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

[2021] SC EDIN 33

PIC-PN2323/19

JUDGMENT OF SHERIFF K CAMPBELL QC

in the cause

CLARE SIMPSON

Pursuer

against

PRET A MANGER (EUROPE) LTD

Defender

Pursuer: C Smith, Advocate, Digby Brown, Solicitors, Dundee
Defender: J Hastie, Advocate, DWF, Solicitors, Glasgow

Edinburgh, 30 April 2021

Findings in Fact

1. The pursuer was employed by the defender in August 2018.

2. The pursuer principally works in the kitchen at the defender's café at 107-109 Market Street, St Andrews. The pursuer tends to work on shifts from 06.00-12.00 or 06.00-14.00.

3. The defender's café in St Andrews is on two floors. On the street level, is an area where customers walk in directly from the street, with tills and an area with fridges. On the same level, customers can walk through to a seated café area. On the first floor is the kitchen were the food is prepared. There is also an office and a staff room. Access to the first floor is via a stairway located at the back of the seated café area.

4. Between the café and the stairway is a firedoor, which has a thin vertical window running most of its height. There is a further firedoor between the kitchen and the landing at the top of the stairs.

5. There is lock on the door from the café to the stairway, which is operated by a key pad on the café side of the door. On the stairway side of the door is a knob that is turned to open the door when it is locked.

6. The defender gave instructions that the door from the stairway to the café was to be locked after 15.00 each day. There was no other formal policy or instruction about the position prior to 15.00.

7. The door was normally unlocked prior to 15.00 each day.

8. The door was occasionally locked in the earlier part of the day, before 15.00.

9. The pursuer was working on 13 August 2018. Shortly before 09.40, the pursuer made her way from the kitchen area to the ground floor. She passed through the fire door, walked through the seated area of the café, to the counter area at the front of the café.

10. The pursuer did not complete her shift on 13 August 2018. She worked on 14 and 15 August. On 16 August 2018, the pursuer attended her GP, and was signed off, work initially until 27 August 2018.

11. The pursuer was signed off work for 29 weeks until January 2019. She began a phased return to work in early February 2019, gradually increasing her weekly hours. She was back to a normal work pattern by March 2019.

12. On 3 April 2019, the pursuer experienced a migraine. She was admitted to Ninewells Hospital, Dundee, overnight. She was signed off work until 6 June 2019.

13. In late September 2018, the pursuer went on holiday to Majorca with her cousin Angela Moffat, and Ms Moffat's infant son. The holiday lasted between 10-14 days. The precise dates are uncertain. The pursuer felt unwell for much of the holiday.

14. The holiday was all-inclusive. The pursuer offered to contribute to the cost. Angela Moffat declined that offer. Apart from use of a water park, no activities had been pre-booked.

Findings in Fact and Law

1. The pursuer has not suffered loss, injury and damage as a result of the fault and negligence of the defender.

NOTE

Introduction

[1] In this action the pursuer claims damages for injuries she says she suffered in an accident in the course of working for the defender at its café in St Andrews on 13 August 2018. The defender disputes that an accident occurred. There is also a dispute between parties about an aspect of the pursuer's medical condition, with consequential argument about damages.

[2] I heard proof in this case by video conference on 2-5 February and 8 March 2021.

[3] Parties had helpfully agreed a Joint Minute, number 24 of process. That recorded agreement about the provenance of medical records (5/3, 5/4, 5/5, 5/7), absence records (6/2), payroll records (6/1), accident records (6/3), safety records (6/4 & 6/5), CCTV footage taken from cameras 5, 9 and 14 within the defender's cafe on 13 August 2018 (6/6), and a number

of photographs (5/6, 5/8, and 6/9). The Joint Minute also contained agreement about some aspects of quantum, to which I return below.

Witnesses

[4] In addition to her own evidence, the pursuer led evidence from Nicola Lawson, Dr John Kennedy, Danielle McLeod, Angela Moffat, Clare McDonald, Iain McArthur and Dr Myles Connor. The defender led evidence from Marcin Skawski and Dr Richard Davenport.

The pursuer

[5] Clare Simpson, the pursuer, was 44 at the time of the proof. She has worked for the defender in various capacities for almost six years. She is employed at the defender's café in St Andrews. She works in the kitchen, and has done so for most of the time she has been employed by the defender. She tends to work on shifts from 06.00-12.00 or 06.00-14.00.

[6] In the course of a shift, the pursuer, and other kitchen staff, may have to go downstairs to the café level for one of a number of reasons. First, to take food down to the refrigerated displays in the café. The second reason would be to answer a call for assistance on the shopfloor. Staff at the till had a buzzer to call for assistance from the kitchen staff if the counter area was busy with customers, or if help was needed clearing dishes from the seated area of the café. The pursuer said that if the buzzer went in the kitchen, you had to get downstairs quickly. That was, she said, because each café was scored by the defender on how quickly customers are served. She said kitchen staff had to drop what they were doing and go straight away. The third reason for going downstairs would be to cover breaks for staff working on the tills.

[7] 5/8/1 is a photograph of the door to the seated area of the café taken from the stairway side. It shows a notice attached to the door. The pursuer said this had been put up following her accident, and said that the door was to be closed with the lock 3-5pm each day. She said the defender's policy was the door was to be open except between 3-5pm.

[8] On 13 August 2018, the pursuer was working on a shift which started at 06.00. As usual, she was working in the kitchen. Shortly before 09.40, the pursuer went downstairs. When first asked in examination in chief, she was unable to remember the reason why she went downstairs. She said that what she remembered was really what was seen on the CCTV recording (6/6). In examination in chief, when first asked, the pursuer had no memory of going down the stairs. Her next memory was of being in the till area, holding her head and being offered an ice-pack by a colleague. She thought that colleagues called Bruno and Carys had been at the till area. She recalled sitting in the staff room on the first floor with a bag of frozen peas to her head. She had a "cracking" headache and felt really sick. She was unable to remember anything else. She did not remember finishing her shift. She did not remember going home. She remembered being at home, lying on her bed feeling "horrendous".

[9] The pursuer recalled working the two days following the accident. She then went to her GP because she had been feeling sick in the car, and she never usually got travel sickness. She got headaches from bright lights and had double vision. She could not remember things and could not concentrate. She felt she was "ratty" with her daughter. Her GP had found bruising on the side of her head. He had said it sounded like concussion. He had signed her off work straight away. The pursuer's GP had referred her to an occupational therapist, Clare McDonald. She had given the pursuer workbooks to help improve her concentration. There had been day targets for activities. The pursuer had to

write down how she was feeling. The pursuer had not felt she was getting better at first, but once into the routine, this did help. Her goals had been to get back to driving and to get back to work. She did not like not being at work. The pursuer was off work for 29 weeks. She had a phased return to work from early February, gradually increasing her weekly hours.

[10] The pursuer had gone on holiday with her cousin Angela Moffat in late September/early October 2018. It had not been planned and had been a surprise. Her cousin had booked the holiday with her partner and son, and had then split up with her partner. She had asked the pursuer to go with her. The holiday was to Tenerife or Majorca. The pursuer had spoken to Clare McDonald before accepting. Ms McDonald said it might be beneficial to get some time away. In fact, the pursuer had spent most of the time in the hotel room. She was still getting headaches. She was not able to walk far, though she had spent some days by the pool.

[11] In cross-examination, the pursuer said she had no memory of going downstairs, but did remember hitting her head on the door. She said her recollection was fuzzy before that and fuzzy after until the point when she was in the staff-room. She said that she had recalled the information in the accident report at the time, but months and years later she could not recall. She said that Clare McDonald had told her that would happen. Pressed on whether she could recall giving an account of the accident to her solicitors, the pursuer said she could recall a conversation but not what she had said. It was, she said, two or two and a half years ago. It was put to the pursuer that her case on record was that her head collided with a metal lock, and her response was that she remembered that was what had happened. She could not remember before or after that.

