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

[2019] SC EDIN 46

PIC-PN1223-18

JUDGMENT OF SHERIFF KENNETH J MCGOWAN

in the cause

SJ AS GUARDIAN OF L

Pursuer

against

CALA MANAGEMENT LTD

Defender

Pursuer: M Crawford; Thompsons
Defender: A Crawford; Clyde & Co

Edinburgh, 23 May 2105

NOTE

Introduction

[1] In April 2017, the pursuer's daughter L was injured when she fell on exiting a play park, suffering unpleasant and, no doubt, painful cuts to her knee. In this case, the pursuer seeks damages on her behalf for those injuries.

[2] I heard evidence from the pursuer; his mother, CC; LF, a neighbour of CC; LJ, L's aunt; Colin Griffin, a company director; and Steven Christie, a landscape gardener.

[3] I was referred to or considered the following authorities/sources:

a. *Anderson* v *Imrie and Imrie* 2016 CSOH 171;

b. *Caparo Industries Plc* v *Dickman* [1990] 2 A.C. 605;

c. *Donoghue* v *Stevenson* 1932 SC (HL) 31;

d. *Feely* v *Co-operative Wholesale Society* 1990 SLT 547;

e. *Hughes* v *Lord Advocate* 1963 SC (HL) 31;

f. *Johnson* v *Rea Ltd* [1962] 1QB, 373;

g. *Jolley* v *Sutton* LBC (2000) 1 WLR 1082;

h. *Stair Memorial Encyclopaedia*, volume 15, paragraph 319.

[4] Having heard the evidence and submissions, I made the following findings in fact.

Findings in fact

[5] The defender carries on business as a housebuilder. In about 2008, the defender acquired land in the area of [redacted], near Larbert. The land was destined to become a series of housing developments, carried out sequentially in a number of different areas.

[6] The first area to be developed was immediately to the north of [street name]. Other areas further north were developed later on.

[7] The first area to be developed comprised 170 plots on which houses were to be built, with certain common areas ("the development"): plan appended to number 6/14 of process.

[8] One of the common areas was located in the centre of the houses which were to form [street name] ("the open area") which is roughly triangular in shape. Within the open area was to be a children's play park ("the play park"): number 5/5/35 of process.

[9] As the development proceeded, the defender sold off the houses. The proprietors of each house had disponed to them the plot they had selected; the house erected thereon; and a 1/76th *pro indiviso* share of the common areas, including the open area.

[10] CC and her husband purchased Plot [redacted], which was to become [address] and a disposition was granted in their favour: number 6/14 of process. They and their immediate

neighbours were the last to move into the development and did so on or about 30 September 2011.

[11] While the development was ongoing, the ground which was to comprise the open area was used by the defender for storage of machines and materials. As the development drew to a close, the defender instructed the landscaping of the open area and the construction of the play park.

[12] A company called The Play Practice (Scotland) Ltd ("The Play Practice") was contracted to construct the play park. The Play Practice subcontracted some or all of the work to Mr Christie.

[13] The play park was to be fenced. Access thereto was to be obtained through gaps in the fence.

[14] The design of the area was to include a method of preventing (or at least discouraging) dogs from entering into the play park, to minimise the risks that their presence might create, such as biting children or fouling the play area. One method of restricting access is the installation of gates. An alternative method is the installation of a metal "grid", which, in the manner of a cattle grid, dogs are reluctant to walk on.

[15] The defender contracted with The Play Practice for "Enviraware Dogrids" to be installed: nos.: 6/1/1 - 4 of process.[1]

[16] As described in the manufacturers' materials:

> "The grid configuration causes the dog's bodyweight to be supported not by its pads, which fall either side of the grid, but by the area of skin between its pads which is particularly sensitive."… "Use the Enviraware Dog grid at the entrances to children's play areas or other sensitive enclosed spaces": Production 6/6/1.

[1] In fact, the parties to the contract appear to have been between The Play Practice and Cala Homes (East) Ltd, rather than the present defender, but no point was taken about that.

[17] The Dogrids consist of metal gratings (or grids). The load bearing bars ("the bars") are long steel rectangles which sit "edge up". Support rods ("the rods") run at right angles to the bars. The rods do not pass through the centre of the bars but are offset so that, depending on which up way the gratings are lying, they will be nearer to or at the top or bottom of the bars, as the case may be. Properly installed, the gratings are orientated so that the rods are near the bottom edge of the bars: Production 6/6/2, figure 1and 6/12/3 of process.

[18] Dogrids are supplied in 2m lengths and a variety of widths. The load bearing bars are 40mm deep and 5mm thick. They are set 40mm apart. The support rods run at right angles to the load bearing bars: production 6/6/2. The edge of the bars where the edge of the 5mm horizontal surface meets the edge of the 40mm vertical surface is a right angled hard edge, which is relatively sharp.

