom, room 8, resulting in a painful sprain to the right ankle. The pursuer now seeks

to recover damages from the defender on the factual basis that what caused him to fall was a defect in the carpet of the upstairs corridor in the hotel, near the access steps to room 8.

[35] The basis upon which the pursuer seeks to bring home liability is encapsulated in the proposition advanced by Miss McWhirter, in submissions, that the carpet defect was one which, in the ordinary course of events, would not have been present had the defender acted with due care. In other words, the case is advanced by Miss McWhirter on the basis that the pursuer has led sufficient evidence to invoke the maxim *res ipsa loquitur*. The pursuer having proved that what caused him to fall was the carpet defect, and the defender having failed to discharge the onus of showing that the accident did not occur through want of care on the part of the hotel's management, liability should be held established, and damages awarded accordingly.

[36] The defender contends, on the evidence, that the mechanism of the accident averred on record has not been proved, and that he should be assoilzied. It is also argued, on behalf of the defender, that the pursuer's reliance on the maxim *res ipsa loquitur* is misconceived, and his case irrelevant in the absence of averment or proof as to the steps which should have been taken, in the exercise of reasonable care, to identify and address the defect in the carpet (if it was there at all).

[37] Quantum of damages is disputed (although not markedly so). The issues before the court are accordingly (i) the circumstances in which the pursuer suffered the injury which admittedly he did; (ii) whether the evidence of what did happen justifies the application of the maxim *res ipsa loquitur*; (iii) if not, whether the pursuer has nonetheless averred and proved sufficient to establish liability on the part of the defender, either at common law or under section 2(1) of the Occupiers Liability (Scotland) Act 1960, and (iv) quantum of damages.

[38] I heard evidence over three days. During the pursuer's proof I heard evidence from the pursuer himself and Megan Riley. During the defender's proof I heard evidence from (i) Jack Kingland; (ii) Kevin Green; (iii) the defender, and Sarah Sophia Harris or Thacker. The evidence of Mr Damon Simmons, a consultant orthopaedic surgeon on the pursuer's list of witnesses, was agreed by joint minute, as were the contents of various medical records.

The evidence

[39] The factual circumstances which bear upon the outcome of this case are set out in my findings-in-fact. It may, however, be helpful to provide a brief summary of the evidence of the witnesses.

Pursuer's proof

The pursuer – Bartholomew Horgan

[40] The pursuer described how he and his partner, Megan Riley, arranged to stay for a long weekend at the hotel over the weekend of 9-12 December 2016. They drove to the hotel with the intention of spending time that weekend walking their dog.

[41] The hotel allocated them to room 8 upstairs. The pursuer described the route which he would take from the bedroom to the public rooms downstairs. It included a descent down a short flight of steps to the upstairs corridor, a further set of stairs and a landing leading to the top of the main staircase (see no. 5/9(i) of process).

[42] The pursuer thought that they had arrived in Ardgour village between 4-5pm. They had walked the dog, had a meal, let the dog out again and then adjourned to the bar in order to take in the Friday night football. At about 2030 hours the pursuer went upstairs to retrieve his phone charger. By that time he had consumed two, possibly three, pints of lager

since arriving at the hotel, not more. He left Ms Riley and the dog in the bar. It was on his return from room 8 to the bar that the pursuer sustained his accident.

[43] The pursuer explained in the witness box that he was coming down the stairs from room 8. As he was coming off the stairs he said that he caught his toe in a tear in the carpet on the landing. He fell, landing on his right hand side, and felt immediate pain in his ankle. The pursuer described the tear as being at a point where two sections of carpet met and that, when he saw it, the tear was sticking up proud of the surrounding carpet. The pursuer was specifically asked, in chief, to comment on the general condition of the upstairs carpet, which he described as "generally poor in several places". The pursuer was also asked (in what was a manifestly leading question, but without objection) whether he felt his foot catch in anything when he fell. The pursuer agreed that he did. However, it should also be noted that the pursuer's evidence was that the first time he actually noticed a tear in the carpet was after he returned from hospital in the early hours of the following morning, and not when he was returning to the bar from room 8.

[44] After waiting in the bar for a while Ms Riley went upstairs to see what had become of the pursuer. By then, he had crawled back up to room 8. Having organised an icepack from the kitchen, Ms Riley called an ambulance. The pursuer thought that he had mentioned to the receptionist at the hotel that he had fallen down the stairs. He was conveyed to Belford Hospital, Fort William. He explained to medical staff that he had fallen downstairs. He had not mentioned the carpet because he did not think that was information they needed to know. The pursuer's ankle was placed in a cast. Following treatment he and Ms Riley had to take a taxi back to Ardgour. On their return Ms Riley took photographs of the defect which the pursuer told the court was the cause of his fall (nos. 5/7 and 5/8 of process).

[45] The pursuer was referred to the accident report form (no. 5/6 of process). He thought that the defender must have completed the form. He signed it before departure from the hotel on the Sunday (11 December) but had not really read it. His brother, who had come up to take the pursuer and Ms Riley back south, was waiting and in a rush to be underway. The pursuer accepted in cross-examination that he had not, at any point between the accident and his departure on the Sunday, mentioned to either the defender or any other member of the hotel staff the existence of any defect in the upstairs carpet. He had, however, told the medico-legal expert, Mr Simmons, in November 2017, that he had been coming down the stairs and come off the first step, caught his toe in the carpet, and rolled over.