[12] The pursuer agreed she had said she hit her right eyebrow. She said her feet had been at floor level at the door. She said she was not at full height because she was bent over checking she had her till card and pen. She now remembered using her left hand on the door. Her head was turned to the left while she was looking for her pen and card. It was put to the pursuer that she had been asked in examination in chief how the accident happened, and she could not remember. The pursuer said that she remembered hitting her head, and had said that. She said that the questions in chief had been about what happened in between. She did not remember why she had been called downstairs. She had pushed the door with her left hand while hunched over checking her pocket; that was when she hit the door. She said a lot of pieces had fallen into place because of what she had seen and heard in the course of this case, but denied that the CCTV footage was what has given her memory of events. With reference to the photographs of the lock on the door, the pursuer accepted she would have had to be bent over quite a bit to come to the level of the lock. She thought that from getting to the bottom step to going through the door took 5-10 seconds. Later in her evidence, she denied that, but accepted that if the transcript recorded her saying that, she would agree.

[13] It was put to the pursuer that she had told others in the past that she was coming down the stairs at pace. She said she probably did, that was what she had remembered then, but did not remember now. She said flashes come or go about things that happened. She said that was not unknown with post-concussion syndrome. The pursuer was shown the footage from camera 9 in 6/6. It was put to her it did not appear that she stopped behind the door for any period of time. She said she did not stop – the bell had gone and she had to get downstairs. She said that did not stop to push the door, but walked with her arm out. There was no delay – the rest of her body had not caught up with her head. She did not

accept her movement through the door was seamless; she said the door would have opened more quickly if it was unlocked because she has a long reach. She thought the CCTV showed her colliding with the door.

[14] It was put to the pursuer she told Dr Connor that Danielle McLeod took her home. She said she did not remember Danielle taking her home. She said that if Dr Connor was the first consultant she saw in connection with this case, she probably remembered more then than now. She said Clare McDonald had told her that would be the case.

[15] On the matter of the holiday with Angela Moffat, the pursuer accepted she could not remember the dates, and said she must have asked her cousin to pass on the dates to her solicitor. The pursuer said she had told her GP that she was going to Majorca, she said she wanted to be sure whether out would be safe and how to take medication. It was put to her that Dr Kennedy had not referred to this in his note of her contact on 25 September 2018; the pursuer said going on holiday was not pertinent to the sick note she was there to discuss, she was a brain-injured person, and her doctor and manager knew that. She said that she had told Dr Kennedy about the trip when she attended for review on 28 September 2018. She said he had said it was a good idea. She said the absence of a note in the GP records was because the holiday was nothing to do with her medical records.

[16] The pursuer said she would not have told Dr Brogan about the holiday when she saw her on 14 September 2018 because she had only seen her once, and she had not decided if she was going to go on holiday at that point. She was not sure whether she had spoken to Clare McDonald about the holiday in person or on the phone. Pressed further, the pursuer said that she could not recall whether she had spoken to Clare McDonald or Dr Kennedy, but was adamant that she had spoken to someone. She could not put things in sequence,

and was not sure who she had seen in August and who in September. She had not spoken to Clare McDonald about the holiday when she saw her in October.

Nicola Lawson

[17] Nicola Lawson has worked at the defender's café in St Andrews for three years. She works in the kitchen, and was working there on 13 August 2018. She confirmed there was a lock on the door to and from the stairway. Her recollection was the lock was not locked regularly. She thought there might have been a policy that the door was to be locked at certain times, but she could not recall what those times might be. Ms Lawson said she had never come down the stairs and found the door locked. She had no specific recollection of the door being locked until the pursuer's accident. She suggested the manager might have locked the door, and the pursuer had taken trays of food down the stairs and had managed to walk into the lock. She accepted that her recollection about that might be wrong, and the pursuer might have gone down to help at the counter.

[18] Ms Lawson was shown the CCTV footage (6/6). Having seen that, she thought the pursuer was going down to help at the counter, because she was not carrying trays of food. Viewing the footage of the pursuer returning to the kitchen, Ms Lawson thought nothing had been said at that point. Ms Lawson had found out what happened later in the day. The pursuer had told her that she had got to the door to the café, did not realise it was locked and hit her head above her eye. The pursuer had said she was dizzy and had a sore head. The pursuer had tried to carry on working, but had been told to go home.

[19] In cross-examination, Ms Lawson could not recall if the bell had sounded in the kitchen requesting help at the till. She said that another reason why the pursuer might have gone downstairs was that she was on her break, and was going to get a coffee. She agreed

that the pursuer would not rush on her way to do that, and that it was possible that is what the CCTV showed. Ms Lawson said that on the CCTV, the door to the café did not look to be locked. She said that the pursuer looked like she came through the door normally; she did not hesitate in any way.

Danielle McLeod

[20] Danielle McLeod formerly worked for the defender at its St Andrews café. She worked there in 2018, as a trainer. She confirmed 5/6/4 showed the keypad on the café side of the door to the stairway to the kitchen. She thought the lock in 5/6/3 looked a bit different from how she recalled it, but confirmed that it was the door. The lock was used in the afternoons. It was easy to open from the kitchen side, you just twist the knob. From the café side, you put the code in. It was possible to keep the door unlocked, there was a latch operated by turning the knob till it clicked. Ms McLeod thought there was policy for the door to be locked after 14.00 or 15.00.

[21] In cross-examination, Ms McLeod confirmed that she was not working on 13 August 2018. She could not have offered to drive the pursuer home for that reason, and also because she does not drive. Ms McLeod was shown the CCTV footage (6/6). She agreed that the pursuer's passage through the door into the café appeared unhindered.

Angela Moffat

[22] Angela Moffat is a data protection officer. She does not work for the defender. She is the pursuer's cousin. She gave evidence about a holiday she and the pursuer took together in Majorca some weeks after 13 August 2018. Ms Moffat had not originally planned to go on holiday with the pursuer, but with her then partner and her son. Unfortunately

they had separated, and as the holiday had been paid for, Ms Moffat offered the pursuer the opportunity to come instead. She was not certain, but thought that the pursuer had had her accident by the point the offer was made. The pursuer did not accept straight away because she wanted to speak to her doctor or consultant. Ms Moffat thought the holiday had been from 28 September 2018 for two weeks. In cross-examination, Ms Moffat confirmed that the pursuer had offered to contribute to the cost, but Ms Moffat had declined that offer.
Ms Moffat was not able to give the exact dates of the trip, but was sure it was from late September- early October 2018.

Dr John Kennedy

[23] Dr John Kennedy is the pursuer's GP. The medical records from Pitcairn Practice, Leuchars relating to the pursuer (5/3 and 5/7) are the subject of agreement in the Joint Minute. Dr Kennedy spoke to a number of entries in the course of his evidence.

[24] Dr Kennedy recalled the pursuer consulting him on 16 August 2018, because she was one of a fairly small sub-group of patients with head injuries and sequelae from them. He recalled the discussion and consideration of onward referrals. Dr Kennedy had noted the pursuer presented with sensitivity to light in her right eye, all day headache, afternoon tiredness, feeling emotional, some double vision. He noted her account as having run down stairs towards a heavy fire door, normally unlocked, straight into the door and struck her head. On examination, he had noted a small supraorbital bruise, slight tenderness of the inferior orbit, but no deformity. The pursuer's eye movements were normal. No eye injury was detected. He had concluded the pursuer had suffered a head injury, with concussion. He had noted that at this stage because it was difficult to predict who will develop sequelae, and who will recover in 2-3 weeks. This was a marker for follow-up.

[25] The pursuer had attended again on 20 August and 24 August. Dr Kennedy saw her on the latter occasion. She had described memory problems. Dr Kennedy was at that point becoming concerned the pursuer's condition had not settled, and that she might have post-concussion syndrome. He then referred the pursuer to a specialist head injury service. Dr Kennedy saw the pursuer next on 7 September 2018. He had noted she experienced nausea with movement; memory impairment; her sleep pattern had improved; her headache had improved. She had been examined by an optician, and required glasses. He had signed her off work until 28 September.