[19] Mr Christie installed the Dogrids in the correct manner. That work was completed in around September 2011: 6/2/1 of process. The bars were "edge up" with the supporting rods, which run at right angles to the bars, at the bottom: productions 6/6; 6/12; 5/6/1 and 5/6/3 of process.

[20] The defender disponed its last share of ownership in the play park on 30 September 2011. Since that date it has not owned any part of the locus.

[21] In terms of Entry 4, Rule 24 in Title Number STG 61696 and Entry 5, Rule 24 in Title Number STG 58829, the defender had a management burden which applied for the period of 5 years beginning with the dates of first registration of Title Number STG 61696 and STG 58829 or for the period during which it was a proprietor of at least one plot in either title, whichever was shorter. Title Number STG 61696 was first registered on 13 November 2008 and Title Number STG 58829 was first registered on 20 September 2007. The last property

disponed from Title Number STG 61696 was disponed on 30 September 2011. The last property disponed from Title Number STG 58829 was disponed on 14 October 2011. As at 1 April 2017, the defender's management burden had extinguished.

[22] In terms of Entry 4, Rules 16.12 and 16.13 and Entry 5, Rules 16.12 and 16.13 of the respective burdens sections of Title Numbers STG 61696 and STG 58829, maintenance of the locus (including the play areas and the equipment located therein) is the responsibility of the 75 residents whose titles had been originally disponed from Title Number STG 61696 and the 95 residents whose titles had been originally disponed from Title Number STG 58829.

[23] As at 1 April 2017 the defender had no obligations arising from burdens (whether of maintenance or otherwise).

[24] The defender handed over factual control of the locus to Hacking & Paterson, the factors, in about June 2012. From that date, the defender has had no control of the locus. In particular, the defender had no factual control of the locus in 1 April 2017.

[25] As this is a residential area with a large number of houses in the vicinity, the open area and playpark was popular with local children and was well used particularly in the summer months.

[26] Between 30 September 2011 and 1 April 2017, there were a number of incidents involving children and adults falling on the gratings. Some injuries were sustained.

[27] LJ's son fell on one of the gratings in about August 2014. She reported that to the defender and was told that they would look into it. Despite a further phone call, she heard nothing further from the defender.

[28] The local residents did not appear to appreciate that they were the co-proprietors of the play area; had been for some years; and had obligations of maintenance in respect thereof. They did not appreciate that Hacking & Paterson were the factor acting on their

(the residents in the area who were co-proprietors) behalf and that the defender had no right, title or interest or burden in relation thereto.

[29] At some stage, a rumour began to circulate among some of the local residents that the grids had been installed upside down. This was fuelled by some of the incidents or accidents which had occurred and the twisted shape of the rods which gave rise to the belief that they were supposed to be treads of some type.

[30] On 1 April 2017, L was visiting her grandmother, CC's, home at [address]. After the extended family had a meal together, L and her two brothers went out to play at the play park. In the course of playing, a ball went over the fence. As L was leaving the play park, she fell onto the grid. Her knee collided with the metal bars causing two full thickness cuts to it.

[31] On a full liability basis, an appropriate award of damages for the injuries sustained by L is £10,000 inclusive of interest to the date of the proof.

[32] Within a few days of L's accident, local residents had taken steps themselves to turn them the other way up: productions 5/5/1 and 3.

Submissions for pursuer

Introduction

[33] In *Jolley*, Lord Hoffman said :

> "…it has been repeatedly said in cases about children that their ingenuity in finding unexpected ways of doing mischief to themselves and others should never be underestimated."

[34] Young children will run and play and fall.

[35] In an environment designed to facilitate child play, at the locus, there ought not (subject to reasonable foreseeability) to have been installed an item capable of inflicting the

injuries seen at 5/8 of process, merely by falling to the ground. There was little utility which could justify such a device in a playpark.

[36] The circumstances of the accident were agreed: paras 3, 4 and 5 of the Joint Minute, number 24 of process.

Did the defender owe the pursuer a duty to take reasonable care for her health and safety?

[37] The defender instructed installation of the grid. They do not rely upon delegation of responsibility for the installation: para 14 of Joint Minute. They opened the park to the public, including young children such as the pursuer.

[38] The tripartite test in *Caparo* is satisfied. L fell within the category of individuals invited to use the playpark. The risk of injury was reasonably foreseeable. It was fair, just and reasonable that such a duty should exist.

Were the injuries suffered by L reasonably foreseeable?

[39] The grid which was installed had long thin metal strips protruding upwards.

[40] The edges of the protruding strips were sharp. The evidence of each of the pursuer's witnesses was that they were sharp. None was challenged nor contradicted. Each was credible and reliable.

[41] The Court is invited to adopt their characterisation. To refuse to do so is to give the benefit of no evidence to the defender.

[42] The injuries (full thickness lacerations to the knee) corroborate the characterisation.