[46] On 12 December 2018 the pursuer attended his GP. On the same date his plaster cast was removed at Burnley General Hospital as unnecessary.

[47] While his ankle was in a cast the pursuer required the assistance of Ms Riley in dressing and showering. Thereafter, she assisted him for a time in getting up and down the stairs. For a period of about one week the pursuer's brother assisted him with lifts as the pursuer was unable to drive.

[48] In cross-examination the pursuer denied propositions put to him to the effect that (i) he had consumed excess alcohol before the accident; (ii) he had staggered from the bar when he made his way upstairs, and (iii) he had admitted to Sophia Thacker that he had been at fault for the accident, having drunk too much and tripped over the dog. The accident report form had been completed before he had been asked to sign it. At no point between the accident and his signing the form had the pursuer given to the defender any account of what had happened. The pursuer disputed the accuracy of the reference in the ambulance report to the pursuer having "twisted on stairs" (no. 6/2/4 of process), saying that he had fallen

down the stairs. He also disputed the accuracy of the hospital note (no. 6/2/1 of process) which recorded him as having "slipped down stairs", denying ever having used the word "slipped", and the later note "fell down a couple of stairs" (no. 6/2/2 of process), saying that he had told the nurse practitioner that he had "fallen down the stairs". Finally, the pursuer's attention was drawn to Mr Simmons' report (no. 5/5/2 of process) which recorded a history of him having "missed the last step landing on a flexed ankle". The pursuer reiterated that he had told Mr Simmons that he had fallen coming off the last step. Mr Simmons had got mixed up about that.

[49] The pursuer described the impact of the accident on his, and Ms Riley's, enjoyment of their weekend away. He had been immobilised in a cast which limited the activities they could undertake. They had departed twenty four hours early. Although the cast had been removed on the following Monday the pursuer had suffered pain and a degree of immobility. He required assistance from Ms Riley in getting dressed and shaving, and getting up and down the stairs. He had relied on his brother for lifts because he was unable to drive for about three weeks. He had also been signed off work for three weeks. The present position was that the pursuer felt occasional aches and clicking in his ankle but there were now no major *sequelae.*

Megan Riley

[50] Ms Riley confirmed the essential details of their arrival at Ardgour. She thought that they had arrived between 3 and 4pm. Before his accident the pursuer, Ms Riley and the dog had been in the bar. The pursuer was watching a Leeds United game on his phone and went to retrieve his charger. Ms Riley was quite clear that she and the dog had remained in the bar while he went upstairs. After 10-15 minutes the pursuer had not returned. Ms Riley

went upstairs to investigate. She found the pursuer prone on the bed. She went in search of ice. She related to the person at reception only that the pursuer had had an accident. She then called an ambulance. After paramedics attended the pursuer the hotel manager came upstairs. There was no discussion with him at that time as to what had happened.

[51] Ms Riley said that, in the taxi back from Fort William, the pursuer had mentioned to her that he had tripped over. She had asked him how he had fallen and he had replied that he had tripped on some carpet at the bottom of the staircase from room 8. Once they were back at the hotel Ms Riley said that she had "had a look", and taken photographs of a rip in the carpet at the bottom of the stairs, and areas where the carpet was worn and had not been laid properly (nos. 5/7 and 5/8 of process). Ms Riley said that she had been told by the pursuer that the screenshot 5/8(ii) showed where the accident had happened. The defect shown in that screenshot was not reported to the hotel at any time before they left. They were more worried about getting the pursuer home. Ms Riley thought that the accident report form was produced just as they were leaving. The pursuer just signed it and there was no discussion about how the accident had occurred.

[52] In cross-examination Ms Riley rejected the proposition that (as it was put) the pursuer "staggered out of the bar with the dog". The dog remained with her. The pursuer had probably had no more than two drinks. She was asked about aspects of the timing of their journey to and from Belford Hospital (the suggestion apparently being that the pursuer and Ms Riley must have returned to the hotel later than was indicated by the timings on the screenshots (nos. 5/8(i) and (ii)). She thought that their return would have been earlier than 2 or 3am. To the suggestion that she had gone looking for evidence, Ms Riley replied that she had spoken to the pursuer's father once they had got back to the hotel and passed the

phone to the pursuer. It was apparently the pursuer's father who had suggested that they take photographs.

[53] When it was put to her that the pursuer's evidence was to the effect that he had not told anyone specifically about a carpet defect on the way to, or back from, the hospital Ms Riley's response was that he had told her that he had got his foot stuck in something, so she had wanted to take a look when they got back. Any suggestion that the photographing of the carpet upstairs amounted to building a compensation claim was rejected on the explanation that Ms Riley did not then know what a compensation claim was, any more than she knew that the pursuer would be making a claim against the hotel. Ms Riley accepted that none of the photographs of the alleged defect was ever shown to the hotel staff during their stay, although there was ample opportunity for her to have done so, and that the pursuer had not asked her to show them to the hotel manager.