[26] On 25 September 2018, Dr Kennedy's colleague Dr Mitchell had extended the pursuer's sick line till 12 October 2018. Dr Kennedy thought that had been done following a phone call. Dr Kennedy saw the pursuer on 28 September. She had been seen by the brain injury team, who had concluded she had post-concussion syndrome. A CT scan had been requested, and rehab treatment commenced. The pursuer's next attendance at the surgery was on 12 October, when she had been seen by a locum GP. Her sick line was extended by a further two weeks.

[27] Dr Kennedy was asked if there was anything in those consultations which raised a "red flag" about the truthfulness of the pursuer's account. He said there was not. The pursuer's presentation resounded of head injury. At no time had he seen anything inconsistent with the reported condition. Dr Kennedy had no recollection of the pursuer mentioning that she was going on holiday or had been on holiday to Majorca at the end of September 2018. He had not noted anything at the time of her attendance on 28 September. If she had mentioned it, he would probably have noted it, as he considered that sort of information useful in building a picture of the patient's life.

[28] In cross-examination, Dr Kennedy said the pursuer had described coming downstairs in a hurry, and was expecting the door to be unlocked because it was normally unlocked. Dr Kennedy said that the information he had about the accident was that the pursuer was running down stairs and hit a door. He agreed that had the flavour of an uncontrolled descent. He understood she had hit her head off the door. On 16 August 2018, the pursuer had been able to remember coming down the stairs. She had described how the accident happened. She had not said at any point that she could not remember what had happened on the day in question.

Clare McDonald

[29] Clare McDonald is an occupational therapist. She has been qualified for more than 20 years. She has worked in the Fife area for 14 years, and works in a neuro-rehabilitation service for adults aged 16-65 based at Cameron Hospital, Windygates, Fife. She recalled the pursuer as a patient in that service. The pursuer had first been seen by Dr Jennifer Brogan, who was then a consultant in rehabilitation medicine in the same service as Ms McDonald on 14 September 2018. That followed a GP referral. From the Cameron Hospital records (6/8), it appeared that on 24 September 2018, Ms McDonald had sent the pursuer a clinic appointment for 8 October 2018. The pursuer had contacted the clinic to re-schedule and on 8 October, a letter had been sent with an appointment for 24 October. That was to be a joint appointment with Ms McDonald, and her colleague Tracy Fowler, an acquired brain injury outreach nurse, both of whom would be involved in management of the pursuer's condition.

[30] The appointment on 24 October 2018 was the first time Ms McDonald had met or spoken to the pursuer. At this initial appointment, the aim was to identify the pursuer's

symptoms, identify a short-term fix, and make a longer term plan for rehabilitation. The pursuer reported fatigue, and Ms McDonald's immediate aim was to help the pursuer put something in place to manage that. That was the most significant issue the pursuer reported at that time. The pursuer was asked to complete a questionnaire about her activities each hour over a two week period, and her rate of fatigue over the same period.

[31] Ms McDonald next saw the pursuer on 8 November 2018. The pursuer had completed the activity questionnaire. The next appointment was on 22 November. The pursuer had followed advice about managing her time and preparing better for sleep. She was feeling less fatigued and had fewer headaches, and those she had were less severe. The next appointment was on 6 December. The pursuer reported increased fatigue ("fatigue ++"). She had travelled to Dundee for an appointment with DWP the previous day. That was not uncommon where someone with a brain injury did more than they had been doing recently. Ms McDonald's advice had been to set goals and targets. The pursuer had two big goals: returning to work and returning to driving.

[32] The pursuer had attended again on 11 December 2018. She reported that her fatigue had generally improved, but increased as a result of a stressful matter with her daughter. By the next appointment on 21 December, the pursuer told Ms McDonald she felt confident about returning to work. Ms McDonald agreed to discuss that and a plan for returning to work at the next meeting. In her view, the pursuer was not ready to return to work at that point, but was ready to make a plan and discuss that with her employer within 3-4 weeks.

[33] The pursuer had not attended the next appointment, but spoke to Ms McDonald by phone on 7 January 2019. She had tried to contact the clinic to re-schedule as she had another appointment. Ms McDonald and the pursuer discussed the return to work plan. The pursuer's manager had agreed to meet with her and Ms McDonald, and a date for that

was fixed for 16 January. The pursuer had called again the same day to say there had been a change of plan, and she was now meeting with her manager and another manager for a health review meeting on 22 January. The pursuer had not attended follow up appointments. Ms McDonald had tried to contact the pursuer by phone on 30 January, 5 and 25 February 2019. She had not been able to speak to the pursuer, but had left voicemail messages. Ms McDonald said that patients may feel that they have moved on and do not require further therapeutic intervention.

[34] The pursuer had phoned Ms McDonald on 8 April 2019. She reported she had been experiencing headaches for two days, with vomiting. She had been to her GP, who had referred her to A&E. As this was medical matter, particularly as the pursuer was reporting her symptoms continuing although she was taking medication, Ms McDonald had suggested the pursuer contact her GP again. Ms McDonald's last contact with the pursuer was on 10 May 2019, when the pursuer phoned the clinic. She was continuing to experience headache and fatigue. Ms McDonald had offered the pursuer an appointment, but she felt able to manage with advice on the phone. She was receiving pain medication from her GP. Returning to work remained a key goal for the pursuer. Ms McDonald never had the impression the pursuer did not want to do so. She has seen people who are not motivated, and the pursuer did not fit into that category.

[35] It was put to Ms McDonald that it might be suggested the pursuer was not injured in August 2018, and had not hit her head. She said that she could only go on what the pursuer reported. Patients who were "at it" reported fatigue and cognitive impairment in different ways. In her opinion, the pursuer was experiencing post-concussion symptoms consistent with the injury she reported. In cross-examination, Ms McDonald confirmed that Dr Brogan's post-clinic letter of 14 September 2018 noted amongst other things, that the

pursuer had not lost consciousness and the history did not suggest any period of post-traumatic amnesia.

Iain McArthur

[36] Iain McArthur is a specialist in audio and video forensics. He began his career as a sound and recording engineer, and subsequently worked in research and development for a manufacturer of recording industry technology. Thereafter he trained with Intergraph Public Safety, a video enhancement software company in the USA. He has undertaken audio and video analysis work for many police forces and agencies around the UK.

[37] He was instructed to examine the CCTV recording (6/6) in this case. His report of 24 November 2020 is produced as 5/9 of process. In the preparation of the report, he was provided with the CCTV footage and a letter of instruction; he was not provided with any other material from process. According to Mr McArthur's report (section (i)), the tasks which he was instructed to undertake were creation of enhanced imagery of the pursuer passing through the door to the café, and "to analyse the enhanced imagery of [the pursuer] passing through the doorway and ascertain whether or not her head is observed to make contact with the door."

[38] Mr McArthur's report contains two series of images. The first, overprinted "frame count" plus a number, are stills from the original CCTV footage from the camera marked "cam 9". In addition to the legend "frame count", they feature the original time clock to the lower right, and an additional counter in a black box at the lower centre of the image. The latter is divided thus: hours, minutes, seconds, frames. The frame counter is numbered 0-25, and reflects the UK television standard frame rate of 25 frames per second. The second set of images in Mr McArthur's report comprises a sequence of magnified images focussed on

the door from the stairway into the seated area of the café. Again the images are overlaid with legend: "magnified image" plus a number, and feature an added time clock in a black box at the bottom centre of the image. Mr McArthur said the CCTV footage contained about 3 or 4 images per second. He compared that with a frame rate for television in the UK of 25 images per second. That difference explained why some of the movement looked jumpy.

[39] In Mr McArthur's view, while the magnified images helped to a degree, it was not possible to see the pursuer's head behind the door because it was obscured by the door. In Mr McArthur's opinion, it was possible to identify where the pursuer's hand was using the magnified images. In his opinion, the pursuer's right hand was on the lock mechanism in magnified images 6-10. On magnified image 3, her hand was about half way up, and it could be her left hand pushing against the door, or approaching the door.