[43] If the defender had wished to challenge the characterisation, a witness could have been asked to attend the site and to give evidence about their own experience.

[44] If collusion between witnesses is implied by the defender, they should have been afforded the opportunity to meet that accusation.

[45] The court does not require expert evidence to determine that a child falling on to sharp, thin, metal edges presents a foreseeable risk of injury.

[46] The precise mechanism of harm did not require to be foreseeable: *Hughes*.

Breach of Duty: installation and lack of proper inspection

[47] Where a duty is owed to young children, the standard of care is often high. For guidance: see approach in *Anderson*, paras 30-38.

[48] The defender had a duty to avoid installing such an item in the playpark. Reasonable care involved appreciating its characteristics by simple inspection at installation and before opening the park to the public. Proper inspection, had it occurred, would have identified that the metal bars were sharp – as was apparent to the pursuer's witnesses when they inspected it.

[49] The lack of care is not excused by the blind reliance upon apparent design. Reasonable care is assessed in context – the relevant context was the play environment of young children. The inspection of the device where children would be playing ought to have been thorough. Had it been undertaken, the defender would have appreciated that the thin, metal strips were sharp and hazardous.

[50] The defender's argument that whether or not the grid was 'sharp' is irrelevant is logically unsound. The foreseeable harm arose out of the presence of deep, protruding, thin, sharp edges where children were at a risk of falling, not the way in which the orientation of the grid is characterised.

[51] The argument infers that the defender could elude responsibility by installing a hazardous device 'correctly' and offends the principles of negligence. The grid probably was upside down when the park was opened. The twisted transverse bars which provided tread for the foot were on the underside; similar grids had been installed in the adjacent park (Inch Garvie Terrace) in the safer state (twisted bars up). The grid at the locus did not conform to the specification of a "Dogrid", (twisted bars, which sat proud of the thin metal strips) and was installed in a different way (against the direction of traffic). The purpose of the flanges was spoken to by Steven Christie who had no knowledge of the design and had never seen the patent.

[52] If the pursuer fails to prove that the grid was 'upside down', the duty to avoid installing foreseeable hazards in a playpark does not fall away. The submission is tested by removing the averment.

[53] If the pursuer fails to prove that the grid was 'upside down' the import of the evidence of the pursuer's witnesses is relevant to foreseeability of harm: the grid looked out of place; its dangerous features were so immediately apparent as to make people wonder how it could be installed correctly; it failed in its purpose and added danger. Turned upside down, it was apparently slightly safer.

Social utility

[54] The installation of the grid was the positive creation of a hazard.

[55] There was no real controversy that the defender intended that the grid should provide a functional utility – to prevent dogs entering the playpark. It was common knowledge that dogs excrete faeces, but the extent of that risk is unknown. The grid which was installed at the locus was not a tolerable replacement for a small gate.

[56] The grid in any event did not achieve its purpose. LF's dog was able to traverse it without difficulty.

[57] Any utility did not outweigh the risk of injury. The prevalence of other incidents at the locus since 2012 indicates very poor design.

[58] Objection to the opinion evidence of Colin Griffin and Steven Christie is renewed. Their assertions about previous installations (particularly where there had been several incidents at the grid at the locus) or gate dangers was opinion evidence and unfounded on record.

[59] In any event, there can be no social utility justification on the evidence for the grids being sharp.

Causation

[60] It can be plainly said that, but for the installation of the grid, the pursuer would not have suffered the injuries which she did.

Conclusion

[61] In all the circumstances, the defender failed to take reasonable care by instructing installation of the grid which was at the locus and opening the park to the public.

[62] The pursuer respectfully moves the court to grant decree in the agreed sum of damages.

Submissions for defender

Motion

[63] The Court should grant decree of absolvitor to the defender. Expenses ought to be reserved.

The Occupiers' Liability (Scotland) Act 1960

[64] The pursuer no longer insists upon his 1960 Act case. For completeness, the defender's position in relation to that is summarised below.

[65] The pursuer cannot succeed in a case based on the 1960 Act because the defender was not an occupier of the locus on 1 April 2017 when L fell. Reference is made to the *Stair*; *Feely*. The defender had neither ownership nor factual control at that date. That is a matter of admission *per* the parties' joint minute of admissions and, in particular, paragraphs 6 – 13 of it.

The pursuer's common law case

[66] It is not the pursuer's case on Record that the grid is inherently dangerous. Had such a case been advanced it would have been necessary to instruct experts. The court heard no expert evidence. The question of whether the Dogrid's upward facing metal strips (as they were on 1 April 2017) are inherently unsafe is, in any event, a question of product liability. It is also not the pursuer's case on Record that the grid was installed with the wrong orientation in respect of the direction of traffic.