[54] Ms Riley recalled the pursuer mentioning that there was an accident report form but she did not see him read it or sign it. She thought that it was at reception as they were leaving.

[55] It was put to Ms Riley that, if a carpet defect had been present such as to cause the pursuer to fall, then she would have been passing it throughout the course of the Saturday. Her response was that she could not remember seeing it, although she "guessed" that it would still have been there.

Mr Damon J Simmons

[56] The terms of Mr Simmons' orthopaedic report, dated 14 November 2017, was agreed between the parties. Leaving to one side the history recorded by him, and to which reference has already been made, it is sufficient to record Mr Simmons' opinion that the

pursuer sustained an injury on the night of 9 December 2016 comprising a grade 2 ankle sprain. Mr Simmons anticipated a maximum recovery period of 18 months, although there was the possibility of occasional "nuisance value" aches in the ankle for between three and five years post-accident. No further investigation or ligament reconstruction was indicated, and there were no implications for either the pursuer's work or the onset of osteoarthritis.

Defender's proof

Jack Kingland

[57] Mr Kingland, age 23, was the barman on duty on the night of the pursuer's accident. He was currently living in Leith and no longer worked for the hotel. He described how trade in the month of December was relatively quiet. During the evening of 9 December 2016 he would have expected to see a couple of locals and one or two guests in the bar.

[58] Mr Kingland claimed to have some recollection of serving the pursuer, who had come into the bar with a dog. His position, in chief, was that he had served the pursuer anything between five and ten pints of beer or lager. His recollection of having done so was based not on the behaviour of the pursuer but rather the number of pints he had served.

[59] Mr Kingland's understanding was that the pursuer was staying in a bedroom on the first floor. He had no specific recollection of the pursuer's departure from the bar. He first became aware of an accident when either the defender or his sister, Sophia, came through to the kitchen and said that someone had had an accident and that an ambulance had been called. It was only when Sophia told him that it was the man with the dog who had been injured that Mr Kingland connected the pursuer with the ambulance. Mr Kingland was told that he had tripped over the dog's lead on the stairs.

[60] The first that Mr Kingland heard about a defect in the carpet was when a claim was intimated by solicitors acting for the pursuer.

[61] In cross-examination Mr Kingland was asked to reconsider his evidence as to the number of pints he had served the pursuer. He thought that he had served the pursuer more than three pints. He knew that it was "a few".

Kevin Green

[62] Mr Green was, at the material time, employed as the hotel's full time maintenance man. His duties involved day to day maintenance and renovation of the hotel rooms. At the time of the accident he would have been working between four and six days a week. Mr Green explained that it would be his normal practice to walk through the hotel in the morning to check whether there was anything amiss.

[63] Mr Green thought that he first became aware of the pursuer's accident on the following Saturday morning. He thought that he had been told by the defender's sister, Sophia, that someone had fallen down the main stairs. Mr Green's evidence was that he had never had any carpet defects brought to his attention. He would walk through the hotel several times a day, as would the cleaners. In a passage of evidence led under reservation Mr Green said that the only carpet-related issue which had required his attention in the time he had been working for the hotel was the replacement of a doorstop. On one occasion (at a location different to the locus of the alleged accident) he had also to attend to an area of carpet which had been lifted by industrial cleaners.

[64] Mr Green had initially understood the accident to have happened at a different set of three steps leading to the landing at the top of the main staircase (see no. 5/9(ii) of process). Later, mention was made of the pursuer having tripped in the area of the steps outside room

8. He had never seen any carpet defect in that location. He had never seen the defect purportedly shown in the screenshots taken by Ms Riley (nos. 5/8(i) and (ii)), and did not consider it possible that he had effected a repair in that area, but then forgotten about it.

[65] In cross-examination, Mr Green denied that the hotel carpet (shown in the photographs taken by Ms Riley) was well worn and not in the best of condition. He declined to accept that he could have forgotten about repairing a defect in the carpet after the pursuer's accident, especially because that would have been a guest safety issue. He agreed that the carpet shown in the screenshots (no. 5/8 of process) was the one in place in late 2016. In re-examination Mr Green said that if he had seen what was shown in those screenshots he would not have been happy and would have fixed the defect.

Rodger Luke Alexander

[66] The defender is the owner and licensee of the hotel. His evidence was that he thought he had checked the pursuer into the hotel. He was aware that the pursuer was accompanied by Ms Riley and a pet dog which he saw around the hotel that weekend.

[67] Turning to the occasion of the pursuer's accident, the defender recalled being asked for ice because someone had fallen on the stairs. He was upstairs in room 8 when the paramedics began to attend to the pursuer. He was not aware of a strong smell of alcohol while in the presence of the pursuer. In the two to three minutes he was in room 8 the defender recalled no discussion about how the accident may have occurred. However, the defender did say that he was at the front door when the pursuer was removed to the ambulance. His recollection was that the pursuer had then said that he had fallen downstairs. The defender also recalled being led to believe that this occurred in way of the three steps on the right hand side of the photograph, no. 5/9(i) of process.