[40] Mr McArthur was asked about magnified images 12 and 13 in examination in chief and in cross examination. He explained that CCTV systems generally had a range of frame rates, and there might be a range of reasons for that. The quality of the images in 6/6 is good but the frame rate is low. In cross-examination, Mr McArthur eventually agreed that with reference to the counter in the black box, magnified images 12 and 13 were 7/25 of a second, or almost ¼ of a second, apart. He also eventually agreed that the images 'frame count 02' and frame count 03' were 1/3 of a second apart. Mr McArthur agreed eventually, because he preferred to characterise the images by reference to the frame rate, but came to agree that it was possible to express the difference as a quantity of time. Expressed in time, from frame count 1 to frame count 3, was ¾ of a second.

[41] While he was not 100% sure, Mr McArthur agreed that Magnified Image 3 might show the pursuer's left hand on the glass in the door. 4 showed the door opening, with her

hand in shadow. 5 showed her hand between the door and door frame. 6 and 7 showed her hand coming down. In magnified image 6, the black vertical oblong on the door was the lock. The black oblong was in line with the pursuer's upper chest in that image. It was not possible to see the pursuer's face and head in that image. Mr McArthur commented that it was not possible to ascertain the pursuer's height, nor, necessarily the height of the lock from the camera, because of the effect of the camera angle and its relatively high vantage point. Mr McArthur felt unable to answer the question of whether the CCTV showed the pursuer's motion through the door as hindered or unhindered. One did not see visual evidence of delay. He did not know anything of the door mechanism. He agreed that at face value, on the images which we have, it did not appear as if the pursuer hesitated coming through the door.

Dr Myles Connor

[42] Dr Myles Connor, consultant neurologist, was led as the pursuer's expert medical witness. He produced a report dated 20 May 2019, (5/1 of process), to which he spoke in evidence. Although the report is described as a draft report, it is in fact in final form. Dr Connor's report was based on examination of the pursuer on 14 March 2019, the history provided by her at that time, and a review of her medical records down to October 2018.

[43] Dr Connor considered while there was no significant functional overlay, functional elements may have contributed to the prolongation of the pursuer's symptoms. From her records, it was evident the pursuer tends to experience medical symptoms more profoundly and they take longer to settle. In that connection, the pursuer's assertion that she is "never really sick", recorded at paragraph 4.18 of his report, stood out. Dr Connor said that one

should not take too much from that because people with functional neurological disorders often told little in giving a history, and more was then found in the notes.

[44] Dr Connor's conclusion, set out at section 8 of the report, was that the pursuer experienced a minor head injury which resulted in concussion on 13 August 2018. She developed typical symptoms of concussion following the head injury which was not associated with any loss of consciousness or significant retrograde amnesia. Dr Connor explained that it was important to ascertain the extent to which a patient had amnesia, because the less recollection the patient has, the more severe the head injury is likely to be. The patchy recall reported by the pursuer was compatible with a minor head injury. It was possible that the pursuer would have complete recollection at a certain point, equally it was possible that some memory would not be recovered.

[45] Dr Connor explained that post-concussion syndrome was now more commonly called post-injury syndrome, because it is recognised patients can have similar symptoms from trauma to other parts of the body, without having suffered head injury. When headache is prominent within a week of trauma, that can establish a diagnosis of post-traumatic headache. The features of sensitivity to light, sound and, especially, movement are characteristic of migraine. The pursuer has a history of migraine with aura. This may have predisposed her to post-traumatic headaches with features of migraine. The pursuer had reported two previous episodes of migraine, but more headaches appeared in the records. Dr Connor said that patients sometimes do not make a connection between symptoms and migraine, or may play down headaches as not migraine. In part that may be because people believe migraines to be exceptional events.

[46] Dr Connor confirmed he had seen Dr Davenport's report. He considered there was enormous overlap between them. The only significant point of difference was about the

episode in April 2019. When Dr Connor had seen the pursuer in March 2019, she was doing very well, but in his view, her original symptoms had not gone. In Dr Connor's view, the episode in April 2019 might be a random event, but in his opinion the probability was that the pursuer had not quite recovered from brain injury at the point he saw her, so that the episode in April was connected to the event in August 2018. However it was very difficult for Dr Connor to give a view about how long the pursuer had suffered from post-concussion/post-injury syndrome in the absence of medical records subsequent to those he had seen, or with a more up to date examination.

[47] Dr Davenport had seen the pursuer in June 2020. Because of the covid-19 pandemic, he had consulted by videoconference, but Dr Connor did not consider that was significant in this case, because physical examination was not essential. The pursuer's examination had been normal when Dr Connor had seen her in March 2019. Dr Connor was asked whether the history of post-accident symptoms noted from the pursuer at paragraph 4.34 of his report contained any "red flags" about the possibility of fabrication. He indicated that neurologists would defer to psychiatrists on the question of malingering. He accepted there was a risk where symptoms were self-reported. It was a matter of feel for what the clinician was told and the timeline. At the time of examining the pursuer, he did not think her account was fabricated. The reason he considered functional disorder was not significant was because the reported symptoms were not getting worse, nor were new symptoms arising.

[48] Dr Connor agreed that the he had noted the pursuer describing the point of injury as the temporal region, Dr Davenport had noted the frontal area and the GP had noted the orbital area. Those were different areas, but he did not consider the inconsistency important because it was possible he misinterpreted where the pursuer was showing him as the point

of on her head. Although he had not recorded it at paragraph 4.27 of his report, Dr Connor recalled that the pursuer said she struck her head on the lock of the door. The pursuer had not said anything about her eyebrow, and that was in a different area of the head. Dr Connor understood the pursuer to have struck the door because it was locked, and her momentum had carried her into the door. As he had noted at paragraph 4.27, the pursuer had told him she was not in any particular hurry. She had been vague about some events around the time of the injury. What was recorded at 4.28 was what she could recall at examination in March 2019.

[49] In cross-examination, Dr Connor explained that the brain takes in information which goes in lengthy loops in the brain to lay down memory. If that process is disturbed by injury, the information is lost, and cannot be retrieved. Thus amnesia about events around the time of an accident is unlikely to be recovered later, although people sometimes have no memory of events in the immediate aftermath of an accident, but memory returns 2-3 days later. What would unlikely is remembering things 2-3 days after an event and thereafter forgetting things a year later, unless that was related to functional symptoms. That would not be a consequence of post-injury syndrome. Dr Connor's view, based on the pursuer's description of residual symptoms, was that her symptoms would be resolved within 3-6 months of the event. Dr Connor was not surprised that the pursuer was not reporting headaches in the period November 2018-March 2019. In his view, she was like many people in not reporting milder headaches. That was not of itself an indication that the headaches had fully resolved.

Marcin Skawski

[50] Marcin Skawski worked for the defender for a number of years until October 2020 when he was made redundant. He worked in their St Andrew's café from 2017 until the beginning of 2019, when he was the assistant manager, and for a time acting general manager. His role was on the shop floor rather than in the kitchen. Mr Skawski said the door to the stairs up to the kitchen was to be locked after 3pm. This was in order to prevent customers and thieves coming up the stairs. After 3pm there were no staff in the kitchen, and nobody in the office. Mr Skawski said that the door should be open before 3pm. He had never seen a situation where the door was locked before that time except in the situation of the pursuer, meaning the events of 13 August 2018.

[51] When staff downstairs buzzed to the kitchen, Mr Skawski said that the kitchen leader would nominate someone to go down. Sometimes a person would volunteer. It was not the case someone had to go downstairs immediately. They had to finish the task they were working on, they could not just leave everything and run. Running in the kitchen and elsewhere was against health and safety.

[52] Mr Skawski had heard about the pursuer suffering an accident from the kitchen leader a day or two later. That would have been Bruno Ferrera or Grant Wilcox. He had first spoken with the pursuer about it when she came to the café with a sick line, which he thought was a couple of weeks later. She did not give him any more information.
Mr Skawski said that later, the pursuer had come to him with a schedule for her return to work, and he had fitted the staff rota to that. He thought she was really motivated to return to work. At one point she had asked for more hours; he had said this was not in the plan from the doctor, and she had said she was feeling fine. Mr Skawski had given her the extra hours.