[67] The pursuer's remaining case is that the Dogrid was installed upside down. In support of that proposition the pursuer sought to lead the evidence of laypersons including L's father, her grandmother, her aunt, and a neighbour. Whilst the defender accepts that

those people have a genuine (albeit mistaken) belief that the Dogrids were installed the wrong way up, the opinion evidence of those individuals is inadmissible. They simply cannot assist the Court on the question of whether the Dogrids were installed upside down.

[68] Separately, their evidence that the grid was 'sharp' as it was installed on the day L fell (on which subject, and a number of others, they appeared to be in close agreement) is inherently subjective. It is, in any event, not relevant to the pursuer's case on Record, which is that the grid was installed 'upside down'.

[69] The evidence from the supplier and the installer of the Dogrids, supported by documentary productions including a patent: 6/12; and an information sheet about the product: 6/6; was that the Dogrids were installed the correct way up in 2011. They are installed this way up to discourage animals, including dogs, from getting into a play park. The following pieces of evidence are, in the defender's submission, key in respect of assessing whether the grids were installed the correct way up. The court was invited to accept them in their entirety.

Colin Griffin

[70] Colin Griffin is the Commercial Director of Kompan, a company who design and build playground equipment. He was previously a designer of playgrounds. Kompan supplied the dog grids installed in [address]. The only dog grid Kompan supply is the Enviraware Dogrid. The Dogrid has been installed in thousands of playgrounds.

[71] The dog grid that L fell on was an Enviraware Dogrid. This was a product Mr Griffin was very familiar with, although he had not inspected the Dogrid at [address].

[72] The Dogrid should be installed with what Mr Griffin referred to as its 'fins' facing up.

[73] The Dogrid, as it was installed at 1 April 2017, was installed the correct way up.

[74] The Dogrids as they are installed now, having been inverted by some of the residents of [address], are installed upside down.

[75] What he referred to as 'flanges' (the metal tabs seen in production 6/10/1) should be on the bottom of the Dogrids, 'flush with the concrete'. Their position on the top as presently located indicates that the Dogrids are presently installed upside down.

Steven Christie

[76] Steven Christie is a landscape gardener who has been installing play parks for 30 years. He installed the play park at [address], including the Dogrids there. He installed the Dogrids supplied to him.

[77] The Dogrid, as he installed it and as it was installed at 1 April 2017, was installed the correct way up. The Dogrids are now installed upside down.

[78] What he referred to as 'locating lugs' (the metal tabs seen in production 6/10/1) should be on the bottom of the Dogrids. Their function is to hold the Dogrids in place. Their position on the top as presently located indicates that the Dogrids are presently installed upside down.

[79] No evidence was led that complaints were made to the defender during its period of ownership or factual control of the locus (which, *per* paragraph 12 of the joint minute of admissions, ended on 28 June 2012). In the absence of complaints it is not understood how the defender could have known of an issue with the Dogrids, even if there was one (which the defender does not accept.)

[80] No evidence was led that the defender did not inspect the locus. In fact, the evidence of Steven Christie suggested that an inspection would have taken place after installation of

the Dogrids. In the defender's submission such an inspection of the locus would, in any event, simply have revealed Dogrids installed the correct way up.

[81] Finally, the pursuer has a fundamental difficulty with causation. The evidence of LF was that her son had fallen on the Dogrid and injured himself several times. She said that the worst of these injuries came *after* the residents had inverted the Dogrids. It is therefore not clear that, even if the grids had been installed in the position they are presently in, L would not have cut her knee.

Grounds of decision

Introduction

[82] Both counsel helpfully produced written submissions which are reproduced above. These were supplemented by oral submissions. Some other points were developed during the course of the oral submissions and they are dealt with below.

The scope of the pursuer's case as pled

[83] Although it is no longer insisted in, it is appropriate that I make some observations about the pursuer's case under the Occupiers Liability (Scotland) Act 1960 ("the 1960 Act").

[84] The factual basis as to the defender's capacity as an occupier was based on an averment that the play park was "owned and occupied" by the defender. At the commencement of the second day of the proof, counsel for the pursuer intimated that he was no longer insisting on that case.

[85] It is very difficult to comprehend the basis on which it was thought appropriate to bring, far less proceed to proof on, a case based on the 1960 Act. The question of ownership (and the existence and nature of associated burdens) was, as may be thought, a matter of

public record. It may be that the title was somewhat complicated, but in that case, appropriate legal advice could have been obtained. Instead, reliance appears to have been placed on an entirely misplaced belief among some of the pursuer's witnesses that as at the date of the accident, the defender was still the owner of the open area incorporating the play park.

[86] As far as 'occupation' and 'control' was concerned, it was clear from the evidence of the pursuer's own witnesses that the defender had long since ceased to have any direct involvement with the play area. The high water mark of the pursuer's case in that respect was that the defender had continued with ongoing developments in other areas of the overall development located some distance away. Quite why it was thought that that could amount to evidence of ongoing occupation and control of the open area at [address] is a mystery.