[68] The defender confirmed that he had completed the accident report form (no. 5/6 of process). The defender had not witnessed the accident. So, what was contained in the form about the circumstances of the accident was what the pursuer had told him. The defender confirmed that the form contained references to steps (in boxes 4 and 5) which he took to mean the steps on the right hand side of the photograph, no. 5/9(i) of process. The form was fully completed when the pursuer was asked to sign it, and the defender remembered him reading and signing it. The defender was 100% sure that no reference was made to any carpet defect (and there was no such reference in the form), nor was any reference made to a carpet defect at any other time during the pursuer's stay at the hotel. The first mention of a defective carpet being responsible for the pursuer's accident occurred in late January 2017, in correspondence from the pursuer's solicitors. The defender had then inspected the carpet upstairs. No defects were discovered. In a passage of evidence again heard under reservation the defender confirmed that he had never seen the upstairs carpet in the condition apparently shown in the screenshots, nos. 5/8(i) and (ii) of process. It appeared that there was a tear which had been lifted up, or pulled, in some way.

[69] The defender's evidence was that he was entirely unaware that Ms Riley had been taking photographs of the hotel carpet. He did not consider the condition of the carpet to have been old and worn in late 2016. He would have replaced it if that had been the case, as he would have instructed Mr Green to repair immediately any defect of the kind shown in the screenshots taken by Ms Riley. In fact the same carpet was still in place at the hotel.

[70] The defender became aware, from a conversation with his sister, of a suggestion that the pursuer had got tangled up with his dog. He did not recall alcohol being mentioned in that conversation. Mr Kingland had, however, given information about how much he thought the pursuer had consumed.

[71] The defender took the photographs upstairs in the hotel, no. 5/9 of process, in early 2017. He did not take any photographs of the steps outside room 8 specifically. Only later did the suggestion come that the pursuer had fallen in that area.

[72] In cross-examination it was put to the defender that what was shown in the screenshots, nos. 5/8(i) and (ii) of process, constituted a tripping hazard. This provided the catalyst for a physical demonstration by the defender, from the witness box, of what he conceived to be the implausibility of an accident having occurred in the manner now alleged by the pursuer. In essence, the nature and appearance of the alleged defect was not such as could cause someone turning *right* at the bottom of the room 8 steps to trip (being, as it appeared in the photographs, off-centre and to the left).

[73] The defender rejected the suggestion that the pursuer only signed the accident form as he was paying the bill and anxious to be away from the hotel, saying that he was sat at a table at the time.

Sarah Sophia Thacker

[74] Ms Thacker is the sister of the defender. In December 2016 she was the assistant manager of the hotel. At the time of the proof she was newly employed as the manager of the Sue Ryder shop in Dingwall.

[75] Ms Thacker spoke to meeting the pursuer at some point over the weekend of 9-11 December 2016 (probably the Saturday), following his return from Belford Hospital. Ms Thacker was seated behind, and the pursuer was leaning on, the reception desk at the time. By the time of the conversation the defender had already told Ms Thacker about the accident. She asked the pursuer if everything was okay. The witness could not recall exactly how the pursuer responded. However, the gist of his response was that he was

okay, that alcohol, dogs and steps didn't mix, and that it was all his own fault. Ms Thacker said that the pursuer had mentioned to her that he was just coming out of room 8 when he became entangled with the dog and tripped on the steps. She did not report this conversation to the defender, but, at the time, she was unaware of any allegation that a carpet defect was to blame for the accident. The impression the pursuer gave Ms Thacker was that he had had too much to drink, and she made an assumption that he had also been referring to the stairs outside room 8.

[76] In evidence led under reservation, Ms Thacker said that she had no recollection of having seen any carpet defect in the vicinity of either the steps outside room 8 or the three steps leading to the landing above the main staircase. Had there been a tear of the kind shown in Ms Riley's screenshots Ms Thacker would have arranged for it to be fixed immediately.

[77] Ms Thacker appeared to accept that, if someone was descending from room 8 and turning right at the foot of the steps, it might be necessary to walk over the apparently torn area of carpet.

[78] In cross-examination Ms Thacker was challenged to explain why she had not reported the terms of her conversation with the pursuer at the time. She replied that the defender had told her that the pursuer had signed the accident book and she had no reason to tell him about the conversation. She did not know until much later what the pursuer was saying had caused him to fall.

Submissions for the pursuer

[79] Miss McWhirter submitted that I should regard the account of his accident, given by the pursuer, as credible and reliable and that, generally, his evidence and that of Ms Riley

should be preferred to the evidence led by the defender. She invited me to conclude that the pursuer had, in his evidence, been consistent about his movements on the night of 9 December 2016. The pursuer's evidence that he was not intoxicated at the time of the accident was also consistent with the probable time of his arrival with Ms Riley, their movements thereafter, and the total lack of any reference in any of the medical notes to the pursuer having shown signs of intoxication at the material time. Miss McWhirter also commended to my attention Ms Riley's evidence. She submitted that it undermined the suggestion that the pursuer had volunteered to the defender's sister that he had become in some way entangled with the dog and that that was what had caused him to fall.