Dr Richard Davenport

[53] Dr Richard Davenport was led as an expert witness by the defender. He is a consultant neurologist. Dr Davenport prepared a report for this case, (6/7 of process) to which he spoke. Because of the covid-19 pandemic, he had been unable to meet the pursuer in person, but had a consultation by video conference, in June 2020. While preparing his report, he had access to the pursuer's medical records down to March 2020. Dr Davenport indicated that it was not possible to conduct a neurological examination by video conference. In the pursuer's case, he would have expected that to be normal. In any event, he had sight of Dr Connor's report, and he had conducted a neurological examination. He knew Dr Connor and would expect to make the same findings as him in this case.

[54] Dr Davenport took a history from the pursuer. At paragraphs 2.3-2.5 of his report, he recorded what she told him about the accident: "she had to go through a fire door with a large metal lock. She was not expecting it to be locked, thus walked straight into it (it was not clear to me how she would ordinarily have opened the door unlocked), apparently head-butting the door with the right frontal region of her head striking the large metal lock. She said she could not remember getting to the tills (which is where she was headed), but remembered being behind the tills and at one point put her head on the counter. She remembered talking to a couple of colleagues. [2.4] Her next recollection was of being in the staff room with a bag of frozen peas on her head, although she could not remember how she got there. After a while she returned to work and completed her shift, then went home. She remembered going to bed with a sore head. [2.5] Her recollection was that the incident occurred on a Monday, she worked the next two days as normal shifts, went to see her GP on the Thursday because of ongoing headache. She was signed off work at that point."

[55] Dr Davenport's impression from the account given by the pursuer was that in August 2018, although on treatment for depression, she was otherwise generally well. She had suffered what sounded like a minor head injury at work, and had developed debilitating symptoms characterised by headache, dizziness, and tiredness, which led to her being off work for about 7 months. Her condition had improved so that she was able to make a phased return to work. She had experienced a recurrence of symptoms and had been off work for a further period of time, before returning to work. She had continued working full-time until the lockdown due to the covid-19 pandemic. She continues to experience headaches, poor concentration and memory disturbance.

[56] Dr Davenport concluded from the pursuer's account to him, the history was consistent with the nature of the injury described. The pursuer's injury was at the minor/mild end of the spectrum. There was no loss of consciousness, there was no post-traumatic amnesia, the pursuer had been able to complete her shift. Post-traumatic amnesia means a patient has been unable to lay down reliable memories in the period between the last reliable memory and when memory returns. That is a period of variable length. The pursuer remembered going round to the till and speaking to colleagues. That history was not suggestive of post-traumatic amnesia. It would be odd to remember events at the time and subsequently forget. Patients do sometimes get muddled because family or friends fill in gaps. Dr Davenport noted that the pursuer continued to experience headaches, which were much less severe than they were and were triggered by concentration or stress, and memory problems. The latter where what Dr Davenport described as "attentional", that is, the pursuer forgets everyday things or that she has already told a person something. In his view, the pursuer is not suffering from significant amnesia.

[57] In section 7 of his report, Dr Davenport had noted what he considered to be relevant entries from the pursuer's medical records. These disclosed a number of GP attendances over the years where the pursuer had been troubled by headaches sufficiently significant to visit the GP. There were also a number of other attendances for soft tissue injuries, which had taken time to heal. In September 2014, the pursuer had attended her GP complaining of headache with visual symptoms. That had a spontaneous onset, whereas the 2018 instance was in the context of head injury. The account of the accident noted by the GP in the referral to rehabilitation medicine services on 24 August 2018, noted at para 7.23, was not the description of the accident the pursuer had given to Dr Davenport, though it was similar.

[58] Dr Davenport had had access to the pursuer's GP records into 2019. At 7.29 in his report, he had reproduced an entry for 3 April 2019. She was noted to have had headache since weekend, gradual onset with intermittent double vision and photophobia; she also had neck pain. The locum GP had noted "previous CT last year after concussion secondary to work related accident, but claims all headaches have been settled for months and no prior history of migraine." The pursuer was admitted to Ninewells Hospital in Dundee the same day. A CT scan was carried out, and nothing of note was seen. The discharge letter noted "she is known to suffer from chronic headaches but usually resolve when lying down." The pursuer was thought to have suffered a migraine, and was discharged the following day with pain medication.

[59] In Dr Davenport's view, this episode was distinct, the pursuer had recovered from post-concussion/post-injury syndrome, and the April 2019 event was a migraine. This was the principal area of disagreement with Dr Connor. Dr Davenport accepted it was possible the episode in April 2019 was linked to the episode in August 2018, but he considered it was not probable. The pursuer had recovered over a period of months, and had had headaches

which did not require medical intervention. Out of the blue, she had had a headache such that the GP had sent her to hospital. If the pursuer had never suffered migraine, that would be more plausible, but she was predisposed to migraine. As Dr Connor's report indicated, she had recovered sufficiently to break the connection.

Submissions

[60] In response to the court's invitation at the close of evidence, parties produced and lodged detailed written submissions ahead of the hearing on evidence. I am grateful to counsel for those, which allowed the debate to be well focussed, and I mean no disrespect by not repeating those submissions at length: they are in process, and were adopted in argument. I shall highlight key elements of the written submissions as well as of the argument presented at the hearing.

Pursuer's submissions

[61] For the pursuer, Ms Smith, moved me to find the defender liable to make reparation to the pursuer, and to grant decree for payment of £15054.28, together with expenses. She moved me to certify the Mr McArthur and Dr Connor as skilled witnesses, and to grant sanction for junior counsel.

Liability

[62] Ms Smith began by accepting that there were problems with the pursuer's oral evidence. In her submission, the question for the court was why that was the case. The court should resolve those difficulties by considering the other sources of evidence. It was plain that the defender's approach was the same, but highlighting the alternative side of the

coin. In that connection, Ms Smith argued I should have regard to the following in particular:

(i) the events happened two and a half years ago;

(ii) it is a feature of the type of injury the pursuer suffered that memory loss and recall is a problem;

(iii) it is a feature of a functional predisposition that that the sufferer is a poor historian, particularly about their medical history.

[63] There was a distinction between mis-remembering and making things up. As Dr Davenport had observed, the pursuer has now revisited the events many times, with different people, and memories could become distorted in that process. The court might not be able to make a positive finding about the reason the pursuer came downstairs, and this would be the reason. Again, the pursuer appeared to be genuine in her belief that she consulted a doctor before going on holiday with Angela Moffat.

[64] Counsel explained the pursuer's position is that to succeed, she needs to prove:

(i) she came down the stairs and the door was unexpectedly locked;

(ii) she hit her head on the door;

(iii) her injury led to a minor brain injury;

(iv) the level of damages she is entitled to is £15054.28.

[65] It was accepted there was no evidence of a policy issued by the defender about the locking of the door from the café to the stairs. There was an informal understanding amongst the staff, and in Ms Smith's submission, that was sufficient to found a duty on the defender. Such understandings were common in workplaces, and might even be counter to management directions; as in this case, they were often backed by operational convenience. Both the pursuer and Ms Lawson gave evidence they had never encountered the door being

locked. There was evidence from Nicola Lawson that it had on occasion been locked, which supported the pursuer's case that it was locked on 13 August 2018.

[66] It was submitted the evidence of the pursuer, Ms Lawson, Ms McLeod, and Mr Skawski showed there was an informal understanding in the café that the door would be unlocked at this time of day. It was reasonable for the pursuer to expect it to be unlocked at the time she went down the stairs. On rare occasions the door was locked at this time of day, and it was therefore possible it was locked on this occasion. Ms Smith invited me to find on the balance of probability the door was locked on the day of the accident at the time the pursuer came through the door.

[67] There had been a good deal of argument from the defender about the CCTV footage (6/6). In the pursuer's submission, the CCTV was neutral on whether the pursuer hit her head on the door. Ms Smith submitted that given the evidence of Mr McArthur, the court could get no assistance from the lay witnesses' impressions of the pursuer coming through the door. That was because Mr McArthur's evidence was that up to 80% of what happened was missing, but it was being viewed as if it was in real time. On his evidence, little or no weight could be given to the impression of the speed at which the pursuer came through the door, though the CCTV was of more assistance with things where time was not critical.