[87] In summary, evidence of ownership and/or occupation and control were fundamental to stating and making a case based on the 1960 Act. These points should have been properly investigated before a case based on the 1960 Act was brought. Instead, it appears to have been advanced on the strength of a wholly inadequate evidential basis, with the result that the defender was put to the time, trouble and expense of meeting a case which could never have succeeded and court time was needlessly expended to no purpose.

The common law case as pled

[88] The proposition ultimately advanced by the pursuer's counsel in respect of the remaining common law case can be summarised as follows: the grid was an inherently hazardous device which gave rise to a foreseeable risk of injury and should not have been installed. This did not depend on proving that it had been installed upside down.

[89] The defender's position was that that was not the case on Record and amounted to a radical change in the pursuer's case of which fair notice had not been given, giving rise to prejudice.

[90] The starting point for an examination of this issue is the terms of the pleadings.

[91] Before turning to examine that issue in more detail, I must repeat some observations made before in other cases about the manner in which written pleadings are framed.

[92] Statement of fact number 4 should set out briefly the pursuer's case. Here it runs to something close to 80 lines of text. Statements of claim of this length, when read along with the relevant answer thereto, make it very difficult for a reader to comprehend what the case is about and in particular which matters are in dispute and which are not. In addition to its length, statement 4 begins with the date of the accident, but then jumps back in time to things that must have happened earlier. It contains factual averments mixed up with averments of duty (which themselves appear in more than one place). In short, it follows no logical layout or order. These failures in drafting are calculated to defeat the purpose of written pleadings: see, generally, *Sheriff Court Practice*, McPhail, 3rd edition, Chapter 9.

[93] Moving on to the terms of the averments themselves, the question is whether these disclose a case based on responsibility for an inherently dangerous item.

[94] Having described L's journey from her grandmother's house to the play park and given a brief description of the general area including the entrances to the play park, the next averment reads:

> "At each of these entrance ways there was positioned on the ground a cattle grid type device which consisted, as it was then laid, of a series of sharp thin metal bars positioned parallel to the entrance way and which anyone seeking to enter the play area required to walk across. The grid had sharp thin metal bars on the underside. The grid hereinafter referred to had been installed upside down. The sharp metal bars do not protrude up when the grid is installed correctly."

[95] The significance of the sentence "The grid had sharp thin metal bars on the underside" is difficult to understand in the context of the case, but nothing was made of this. That apart, it is clear that the pursuer is offering to prove that the grid had been installed upside down: "The grid hereinafter referred to had been installed upside down"; and that it was this orientation which created the danger: "…a cattle grid type device which consisted, as it was then laid, of a series of sharp thin metal bars positioned parallel to the entrance way…" and "The sharp metal bars do not protrude up when the grid is installed correctly."

[96] There then follows some averments about some British Standards and the defender's putative ownership and occupation of the play area. This is followed by the averment that:

> "…each of the said cattle grid type devices at the entrance ways had been installed by (the defender) or upon their instruction…".

[97] There is then a description of the accident itself followed by this averment:

> "The cattle grid type devices as they were then positioned represented an obvious risk of injury particularly to children who were likely to be making their way into the play area."

[98] The phrase "…as they were then positioned…" is a clear reference to the grids supposed upside down orientation.

[99] There are then averments about reports of other accidents including a report to the defender to the effect that a report was made about "…the dangerous state of the grate (*sic*) including that it appeared to have been installed upside down".

[100] Further on, there is an averment that after the accident, local residents inverted the grids so that the bars were no longer on top.

[101] Taking all of that together, it is clear that a key factual assertion in this case is that the grid was dangerous *because* it had been installed upside down. Counsel for the pursuer argued that a failure to prove that the grid had been installed upside down did not mean

that the duty to avoid installing foreseeable hazards in the playpark fell away, which proposition could be tested by removing the averment: in his oral argument, counsel appeared to suggest that the Court could simply delete it.

[102] But it is not for the Court to amend parties' pleadings for them, so as to facilitate the making of arguments of which no notice has been given. If a fall-back position was to be argued, nothing could have been simpler from the point of view of pleading i.e. the introduction of an alternative or separate or *esto* argument to the effect that *if* the grid had been installed the right way up – contrary to what the pursuer offered to prove – then the pursuer proposed to aver and prove that it constituted a hazard nevertheless. No such averment appears, despite the specific averment on behalf of the defender that the grids had been installed the correct way up.

[103] In my view, this is no mere insignificant technicality. If the pursuer wanted to make an alternative case that the grid was a hazard even if it was the correct way up, that is a case which is factually and legally very different from one based on 'wrong installation'. I agree with counsel for the defender that different (or additional) evidence would have been likely to be required, such as the number and location of installations; the number and type of reported accidents; the relative effectiveness of other methods of preventing dogs entering play parks [e.g. gates]; and the relative number and type of accidents attributable to such alternative methods of security. Expert evidence may have been required.