[80] The pursuer having proved that the cause of the pursuer's fall was the involvement of his foot with a tear in the carpet at the bottom of the steps outside room 8, Miss McWhirter argued that the maxim *res ipsa loquitur* was engaged. The hotel was under the control and management of the defender. The defect in the carpet was not one which would ordinarily occur where the defender had exercised due care, and it was not for the pursuer to aver and prove the cause of the defect. It was for the defender to show that the accident was not caused by want of care on the part of the hotel's management. That had not been done and liability should be held established. In support of her analysis of the legal position, Miss McWhirter referred me to *Ward v Tesco Stores Ltd* [1976] 1 ALL ER 219; *Scott v The London and St Katharine Docks Company* (1865) 3 H&C 596, and *Turner v Arding & Hobbs Ltd* [1949] 2 ALL ER 911; *R Conway: Personal Injury Practice in the Sheriff Court* (Third Edition), chapters 18-19; *Gloag and Henderson: The Law of Scotland,* (Fifteenth Edition), paragraph 26.08.

Submissions for the defender

[81] Mr Davidson submitted that the pursuer's case failed both in fact and law. In inviting me to reject the pursuer's explanation for how he came to fall he pointed to the records of the ambulance service and Belford Hospital, and the history taken by Mr Simmons, as providing apparently differing accounts of what the pursuer said about the circumstances of the accident. I was also referred to the terms of the accident report form which, whatever else they might convey, made no reference to any defect in any carpet anywhere in the hotel as having been the operative cause of the pursuer's accident. Inviting me to prefer, generally, the evidence of the defender's witnesses, Mr Davidson submitted that the pursuer had failed to prove that there was a defect in the carpet. Even if there was such a defect the pursuer had failed to prove that it contributed, in any way, to the accident which befell him.

[82] Mr Davidson observed that the pursuer's case on record was advanced at common law and under reference to the duties said to be incumbent on the defender in terms of the Occupiers' Liability (Scotland) Act 1960. Whether or not the statutory case added anything to the common law in the circumstances of this case (and Mr Davidson submitted that they did not) the pursuer had made no averments to the effect that the defect was *in situ*, and in the exercise of reasonable care should have been identified, and dealt with, prior to the accident. This omission on the part of the pursuer was highly significant because the circumstances of the case were not such as to engage the maxim *res ipsa loquitur*. In argument, Mr Davidson referred to *Wallace v Glasgow District Council* 1985 SLT 23; *Cordiner v British Railways Board* 1996 SLT 209; *McGuffie v Forth Valley Health Board* 1991 SLT 231; *Gibson v Strathclyde Regional Council* 1993 SLT 1243; *WJ Stewart: Liability for Delict*, paragraph A33-024, and *Conway: Personal Injury Practice in the Sheriff Court, supra.*, pp.220-221.

Discussion

[83] In determining whether the pursuer has established liability against the defender it is, in my view, appropriate to address, in turn, the following questions, namely (i) was a defect present in the hotel carpet below the steps leading directly to room 8? (ii) was the pursuer affected by alcohol at the time of the accident? (iii) did the pursuer fall as a result of a defect in the carpet below the room 8 stairs? (iv) are the circumstances such as to entitle the pursuer to rely on the maxim *res ipsa loquitur?* I propose to address each of these questions in turn.

(i) Was a defect present in the hotel carpet below the room 8 stairs at the time of the accident?

[84] In considering this question I am to be taken as referring to a defect of the kind which appears to be shown in the screenshots, nos. 5/8(i) and (ii) of process. This was what Ms Riley states that she recorded on her return from Belford Hospital in the early hours of Saturday 10 December 2016.

[85] The consistent evidence of those of the defender's witnesses who gave evidence on the matter was to the effect that no such defect existed at the time of the accident, or, at least, had not been observed to exist. The defender himself made no attempt to suggest that what was shown in Ms Riley's screenshots was anything other than a defect in the carpet. Indeed, I was impressed with his candour in telling the court that, had he seen what appeared to be shown in Ms Riley's screenshots, the defender would have immediately instructed Mr Green to effect a repair. Mr Green was similarly forthcoming in stating that he would not

have been happy with a carpet in such a condition, and he would have fixed the apparent defect.

[86] Conversely, Ms Riley was adamant that the defect was present after she and the pursuer returned to the hotel by taxi from Fort William. Perhaps curiously, the pursuer's own evidence was that he first noticed the tear in the carpet only after he returned from hospital. None of the defender's witnesses disputed that the carpet depicted in Ms Riley's screenshots was anywhere other than in the hotel. Relying, principally, on a note in the Belford Hospital records suggesting that the pursuer was only released from hospital at about 0120 hours, Mr Davidson sought to question the accuracy of the timing of Ms Riley's screenshots. I am not sure that the precise timing greatly matters. It is plain from the evidence that the screenshots were taken after the pursuer's accident. The images in no. 5/8 of process are clearer than the somewhat grainy images in no. 5/7 of process. In so far as it is possible to judge these things at all, the defect shown in the pictures, if that be what it is, has the appearance of being recent. In no. 5/8 of process a small area of floorboard appears to be visible. The edges of what resembles a tear in the carpet are light in colour and contrast with the colour of the carpet surface.