[68] On the mechanics of the accident, the pursuer had given a detailed account of hitting her head on lock. She said it had taken 5-10 seconds to come through the door, and Ms Smith accepted that was implausible, even on her view of the CCTV. However she submitted it is well within the experience of the court that people often mis-estimate periods of time. The important question was whether the pursuer did the things described and she remembers doing the things described. While the pursuer's account about checking her

pockets and walking with her head lowered to do so was a curious passage of evidence, but one which could be explained by her injuries. Even if the court did not accept this passage of evidence, that did not mean the claim failed; the court had to look at rest of evidence.

[69] The defender's written argument took a point that on record, the pursuer pleads the digilock is on the inside (i.e. the stair side) of the door, which it is not. If anything turns on that, the pursuer's case is founded on her striking the lock, and is intended to denote the whole thing. On the question of whether the door was locked on 13 August 2018, the defender's clear position is that it was not locked. There was a real difficulty for the defender in that on her return journey, the CCTV shows her stopping at mirror, checking her head, entering code on door and opening the door, picking up her drink and going up stairs.

Damages

[70] In relation to quantum, Dr Kennedy and Clare McDonald were led not simply to read agreed medical records, but because they support the pursuer's credibility. They found her to be truthful. Ms McDonald has seen malingerers in the course of her clinical work, and the pursuer looked to be different from that to her. In particular, the pursuer relies on her description of symptoms being entirely in keeping with her condition, which is complex and poorly understood. This remained true even in the dynamic situation of Q&A dialogue. Neither Dr Kennedy nor Ms McDonald considered there were "red flags" in terms of the truthfulness of the pursuer's account to them. Her reported symptoms were consistent with her condition. Dr Connor agreed.

[71] Dr Connor's view was the pursuer was disposed to experience functional pain after relatively minor injury. The pursuer's history was typical for someone likely to experience a

functional element after an injury, both in terms of the number of engagements with medical services, and in failing to acknowledge this when giving a medical history. On balance, her relapse in April 2019 was causally related to the injury rather than her prior history of migraine. Dr Connor's view that she was not fully recovered at that point should be preferred. That in turn means that the pursuer recovered fully by around June 2019 when she returned to work.

[72] Evidence about the holiday with Angela Moffat was relevant for two reasons (i) it is a head of claim; and (ii) it goes to the pursuer's credibility. On latter point, if the pursuer's evidence is a fiction, she perpetrated this on her cousin for the length of a 10 day holiday. Ms Smith noted that the defender accepted Ms Moffat as credible.

[73] The pursuer claims damages for: solatium, past loss of earnings, loss of enjoyment of a holiday, and inconvenience. Ms Smith submitted that the appropriate level for solatium was £8000. She referred to the Judicial College Guidelines, section 3(e) – minor brain or head injuries, which gives a range £1880-10,890. The pursuer was in the top half of that bracket, given her ongoing symptoms. Interest to date was £800.

[74] Past loss of earnings had been agreed in the Joint Minute on a number of scenarios. The pursuer submitted that it ought to be assessed to June 2019. That brought out £5027. Interest to June 2019 (at 4%) was £167.50; interest thereafter to date (at 8%) was £871.28.

[75] It was accepted there is no patrimonial loss, and this element of the claim is simply about loss of enjoyment, hence the modest valuation. Loss of enjoyment of the holiday was appropriately assessed at £300, taking account of the fact the pursuer did not pay for the holiday. Interest amounted to £56.

[76] The total for all heads was therefore £15,054.28, and the court should grant decree accordingly.

Contributory negligence

[77] Ms Smith submitted that, if the door was locked, contributory negligence simply did not arise. In her submission, there might be room for contributory negligence only on the hypothesis that the pursuer ought to have known the door was sometimes locked. However, her evidence was she had never known it to be so, and further her evidence about responding to the buzzer was relevant in this context. If the court was against her on that, any contribution was de minimis, no more than 10%.

Defender's submissions

[78] For the defender, Mr Hastie moved me to grant absolvitor with expenses to the defender. He also moved me to certify Dr Davenport as a skilled witness, and to grant sanction for junior counsel.

Liability

[79] The defender submitted there were three essential facts the pursuer required to establish to set up the duty averred, and that failure to establish any one was fatal to the claim on liability. These were (a) that the door ought to have been unlocked at the time the pursuer attempted to walk through it (agreed to be 09.39 on 13 August 2018); (b) that it was in fact locked; (c) that as a result of it being locked, the pursuer's head collided with the lock causing her injury.

[80] Mr Hastie submitted that the credibility and reliability of the pursuer was at the heart of the case. He made clear that the focus of the defender's attack on this front was in relation to liability. The pursuer sought to establish liability on a particular set of circumstances, and the defender joined issue on that. The defender did not submit that the

pursuer's medical history was a fabrication. The defender's position was the pursuer was at best unreliable, and at worst incredible. In general terms, her position appeared to be that apart from remembering she hit her head on the locked door when she came down the stairs, she could remember very little. There were particular instances, for example when confronted in cross-examination with the height of the lock and her own height, the pursuer proceeded to given an account, apparently for the first time, of how she was bent over looking for a pen and till card or notebook in her left pocket, with her right hand on the door and left thumb opening the pocket. Asked in re-examination why she had not given this account in chief, she had said she thought she had, that "it had totally slipped [her] mind" and that she had "memories that come and go".

[81] On behalf of the pursuer it had been suggested that her poor recall was a feature of the type of injury. However Dr Brogan and Dr Davenport had found no post-traumatic amnesia. Accordingly, the defender submitted, the pursuer's poor recollection could not be explained away by that. The defender accepted that the court was entitled to accept parts of the pursuer's evidence and reject other parts; the defender's position was there were so many problems with the evidence of this pursuer, that the court would require to be very careful about what parts to accept.

[82] Mr Hastie submitted even allowing for the brevity of pleading in personal injuries actions, it was not clear what the pursuer contended the duty said to have been breached by the defender actually was. It was submitted that an "informal understanding" was not sufficient to create a duty on the defender; it was not even clear the defender was aware, and the pursuer appeared to accept that there was no formal policy made by the defender. Further the pursuer pled that "the defender's policy is this door ought to be locked after 3pm", but she did not aver that the door "ought" to be unlocked before that time, nor that as

a matter of fact it was policy that it should be open before that time. The use of "ought" was ambiguous. In any event, the evidence did not establish the existence of a policy about the door being unlocked before 3pm.

[83] The CCTV footage (6/6) did not support the pursuer's assertion the door was locked. Mr McArthur said that at face value the pursuer did not appear to hesitate when she passed through the door. The other witnesses who were familiar with the door and who had passed through it many times gave unchallenged evidence that looking at the pursuer's passage through the door on CCTV, the door appeared not to be locked.

[84] The defender submitted that the CCTV footage could be considered on the question of the time taken for the pursuer to come through the door, because Mr McArthur had, ultimately, agreed that it was possible to understand his frame rate in terms of conventional time. The pursuer's submissions referred to magnified images 12 & 13, there was a 7 frame difference amounting to 28/100 second, or just over ¼ second. The witnesses who were current and former staff of the defender were familiar with door, and they were all clear the door was not locked. In the two frames where pursuer accepts she was on floor level, to where door opens, the pursuer accepted covered less than 1/3 of second. Mr McArthur was asked, and he said "on face value look to be open normally". In addition, it was pertinent to noted Mr McArthur was instructed to see whether behind the door he could see pursuer hit her head against the door. He clearly was not aware the allegation was this door was locked. His conclusion unsurprisingly was you could not see the incident: it was obscured by door.

[85] From the images, the pursuer's hand appears to be on the door; Mr Hastie pointed to the pursuer's evidence about bending down, looking into her pocket while pulling it out with her left thumb, but the evidence of Mr McArthur was it appears to be her left hand on

door. Ms Smith had argued it was reasonable to infer the pursuer was putting the hand forward to open the door; but, he asked, how could that be, if her left hand was in her pocket. The pursuer could not have it both ways. Mr McArthur agreed the frame count between frame 02 and 03 (when the pursuer first appeared, and when the door was slightly open) was 1/3 of a second. The pursuer said in her evidence that had taken her 5-10 seconds. That was so implausible as to be incredible.