[104] In short, this is a radical change in position, of which no adequate notice by the pursuer had been given and when the evidence had finished. As such, to allow it would be prejudicial to the defender and accordingly, I do not do so. On that basis alone, the defender is entitled to decree of absolvitor. Lest I am wrong in the foregoing, it is appropriate I give my views briefly on the common law case.

The common law case examined

Facts

[105] I begin with my views on the key factual disputes.

Was the grid a Dogrid?

[106] Counsel for the pursuer maintained that it had not been proved that the grid at [address] was a Dogrid. In my view, the evidence of Mr Griffin and Mr Christie taken along with the relevant documentation proved, as a matter of probability that it was. It is true that neither had seen the patent; Mr Griffin had not visited the locus; and there were differences between the design as shown in the documentation and that which was installed. But the latter were of a very minor nature. Both Mr Griffin and Mr Christie were familiar with the type of product and no contrary evidence was led for the pursuer.

Was it installed 'the right way up'?

[107] None of the pursuer's witnesses claimed any technical knowledge about the installation of this type of grid. Their belief that it was 'the wrong way up' seems to have been based on (i) the occurrence of some falls and (ii) an assumption that the twisted nature of the rods was in fact meant to provide a tread. Unfortunately, they were wrong. I accepted the evidence from Mr Griffin and Mr Christie that the grids at [address], as originally installed by the latter were the right way up. Again, both Mr Griffin and Mr Christie were familiar with the type of product. Mr Griffin said that grids like this had been installed in 'thousands of playgrounds'. Mr Christie had been installing play parks for 30 years and said that he had installed these grids correctly.

[108] Some attempt was made to place reliance on other grids in the general locality which appeared to have the bars at the underside, but there was no evidence as to (i) when or by whom they had been installed; (ii) which orientation they had been in when installed; or (iii) if – and if so when and in what circumstances – they had been turned over.

[109] No other contrary evidence was led for the pursuer. Accordingly, I was satisfied that the grids were installed the correct way up in 2011 and were still in that state when L fell.

Accident circumstances

[110] I was invited to hold that the accident circumstances were agreed, by reference to the joint minute. But while it is agreed that L fell and cut her knee because it collided with the metal bars, we do not know the mechanism of the fall. Did she slip? Did she trip? This would be relevant to an evaluation of risk (and hence fault) in the context of the mechanism of other accidents.

Nature and extent of hazard

[111] The pursuer's witnesses did say the edges of the bars were sharp, but not like 'a knife edge'. Beyond that, the word 'sharp' is a subjective term. On the other hand, it is not difficult to see that if a person was to fall hard onto a bar – perhaps particularly when there is forward motion – that would be likely to cause some injury. But that is merely the beginning and not the end of the discussion about duty and breach thereof.

The legal propositions underlying proof of fault

[112] To establish liability for negligently caused harm requires proof (i) that a duty of care existed; (ii) the pursuer was in breach of that duty; and (iii) the harm was caused by the

breach of duty. Whether or not a duty of care exists depends on analysing questions of foreseeability of harm and proximity.

Duty of care

[113] In *Robinson*, Lord Reed in a review of the various authorities had this to say at paragraph 21:

> *"Caparo*
>
> 21 The proposition that there is a *Caparo* test which applies to all claims in the modern law of negligence, and that in consequence the court will only impose a duty of care where it considers it fair, just and reasonable to do so on the particular facts, is mistaken. As Lord Toulson JSC pointed out in his landmark judgment in *Michael*…para 106, that understanding of the case mistakes the whole point of the *Caparo* case, which was to repudiate the idea that there is a single test which can be applied in all cases in order to determine whether a duty of care exists, and instead to adopt an approach based, in the manner characteristic of the common law, on precedent, and on the development of the law incrementally and by analogy with established authorities…
>
> 24 In the *Caparo* case… Lord Bridge of Harwich noted that, since the *Anns* case, a series of decisions of the Privy Council and the House of Lords, notably in judgments and speeches delivered by Lord Keith of Kinkel (including his speech in *Hill*…), had emphasised "the inability of any single general principle to provide a practical test which can be applied to every situation to determine whether a duty of care is owed and, if so, what is its scope": p 617. It is ironic that the immediately following passage in Lord Bridge's speech has been treated as laying down such a test, despite, as Lord Toulson JSC remarked in *Michael's* case, the pains which he took, at pp 617–618, to make clear that it was not intended to be any such thing:
>
> > 'What emerges [from the post-*Anns* decisions] is that, in addition to the foreseeability of damage, necessary ingredients in any situation giving rise to a duty of care are that there should exist between the party owing the duty and the party to whom it is owed a relationship characterised by the law as one of 'proximity' or 'neighbourhood' and that the situation should be one in which the court considers it fair, just and reasonable that the law should impose a duty of a given scope upon the one party for the benefit of the other. But it is implicit in the passages referred to that *the concepts of proximity and fairness embodied in these additional ingredients are not susceptible of any such precise definition as would be necessary to give them utility as practical tests, but amount in effect to little more than convenient labels to attach to the features of different specific situations which, on a detailed examination of all the circumstances,*

> *the law recognises pragmatically as giving rise to a duty of care of a given scope*.' (Emphasis added.)