[87] Determining how, on the evidence, such a defect would have appeared (if at all) at the time of the pursuer's accident is much more difficult. I heard no evidence about the characteristics of the tear, as shown in the photographs and screenshots. No witness offered any opinion as to whether it *was* likely to be recent, or of some age. No witness offered any view as to whether it posed a hazard to someone turning right at the bottom of the stairs below room 8, as the pursuer claimed to have been doing. That said, I have come to the view that Ms Riley was being truthful in her evidence that what is shown, in both the photographs and the screenshots, comprised a tear in the carpet of some kind and that,

absent any other evidence on the matter, it was likely to have been present *in some form* at about 2030 hours (and therefore only a matter of hours before).

(ii) Was the pursuer affected by alcohol at the time of the accident?

[88] I was not persuaded that Mr Kingland's evidence about the amount of alcohol consumed by the pursuer was reliable. I considered it to be of significance that there was nothing in the ambulance notes, or the notes of Belford Hospital, such as to indicate that the pursuer presented under the influence of alcohol. Had he been significantly intoxicated I should have expected something of that nature to be recorded in the notes. Moreover, the defender himself told the court that he was unaware of any smell of alcohol when he visited the pursuer in room 8 at the time when the ambulance personnel were in attendance.

[89] It will be recalled that Ms Thacker gave evidence about a conversation with the pursuer, the gist of which was that he blamed alcohol and an entanglement with the dog for his fall. I believed the evidence of both the pursuer and Ms Riley that the dog had not gone upstairs with the pursuer. I do not know how Ms Thacker came to recount what she did. It would be idle to speculate on what disparate sources of information she may have picked up in this regard. Her recollection of the conversation was vague, and the account at odds with the contents of the accident report form. I did not feel able to rely on her evidence. I was not prepared to make any finding that the pursuer had consumed more than three pints of lager by the time of the accident. In short, I considered it unlikely that alcohol had any significant bearing on what happened on the night of 9 December 2016.

(iii) Did the pursuer fall as a result of a defect in the carpet below the room 8 stairs?

[90] At one point in her closing submissions, Miss McWhirter submitted that, properly understood, the pursuer's evidence was to the effect that he caught his toe on something on the landing, and that "something" must have been the defect in the carpet shown in Ms Riley's screenshots. I think, ultimately, that was probably an accurate characterisation of the pursuer's evidence. The pursuer was quite clear that he only noticed the tear in the carpet after his return from hospital. On that matter I preferred his evidence to that of Ms Riley. Her evidence was that she had asked the pursuer in the taxi back from Fort William how he had fallen and he had replied that had tripped on some carpet at the bottom of the staircase from room 8. On their return she had then "had a look", and taken shots of rips in the carpet and areas where it had not been laid properly (nos. 5/7 and 5/8 of process), and the pursuer had told her that the screenshot, no. 5/8(ii) of process, showed where the accident had happened. I find it inherently improbable that the pursuer could have forgotten that, while they were in the taxi back, he gave an account to his girlfriend about the cause of his fall which implicated the hotel carpet. I do not believe that he gave such an account.

[91] Indeed, having considered all of the evidence, I am unable to hold it proved that what caused the pursuer to fall was a defect at the bottom of the room 8 stairs. I have reached that conclusion substantially on the basis that were too many contemporaneous records containing accounts for the accident which were significantly at odds with the case now being put forward by the pursuer.

[92] In the first place, the Scottish Ambulance Service record noted a history of the pursuer having "twisted on stairs". The Attendance Record of the Accident and Emergency Department of Belford Hospital initially recorded a history of the pursuer having "slipped

down stairs". The notes of the Nurse Practitioner at Belford Hospital, who treated the pursuer at hospital, recorded that the pursuer "fell down a couple of stairs this evening".

[93] The only documented instance of a piece of carpet having any relevance to the pursuer's accident was contained in the medical report prepared, on the pursuer's behalf, by Mr Simmons, no. 5/5 of process. It is not without significance that Mr Simmons examined the pursuer on 14 November 2017, so many months after the accident. What Mr Simmons recorded was that the pursuer told him that "he was coming down the stairs when his toe caught a piece of carpet that was sticking up. As a result this caused him to fall over and twist his right ankle. He told me that he fell and missed the last step, landing on a flexed ankle on the ground floor and he fell to the floor sustaining injury." Even that history is at odds with the pursuer's case on record which places the defect, and the cause of the pursuer's fall, on the landing. (It is worth recalling, from paragraphs 6 and 12 of the parties' joint minute, that the contents of the Belford Hospital records are to be treated as the equivalent of the oral evidence that would be given by those responsible for preparing them. Mr Simmons' report is to be treated similarly. It follows that what I am bound to treat as the oral evidence of those witnesses has not been challenged in cross-examination).

[94] The pursuer endeavoured variously to explain the terms of these records. I have already rehearsed his responses when the records were put to him by Mr Davidson in cross-examination (at paragraph [48] above). It is unnecessary to repeat them here. Suffice it to say that, were I to accept the evidence of the pursuer, at least three medical personnel (including a consultant orthopaedic surgeon) must have misunderstood, or misreported, what the pursuer had said about the cause of his accident.