[86] The pursuer had submitted it was not necessary for her to show she hit her head on the lock, as opposed to the door. But the pursuer has pinned her case on hitting her head on the lock; that was also what she said, for example, in the accident report (6/3). It would have been open to the pursuer to plead she hit the door; the problem for pursuer is the height of the lock, which was an agreed fact in terms of the Joint Minute. The difference between the pursuer's height and height of lock was 25-32cm. The pursuer's story about bending down and that is how she hit the lock is implausible. In his evidence, Mr McArthur agreed the CCTV clearly showed the lock at about shoulder height.

Damages

[87] On the assumption that the pursuer had established she had suffered some sort of head injury, Mr Hastie directed me to the Judicial College Guidelines, section 3(e) – minor brain or head injuries, which gives a range £1880-10,890. Any injury was minor.
Dr Davenport considered the symptoms causing an absence from work of 29 weeks was more than he would have expected. Although the pursuer was not fully back at work till February 2019, the pursuer said she felt fit to return in December 2018. She did not attend further OT appointments after December 2018. She reported fewer headaches, and that they

were less severe. By April 2019, it was noted she had no headaches for months. Any award should be at the lower end of the bracket, say £3500-4000.

[88] Mr Hastie noted that wage loss was agreed in the Joint Minute for three periods. The first two were alternatives. If the court was satisfied the pursuer was fit to return to work in December 2018, which was one account of the pursuer's own evidence, paragraph 12(i) would apply; if Dr Davenport's evidence was accepted, paragraph 12(ii) would apply. The third period related to the further symptoms in April 2019, and would apply only if Dr Connor's evidence on the second period of absence was preferred. Obviously the defender's position was that there was in fact no loss.

[89] There was no evidence of any financial loss to the pursuer in relation to the holiday with Angela Moffat. Any enjoyment was, on the pursuer's own evidence, limited; in any event, Angela Moffa's young son was with them, so that what they could have done was limited. The defender's primary position was no award should be made, and as a fall-back, if an award was made, it should be token, say £100.

Contributory negligence

[90] On the pursuer's own account, she was not paying proper attention. The pursuer's account in evidence was she was not looking where she was going, she was checking her pocket, she said. She was in a rush. Danielle McLeod said the door might be locked, and she would take care. In those circumstances, the pursuer ought to have been taking care for her own safety. The defender submitted the pursuer ought to be found to have been at fault to the extent of 50%, and any damages modified accordingly.

Analysis and conclusions

[91] This is a perplexing case because of the disjunction between the quality of the evidence on the issue of whether the pursuer suffered an accident in the manner pled on record, and the evidence about the pursuer's medical history. On the latter, while there is a dispute about whether the pursuer's second absence from work in April-June 2019 is attributable to any injury the pursuer may have suffered in August 2018, all of the medical witnesses, both the treating clinicians and the expert neurologists, accepted the pursuer's account of her symptoms as consistent with a head injury resulting in a minor brain injury.

[92] In my view, the primary issue of contention on the evidence in this case is the nature of the events of 13 August 2018. There is a secondary issue about whether the pursuer's second period of absence from work from April 2019 was a consequence of the events of 13 August 2018. From those follow a number of issues in relation to damages. It is convenient to consider the evidence under these headings.

The events of 13 August 2018

[93] In summarising the evidence of the witnesses, it has been necessary to set out at greater length than might perhaps be usual the account of events given by the pursuer to different people at different times. That is because whether or not an accident happened is the central issue in this case, and the assessment of the pursuer's evidence is the key to that, particularly because there were no eye-witnesses apart from the pursuer herself. In the course of the proof, evidence was led from three sources which or who were present in the café on 13 August 2018, namely the pursuer, Nicola Lawson, and the CCTV footage (6/6). I consider that none of those individually provides a definitive answer; nor do I consider that taken together do these three sources provide an answer. I shall deal with them in turn.

[94] A great deal therefore turns on the credibility and reliability of the pursuer. From the outset of her submissions, Ms Smith conceded there were problems with the pursuer's oral evidence. In my view, she was quite right to do so.

[95] On some points, the pursuer was not consistent across her oral evidence (e.g. whether she could recall going down the stairs; whether or not she could recall what happened at the door, and, if so, what in fact happened; whether she called Dr Kennedy or Clare McDonald before the holiday with Angela Moffat). On other points, she was flatly contradicted by other witnesses in a position to know or recall matters (e.g. about the supposed need to drop everything when the buzzer from the serving area goes off in the kitchen; Danielle McLeod about whether she was at work on 13 August 2018, and whether she drove the pursuer home; Dr Kennedy and Clare McDonald having no recollection or record about the pursuer contacting them about the holiday). On yet others, her account in court contradicted elements of accounts given by her to others (e.g. of her running downstairs to Dr Kennedy; of her being in no particular hurry to Dr Connor).

[96] In considering those, Ms Smith said I should have regard to the passage of time, the type of injury the pursuer averred she had suffered, and her predisposition to functional symptoms. In my view, it is not sufficient to point to the passage of time in this context. The court is of course well accustomed to the problem of witness recollection sometimes fading as time passes. In my view, that is somewhat different from a witness giving materially different accounts across the course of his or her oral testimony. Further, in my view, the medical evidence does not provide a basis for such allowances. In particular, having regard to the expert neurology evidence, from both Dr Connor and Dr Davenport, these differences are not explained by amnesia associated with an accident on 13 August 2018. Both were agreed the pursuer did not experience significant amnesia.

[97] On the question of memory loss, both experts gave consistent evidence about the process of memory formation which is relevant in this context. Dr Connor explained that the brain takes in information which goes in lengthy loops in the brain to lay down memory. If that process is disturbed by injury, the information is lost, and cannot be retrieved. Thus amnesia about events around the time of an accident is unlikely to be recovered later, although people sometimes have no memory of events in the immediate aftermath of an accident, but memory returns 2-3 days later. What would unlikely is remembering things 2-3 days after an event and thereafter forgetting things a year later, unless that was related to functional symptoms. That would not be a consequence of post-injury syndrome. Dr Davenport added that it would be odd to remember events at the time and subsequently forget. Patients do sometimes get muddled because family or friends fill in gaps.

[98] Accordingly, I conclude that I cannot accept the evidence of the pursuer except where it is supported by another reliable source.

[99] To deal with a secondary point; the defender made something of the fact that the pursuer's case on record was that she had struck her head on the lock, but that it was now argued the she had hit her head on the door. If the matter had been pressed, I would have held that a case of the pursuer striking her head on the door on which the lock was mounted, rather than the lock itself, was a variation, modification or development of the case pled (cf. *Burns* v *Dixon's Iron Works* 1961 SC 102, at 107 per LJC Thomson).

[100] Turning next to Nicola Lawson, the only other witness led in evidence who was working in the café on 13 August 2018. In my view, she was plainly doing her best to tell the truth, however it was evident that she does not have a clear recollection of all of the events of that day. Further, she was not an eye-witness of the accident. She offered one account of why the pursuer went downstairs on first questioning, and (correctly) agreed she

was misremembering when shown the CCTV 6/6. She indicated she had no clear recollection if the buzzer/bell from the counter area went before the pursuer went downstairs. Ms Lawson also said she had not found out what happened until later in the day, yet pursuer came upstairs fairly shortly after, and apparently nothing was said, not even that the pursuer was going to the staff room. Accordingly it seems to me her evidence is at best neutral.

[101] Lastly, turning to the CCTV footage, 6/6 of process. That is not witness evidence, of course, and falls to be interrogated in a slightly different way. It appeared to be the pursuer's position that I could not conclude from the CCTV that the accident did not happen. That was premised on Mr McArthur's evidence about the frame rate, and what visual information was therefore missing. Mr McArthur is qualified by experience and some specialist training, and on that account passes the threshold of skilled/expert witness. On the whole, he was careful not to stray outwith the area of his expertise. However, he was at times rather dogmatic in responding to questions in cross about the issue of real time vs frames per second, which was a perfectly reasonable question to canvass.