25 Lord Bridge, at p 618, immediately went on to adopt an incremental approach, based on the use of established authorities to provide guidance as to how novel questions should be decided:

> 'I think the law has now moved in the direction of attaching greater significance to the more traditional categorisation of distinct and recognisable situations as guides to the existence, the scope and the limits of the varied duties of care which the law imposes. We must now, I think, recognise the wisdom of the words of Brennan J in the High Court of Australia in *Sutherland Shire Council*…, 43–44, where he said:
>
> > "It is preferable, in my view, that the law should develop novel categories of negligence incrementally and by analogy with established categories …"'"

It was that approach, and not a supposed tripartite test, which Lord Bridge then proceeded to apply to the facts before him.

26 Applying the approach adopted in the *Caparo* case, there are many situations in which it has been clearly established that a duty of care is or is not owed: for example, by motorists to other road users, by manufacturers to consumers, by employers to their employees, and by doctors to their patients. As Lord Browne-Wilkinson explained in *Barrett*… 559–560:

> 'Once the decision is taken that, say, company auditors though liable to shareholders for negligent auditing are not liable to those proposing to invest in the company … that decision will apply to all future cases of the same kind.'

Where the existence or non-existence of a duty of care has been established, a consideration of justice and reasonableness forms part of the basis on which the law has arrived at the relevant principles. It is therefore unnecessary and inappropriate to reconsider whether the existence of the duty is fair, just and reasonable (subject to the possibility that this court may be invited to depart from an established line of authority). Nor, a fortiori, can justice and reasonableness constitute a basis for discarding established principles and deciding each case according to what the court may regard as its broader merits. Such an approach would be a recipe for inconsistency and uncertainty, as Hobhouse LJ recognised in Perrett… 90–91:

> 'It is a truism to say that any case must be decided taking into account the circumstances of the case, but where those circumstances comply with established categories of liability, a defendant should not be allowed to seek to escape from liability by appealing to some vaguer concept of justice or fairness; the law cannot be re-made for every case. Indeed, the previous

> authorities have by necessary implication held that it is fair, just and reasonable that the plaintiff should recover in the situations falling within the principles they have applied.'

27 It is normally only in a novel type of case, where established principles do not provide an answer, that the courts need to go beyond those principles in order to decide whether a duty of care should be recognised. Following the *Caparo* case, the characteristic approach of the common law in such situations is to develop incrementally and by analogy with established authority. The drawing of an analogy depends on identifying the legally significant features of the situations with which the earlier authorities were concerned. The courts also have to exercise judgement when deciding whether a duty of care should be recognised in a novel type of case. It is the exercise of judgement in those circumstances that involves consideration of what is "fair, just and reasonable". As Lord Millett observed in *McFarlane*… 108, the court is concerned to maintain the coherence of the law and the avoidance of inappropriate distinctions if injustice is to be avoided in other cases. But it is also

> 'engaged in a search for justice, and this demands that the dispute be resolved in a way which is fair and reasonable and accords with ordinary notions of what is fit and proper'."[2]

[114] The basis on which I should approach the present case – either as one said to be covered by established principle (whether by reference to precedent or analogy) or raising novel issues – was not fully addressed, counsel for the pursuer only referencing the neighbourhood principle in *Donoghue* and the "*Caparo* test"; and giving *Johnson* as an example.

[115] In my view, both *Donoghue* and *Johnson* are distinguishable on their facts. In *Donoghue*, no other party had responsibility for or the opportunity to intromit with the contents of the bottle of ginger beer before it was consumed; and in *Johnson*, the defendants were using the premises in question.

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[2] For an interesting discussion of the *Robinson* decision, see *'Negligence and the Duty of Care, the Demise of the Caparo test; and Police Immunity revisited: Robinson v Chief Constable of West Yorkshire*', Cameron, Edinburgh LR Vol 23, pp 82-88; and for a recent example of the approach to be taken, see *Community Solution Services Ltd* v *First Scottish Searching Services*, [2019] SAC (Civ) 4.

Foreseeability

[116] I accept that a hypothetical "reasonable" party who was responsible for the installation of a play park would reasonably foresee that a user of the play park might be harmed if the installation was in some way unsafe.

Proximity

[117] For there to be a duty of care, there must also be proximity, comprising some kind of pre-existing relationship. In my view, in this case, it is very doubtful that there could be said to be such a pre-existing relationship between the defender and L. Counsel for the pursuer submitted that L was invited to use the play park. But how can it be said that she was invited by the defender to do so, given that they had relinquished ownership and occupation years before the accident? In addition, to hold that there was a relationship of proximity would be to recognise a duty of care (on former proprietors of certain premises or property) owed for all time to any person who happened to enter thereon. In other words, the creation of a duty to an indeterminate class.