[95] The hotel's accident report form, which the pursuer signed, contained a description of the accident. It was in the following terms:

> "Turned ankle when descending two steps in corridor upstairs. Likely sprain/ligament damage…"

The form made no mention of any carpet defect. The pursuer stated that he had not given to the defender any account of the accident prior to being asked to sign the form on the day of his departure, and that he had not really read it at the point when he did sign it. By contrast, the defender said that, not having witnessed the accident, what was written into the form about the circumstances of his accident were what the pursuer had told him, and that he remembered the pursuer reading and signing the form. I found the position of the pursuer to be inherently improbable. I have already held that I was not satisfied on the evidence that the pursuer was significantly affected by alcohol at the time of the accident. I did not form the impression from his evidence that the pursuer was unintelligent. I found it surprising that he would have overlooked, in the body of the form, as important a detail as the existence of the carpet defect, if it really had been responsible for what transpired.

[96] The combination of the contents of the records to which I have made reference, and the absence of any complaint about any defective carpet to the staff of the hotel, have led me to conclude that I cannot be satisfied, on a balance of probabilities, that it was a carpet defect which caused the pursuer to fall and turn his ankle. Rather, the totality of the evidence seemed to me to present a situation where, at the material time, the pursuer was unclear about what had caused him to fall. Particularly in cross-examination of Ms Riley, Mr Davidson floated, none too subtly, the idea that, from an early stage, the pursuer and Ms Riley had the possibility of a compensation claim in mind. That is not a view I am prepared to take of matters. Plainly, the pursuer suffered a fall. I do not rule out the possibility that the pursuer has quite persuaded himself that the carpet was responsible for that fall. I just do not consider that, on the evidence, he has proved on a balance of probabilities that it was.

[97] For completeness, I also observe that the mechanism of the accident described by the pursuer was difficult to reconcile with the shape and appearance of the defect in the screenshots taken by Ms Riley. I heard no technical evidence on the matter, no doubt because no near contemporaneous inspection of the defect was undertaken by anyone. The defender sought to demonstrate that, for a person turning right at the bottom of the stairs (as the pursuer claimed to be), the apparent defect was not a natural tripping hazard. A health and safety consultant, Mr John Stewart, was on the pursuer's list of witnesses but was not called to offer any illuminations on this subject. How a defect of the character shown in the screenshots could have caused the pursuer to turn on his ankle, in the circumstances described by him, remains unexplained by the evidence.

(iv) ***Res ipsa loquitur***

[98] In article 6 of condescendence, the pursuer avers that his claim against the defender is based on fault at common law, breach of contract, and their [sic.] breach of statutory duty in terms of the Occupiers' Liability (Scotland) Act 1960. It was apparent from her submissions, however, that Miss McWhirter invited the court to find liability established on the principle that, an accident having been proved to have occurred as a result of the defect in the carpet below the steps outside room 8, an inference of negligence arose which fell to be negatived by the defender, and that the defender had failed to do so. Having reached the conclusion that the pursuer has failed to prove that the carpet defect did cause the pursuer to fall and turn his ankle, the conditions for the operation of the maxim *res ipsa loquitur* have not been satisfied. However, it may assist if I were to explain briefly why, in my view, the conditions for its operation would not have been satisfied even if the defect had been implicated in the accident.

[99] The maxim applies where the occurrence giving rise to the accident is shown to be under the management of the defender, and the accident is such as in the ordinary case does not happen if those who have the management use proper care (*Scott v London and St Katharine Docks co., supra.,* per Earle J at p.601; approved in *Ballard v North British Railway Company* 1923 SC (HL) 43, per Lord Dunedin at pp.54-55). It is not controversial that once a pursuer has led sufficient evidence to invoke the maxim *res ipsa loquitur*, the court will find for the pursuer unless the defender has cleared himself of negligence *(O'Hara v Central SMT Company Ltd* 1941 SC 363, per Lord President Normand at p.379).

[100] However, as I understand the authorities on *res ipsa loquitur*, it is a necessary factor in its application that the pursuer does not know, and cannot reasonably be expected to know, the cause of the event giving rise to the accident (cf. *Gloag and Henderson, supra.*, paragraph 26.08). If that can be explained, then the court requires that it should be explained, and an inference of fault being the cause can be of no assistance (*Bolton v Stone* [1951] AC 850, at p.859; *Mars v Glasgow Corporation* 1940 SC 202, at p.209). In my opinion, the present case is not one in which the rights of the pursuer depended on facts incapable of proof by him, and exclusively within the knowledge of the defender (*Elliot v Young's Bus Service* 1945 SC 445, at 456). Rather, in the instant case, the pursuer relied, at proof, on the existence of a tear at the point where two sections of the upstairs carpet met each other in the upstairs corridor. The evidence disclosed that the same carpet remained *in situ* at the hotel. The pursuer also tendered photographic evidence, taken by his partner, of what Ms Riley conceived to be the allegedly worn condition of the carpet, and of other areas where she considered the carpet to have been improperly laid. The pursuer himself purported to express a view on the general condition of the carpet. These were, and are, not the kind of circumstances in which it can properly be said that the pursuer *cannot* know the cause of the tear. As Mr Davidson