[102] Accepting that compared to the frame rate of cinema film or television, the number of frames per second was less, and information would likely be incomplete, it is nonetheless evident that 6/6 is a motion picture with a good deal of visual information. That is evident on viewing the movement of the pursuer and other people in the cafe, which has a substantial measure of fluidity to it, and can be contrasted with the jerky or apparently speeded up images of early cinema films which were canvassed in evidence.

[103] What can be said with certainty is that the CCTV footage does not show the accident happening, whether on the basis that the pursuer struck the lock or the door more generally. It is not possible to see exactly what happened when the pursuer reached the door through

the window, and none of the witnesses who were shown the CCTV footage suggested otherwise.

[104] There was a good deal of discussion about the apparent ease of movement through the door. Even Mr McArthur felt unable to answer the question of whether the CCTV showed the pursuer's motion through the door as hindered or unhindered. One did not see visual evidence of delay. He did not know anything of the door mechanism. He agreed that at face value, on the images which we have, it did not appear as if the pursuer hesitated coming through the door.

[105] Further, on the evidence of the footage 6/6, in my opinion, it cannot be said with certainty whether the pursuer is in a rush, the seated area is certainly not busy (and there are no uncleared tables), and the counter area is not especially busy. It may also be noted the pursuer is holding her head when she reaches the counter area, though not elsewhere on her journey through the cafe. On the CCTV, the pursuer remains at the counter area for approximately one minute, appears to make herself a drink, and walks back through the café to the stairs with what appears to be a drink container.

[106] What of the other sources of evidence? Part of the pursuer's argument is that the medical witnesses, both the treating clinicians and the experts instructed for this case, found her presentation to be consistent with a minor brain injury and post-concussion/post-injury syndrome. Those witnesses are all well qualified, and Dr Kennedy and Ms McDonald appeared to have good recall of their engagement with the pursuer, and could explain why that was. However, on its own, that does not prove the pursuer experienced an accident in the manner averred on record. The medical evidence is based on the history given to the several clinicians by the pursuer. Her first attendance was several days after 13 August 2018. In the nature of her presenting complaints, there were limited observable signs and

symptoms: Dr Kennedy noted only some tenderness of the inferior orbit. The pursuer has given an account of a head injury, though reporting different locations on her head to different clinicians. Whatever it may disclose about the condition the pursuer was suffering from, I consider the medical evidence is neutral about how such symptoms originated.

[107] It was argued that parties' cases were so sharply divergent that I was compelled to reach a view about, and determine the matter on, the pursuer's credibility also. While it is, of course, correct that a witness may be so unreliable as to be incredible, I am not persuaded that is necessary to go so far in this case. I prefer to approach this aspect of matters from the perspective of the onus of proof, and whether the pursuer has made out her case. It has been said that "questions of onus cease to be important once evidence is before the court." (*Sanderson* v *McManus* 1997 SC(HL) 55, per L Hope at 62G). However where the court is unable to come to a definite conclusion on the evidence because no inferential conclusion is more probable than the others, nothing has been proved and the party bearing the onus of proof has failed (cf. *Hendry* v *Clan Line Steamers* 1949 SC 320, at 328 per L Jamieson).

[108] Given the conclusion I have reached about the pursuer's reliability, it is necessary to consider the other sources. I have explained why I consider neither of the contemporaneous sources give support to the pursuer. The medical evidence is neutral about the occurrence of an accident in the manner the pursuer claims. For all of those reasons, I conclude the pursuer has failed to prove that she suffered an accident in the manner averred on record.

The pursuer's absence from April 2019

[109] There was only one area of significant disagreement between Dr Connor and Dr Davenport, namely whether the migraine the pursuer experienced on 3 April (and which

required an overnight in-patient stay at Ninewells Hospital) was connected to previous symptoms, or was a new episode.

[110] On this point, I prefer Dr Davenport's view. It was common ground the pursuer was able to return to work in early February 2019. As Dr Davenport explained in his report (paragraph 8.9) and oral evidence, the episode in April 2019 must be seen against the pursuer's history of migraine extended back more than 10 years (even if the pursuer herself characterised only one episode as migraine). I accept Dr Davenport's evidence that, viewed against that background, the pursuer's experience in April 2019 is more likely to be another episode in that series, rather than a continuation of symptoms from August 2018.

Damages

[111] On the view I have taken in relation to liability, the question of damages does not arise. Lest I should be wrong about that, it is appropriate to deal briefly with damages. On record, the pursuer claims damages under the following heads: (a) solatium; (b) past loss of earnings; (c) loss of enjoyment of "a pre-planned holiday"; (d) inconvenience. I consider these in the same order.

Solatium

[112] It was common ground that an appropriate range for solatium might be found in the Judicial College Guidelines for the Assessment of General Damages in Personal Injuries Cases, chapter 3(A)(e) "minor brain or head injury":

> "In these cases brain damage, if any, will be minimal. The level of award will be affected by the following considerations:
>
> (i) severity of initial injury;
> (ii) period taken to recover from symptoms;

(iii) extent of continuing symptoms;
(iv) presence or absence of headaches.

The bottom end of the bracket will reflect full recovery within a few weeks."

The bracket range is £1800 – 10,890.

[113] Any injury in this case was minor. The pursuer was absent from work for a number of months, and on the view I have reached about the medical evidence, was fully recovered by February 2019. Headaches diminished over time, and the medical evidence was that any headaches she experiences now are a consequence of her prior history. In that context, I consider the pursuer falls in the middle of the bracket. I would have awarded £4750.

Loss of earnings

[114] In paragraph 12 of the Joint Minute, parties have agreed figures for past loss of earnings on three scenarios.

"(i) Between 16 August 2018 and 27 December 2018, the pursuer sustained a loss of £2104;
(ii) Between 16 August 2018 and 21 February 2019, the pursuer sustained a loss of £3453;
(iii) Between 11 April 2019 and 6 June 2019, the pursuer sustained a loss of £1574."

On the view I have taken about the medical evidence concerning the pursuer's recovery by March 2019, I would have awarded damages under this head on basis (ii) in the Joint Minute. That would mean an award of £3453 under this head.

Enjoyment of holiday

[115] I am not satisfied on the evidence I heard that the holiday to Majorca could be described as "pre-planned". The pursuer demurred from the description of its being a planned trip, saying it was a surprise, and that she was invited to take up a free place which had become available due to the break up of her cousin's relationship. The pursuer said she

offered to pay towards the cost, and her cousin declined to accept the offer. Angela Moffat confirmed that. It seems to me that in contrast to other cases in which the question of holidays as a head of loss has arisen (e.g. *Whyte* v *University of Dundee* 1990 SLT 545; *Potts* v *McNulty* 2000 SLT 1269), there is no patrimonial loss. In the circumstances disclosed in the evidence, I consider that any loss in that respect would fall under the umbrella of solatium, being in the nature of a (temporary) loss of amenity.

Inconvenience

[116] I heard no evidence about the unspecified 'inconvenience' pled as a separate head on record. I would not have awarded anything under this head.

Contributory negligence

[117] The initial problem here is the sheer inconsistency of the pursuer's oral evidence. Ms Smith was, I think, correct that the starting point is in order for contributory negligence to be in issue, there must be a possibility of the door being locked in the morning. Evidence varied about that. While I was not able to make a positive finding, that does not exclude the possibility. In that event, on the pursuer's account in cross-examination of checking her pockets as she came down the stairs towards the door, she was not paying full attention to where she was going when she reached the foot of the stairs and the door. I would have found her contribution to be 50%.

Disposal

[118] In the result, I will grant decree of absolvitor in favour of the defender, together with the expenses of the action. I will certify Dr Davenport as a skilled witness. Both parties

submitted that the cause was suitable for the instruction of junior counsel. Having regard to the range and complexity of the evidential issues arising, I consider the cause merited the instruction of junior counsel.