[118] Accordingly, my view is that there is a lack of proximity and hence no duty of care in the circumstances.

'Fair, just and reasonable'

[119] Even if I am incorrect on the issue of proximity, as already noted, that would create a duty of care on former proprietors of certain premises or property, in respect of the condition thereof, owed for all time to any person who happened to enter thereon.

[120] That would create potential 'long-tail' liabilities in respect of the condition of heritable property and the pertinents thereof to a potentially very large number of people.

[121] Where the law already imposes by statute a duty related to dangers arising from the condition of property on the occupiers thereof by means of section the 1960 Act, it is difficult to see why it would be fair, just or reasonable, to impose a separate duty of care on former owners/occupiers.

Breach of duty

The duties desiderated

[122] Assuming for the sake of argument that the defender owed a duty of care to L, what are the particular duties specified in this case?

[123] The duties desiderated as disclosed in the pleadings appear to be:

a. (instructing) removal; and/or

b. otherwise reducing the risk of injury from them; and/or

c. inspection; and/or

d. cordoning off.

[124] Before examining each of these in turn, it is necessary to say a little more about the evidence as to the general circumstances and the defender's state of knowledge.

[125] In this case, the defender does not attempt to delegate legal responsibility to the contractor – but neither is there any suggestion that The Play Park was not a legitimate and suitable contractor.

[126] The evidence of Mr Griffin was that grids of this type have been installed in thousands of play parks. That was not contradicted or challenged, but even if it is exaggerated, it suggests a commonly used item.

[127] Mr Christie has been installing play parks for 30 years. He was plainly familiar with this type of product and saw nothing unusual in its installation and [address].

[128] Although the pursuers' witnesses did describe the edge of the bars as sharp, it was not blade like. The sharpness came from the right angle. But there are hard edges of objects all around which could cause injury if a person fell against them. Inside there are things like desks and tables. On, or adjacent to, pavements, there are kerbs and the edges of walls and fences; metal waste bins and the edges of drain covers. In playparks, there are fences, slides and swings. In other words, there are potentially injurious items all around – and there is no duty to create a risk-free environment.

[129] The bars on the grids were, although of narrow construction, relatively close together. They were installed for a legitimate purpose.

[130] If the pursuer wished to make a case that the grids were a hazardous – and therefore an unsuitable item which should not have been installed – there would need to have been averred and proved that that was or should have been apparent to the defender at the time of installation. The mere occurrence of an accident causing injury (even serious injury) cannot give rise to the conclusion that the grid presented an unacceptable risk. If the pursuer's position was that the social utility from using Dogrids (as opposed to, say, gates) did not outweigh any associated risks, then the onus was on him to aver and prove that.

[131] In any event, the suggestion that the hazardous nature of the grids would have been evident on inspection is not borne out by the evidence. The tenor of the evidence is that the local residents reached that conclusion over time, as a result of several incidents, rather than something which was considered to be so dangerous on first examination that immediate action was required.

[132] It is clear that there had been some accidents between June 2012 and 1 April 2017. But in the absence of comparable information about the number of accidents which might typically occur in similar locations over a similar period, how am I to conclude that the risk

of such was higher than normal, thereby creating an unacceptable risk? The absence of information about the precise mechanism of L's accident makes a like for like comparison between her fall and other accidents even more difficult. For what it is worth, the total number of previous accidents – a handful – seems not to be particularly striking for a busy play park over a period of nearly 5 years. Furthermore, it appears that only one accident was ever reported to the defender prior to L's accident.

[133] The defender was not the owner of the play park and had no right, title or obligation in relation thereto. There was no suggestion that the defender had assumed any ongoing obligations of any type in relation to the play area – quite the contrary.

[134] Returning then to the duties, I understood counsel for the pursuer to accept that the desiderated duties arose at the time of installation. (If that is correct, then the occurrence of any accidents later becomes irrelevant.)

[135] Assuming that is correct, and the defender had inspected the playpark, it would have found properly installed Dogrids. For the reasons set out above, I do not accept that a visual inspection alone would (or should) have led them to the conclusion that they created a hazard. Accordingly, even if there was a duty to inspect, no duty to (instruct) removal; otherwise reducing the risk of injury from them (whatever that may mean); or cordon off would have arisen. The inspection would have disclosed properly installed Dogrids.

[136] Once the defender had divested itself of ownership and occupation of the play park, I do not see how any of the desiderated duties could arise at all, even once they were made aware of an accident in about 2015.

Causation

[137] The pursuer has not proved that L fell due to any fault or negligence on the part of the defender.

Disposal

[138] In these circumstances, I shall grant decree of absolvitor. All questions of expenses are reserved meantime.