observed in submissions, there would have been nothing to prevent the pursuer undertaking investigations, precognoscing witnesses, or making arrangements to inspect the carpet, in the course of preparing a case for proof, with a view to advancing an inspection and maintenance case. Indeed, he submitted that, having pled the 1960 Act as well as common law fault in his pleadings, that is exactly what the pursuer should have done (cf. *Wallace v Glasgow District Council, supra.*, at p.24; *Stewart, supra.*, paragraph A33-024; *Convery, supra.*, pp.220-221). I agree with that submission. In my opinion, it was for the pursuer to aver and prove the manner in which the defender was in breach of his common law duty to exercise reasonable care for the safety of the pursuer, or his statutory duty to exercise such care as was reasonable in the circumstances, where the condition of the carpet was concerned. That, the pursuer did not attempt to do. Instead, what was advanced by Miss McWhirter was a very narrow case on the evidence, which depended on the conditions for invoking the maxim *res ipsa loquitur* having been established. Since I have held that the conditions for its operation would not have been satisfied, even if the defect had been implicated in the accident, I am bound to conclude that no relevant legal basis has been established for the recovery of damages in this case.

The pursuer's objection

[101] During the evidence, Miss McWhirter took objection to questioning which was intended to elicit evidence about, broadly, the hotel's maintenance systems. She submitted that, beyond the denial of the existence of any carpet defect, there were no averments to support the leading of such evidence. The objection, repeated more than once, primarily concerned the evidence of Mr Green and the defender. I heard the evidence, to which objection was taken, under reservation of all issues of relevancy and competency. The

evidence went little further than to identify that Mr Green had a broad commission to undertake repairs around the hotel, and that the defender would have arranged for repair of a defect of the kind shown in Ms Riley's screenshots. Ultimately, that evidence had no significant bearing on my decision in this case.

[102] More fundamentally, however, and for the reasons already explained, it was for the pursuer to lead in evidence a basis for establishing a breach of the defender's duty of reasonable care, or his statutory duty as occupier of the hotel under section 2(1) of the 1960 Act. To highlight the relative paucity of the defender's pleadings, on the matter of the pre-accident condition or maintenance of the hotel carpet, served only to shine a spotlight on the absence of any kind of inspection or maintenance case in the pursuer's own pleadings.

[103] Had it been necessary, however, I would have regarded the final three sentences of answer 4 as providing sufficient notice of the evidence which was led, objected to, and heard under reservation.

Quantum of damages

[104] Notwithstanding, my views on liability, it is necessary to address, briefly, the parties' competing submissions on quantum. Damages in this case were not agreed. The figure brought out in the pursuer's statement of valuation of claim was £4,699. The defender's statement produced a figure of £2,905. Such difference as there was can be explained by the parties' diverging valuations of *solatium*, and the inclusion, by the pursuer, of an additional head of claim for loss of enjoyment of the holiday (which Mr Davidson submitted should simply be treated as part of the *solatium* claim).

[105] Under reference to the Judicial Studies Board Guidelines (chapter 7(N)(d) ("Modest Injuries"), and *Andy Heer v Asda Stores Ltd* [2016] SC KIR 43, a decision of Sheriff Thornton

sitting in Kirkcaldy Sheriff Court, Miss McWhirter valued *solatium* at £3,500. Her valuation of the loss of enjoyment of the pursuer's holiday she placed, separately, at £250. Mr Davidson valued *solatium* (encompassing an element for loss of enjoyment of the holiday) at £2,250, submitting that the case of *Andy Heer, supra.* was out of line with other authorities cited in *Kemp & Kemp* (cf. *Davis v Patel: Kemp & Kemp,* volume 4, 17-048).

[106] In deciding between these two competing positions I have taken into account Mr Simmons' prognosis whereby he anticipated a maximum recovery period of 18 months, albeit with nuisance value symptoms persisting for potentially as long as 3-5 years. In the case relied on by Miss McWhirter, Sheriff Thornton valued *solatium* at £3,000 in circumstances which, while marginally more serious in terms of the immediate effects of the accident on that pursuer, are not very far removed from the present case. The case cited by Mr Davidson (together with the other case notes included in the excerpt from *Kemp & Kemp* with which I was provided) are relatively elderly. Had I been awarding damages in this case I would have considered a figure £3,000 to represent a reasonable level of compensation, although I would not have considered it necessary or appropriate to make a separate award for loss of enjoyment of the pursuer's holiday.

[107] As regards services the figures here are marginal. There was no attempt by the pursuer to exaggerate the support he received in that respect. Taking a broad and sensible view, I would have awarded £300 to cover the support provided to, and received by, the pursuer in the immediate aftermath of the accident.

[108] In all the circumstances, had the pursuer prevailed on liability, I would have awarded damages in the sum of £3,976, calculated as follows:

Solatium: £3,000.00

Interest: £250.00 (4% p.a on £2,850)

Services:	£300.00
Interest:	£42.00
Travel:	£280.00
Interest:	£45.00
Taxi:	£50.00
Interest:	£9.00
TOTAL	£3,976.00

[109] In view of my rejection of any material involvement of alcohol in the circumstances of the pursuer's fall – or for that matter any entanglement with the dog on the stairs – I would not have been disposed to make any deduction for contributory negligence.

Decision

[110] In the result, I have granted decree of absolvitor in favour of the defender. I was invited to reserve expenses meantime, and that is what I have done. Parties are invited to liaise with the sheriff clerk in order that (if required) an appropriate hearing date can be assigned.