

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

[2021] SC EDIN 36

EDI-PN3025

JUDGMENT OF SHERIFF ROBERT D M FIFE

in the cause

ELIZABETH MORAG McCANN

Pursuer

against

DUMFRIES AND GALLOWAY COUNCIL

Defender

Pursuer: Scullion, Advocate, Balfour + Manson LLP, Edinburgh
Defender: Ireland, Solicitor Advocate, DAC Beachcroft Scotland LLP, Glasgow

Edinburgh, 19 February 2021

Introduction

[1] In this action, the pursuer claims damages following an accident on 19 April 2016 when she slipped on a slipway sustaining injury. Damages were agreed in the sum of £15,000, plus interest, on a full liability basis. The proof was restricted to liability and contributory negligence.

[2] The following authorities were placed before the court:

1. *Dawson v Page* [2013] CSIH 24;
2. *Wardle v Scottish Borders Council* 2011 SLT (Sh Ct) 199;
3. *Fegan v Highland Council* [2007] CSIH 44;
4. *McGlone v British Railways Board* 1966 S.C. (H.L.) 1;

5. *Brown v Lakeland Limited* [2012] CSOH 105;
6. *Cowan v The Hopetoun House Preservation Trust & Others* [2013] CSOH 9;
7. *Leonard v the Loch Lomond and the Trossachs National Park Authority* [2014] CSOH 38;
8. MacPhail on Sheriff Court Practice (Third Edition) Chapter 27.

[3] The sheriff, having resumed consideration of the cause, finds the following facts to be admitted or proved.

Findings in fact

[4] In April 2016, the pursuer was employed as a teacher at Troqueer Primary School, Dumfries.

[5] The defenders are the owners and occupiers of the slipway (“the slipway”) at the Carlingwark Outdoor Centre, Castle Douglas (“the Centre”).

[6] Water sports, and in particular sailing boats, start from the slipway to Carlingwark Loch (“the loch”). The slipway is constructed from seven precast concrete sections (“concrete sections”), each about 2m by 3m. The slipway is shown in photograph 6/2/5, see appendix to this judgment.

[7] A number of the concrete sections of the slipway are submerged by the water of the loch. The waterline is not static and waves can lap onto the slipway.

[8] The concrete sections below the waterline are very slippery underfoot as a result of algae growth and other deposits.

[9] All sections of the slipway above the waterline are not slippery, whether wet or dry. There is no algae growth above the waterline.

[10] The defenders had in place a Safe System of Work (“SSOW”) for water sports on the loch. The SSOW was written and authorised by Mike Taveren and issued on 16 February 2016. Mr Taveren was the Lead Outdoor Officer with overall responsibility for the running of the Centre, including Health and Safety. The SSOW also gave responsibility to the individual instructors running sessions on the water for the safety of the groups with whom they were working, and for ensuring their familiarity with activity specific risk assessments.

[11] RA20 was the defenders’ risk assessment for using the loch for water sports, dated 9 February 2016. The “Assessors Name” (*sic*) is listed as Mike Taveren. That risk assessment identified “slips and trips on slipway” as a “Hazard”; listed various “existing control measures”, including “clear debris off of paths and slipway; slipway has been cleared of moss and algae where possible; signs up on slipway to warn of hazard; clients warned by staff that the slipway is slippery.”

[12] The usual system of minimising the risk of slipping on the slipway was to pressure wash the slipway each spring before the season of water activities commenced. That system was designed to remove algae and other debris from the slipway. It was effective at removing algae and other debris from concrete sections which were above the waterline, but ineffective at removing algae from concrete sections which were submerged.

[13] Owing to a higher water level of the loch over the winter 2015/2016 months, the annual pressure washing of the slipway did not take place in spring 2016. By the time of the pursuer’s accident, the slipway had not been pressure washed for over a year.

[14] In the days prior to the pursuer’s accident, Robbie Garside, an instructor at the Centre, was working in the water below the waterline when he slipped on a concrete section of the slipway and fell.

[15] On 18 April 2016, the pursuer accompanied a group of her pupils (“the children”) to the Centre for a residential course, which included water sports on the loch. The instructors for the course were Ed Hex and Mr Garside. Mr Rain, the father of a pupil, also attended the course as a parent-helper.

[16] On the morning of 19 April 2016, the instructors gave safety briefings to the children before any water sports commenced. The children were warned the slipway in general was slippery and, in particular, that below the waterline of the slipway was slippery and that Mr Garside had recently slipped below the waterline. The children were warned not to step on the slipway below the waterline.

[17] There were signs attached to trees near to the slipway warning of the risk of slipping.

[18] Following the safety briefings, to the left hand side of the slipway the children were assisted onto “fun boats” by Mr Garside. The children walked with caution on the slipway, linking arms to support one another.

[19] After all the children were in the fun boats, the pursuer was told to wait on the right hand side of the slipway for Mr Hex until he brought round the rescue boat. She waited for him at a place he indicated on the slipway above the waterline.

[20] Mr Hex stood in the water behind the boat and manoeuvred the boat to the side of the slipway adjacent to where the pursuer was standing. He had a clear view of the pursuer.

[21] The pursuer lifted up her right leg in order to step onto the boat at which point the pursuer took a small step forward with her left foot placing it below the waterline. As she moved her right leg to step onto the boat, her left foot slipped on algae on the slipway and she fell.

[22] As a result of the accident, the pursuer sustained an un-displaced left radial styloid fracture and a small avulsion fracture from the tip of the ulnar styloid.

[23] The day after the pursuer's accident, Mr Hex scrubbed sections of the slipway that were submerged with a wire brush in order to remove algae. That task took five hours and removed most of the algae, but the water became opaque during the cleaning and patches of algae were left. Where algae was removed the slipway was not slippery.

[24] The defenders used the wire brush method to remove algae for some time after the accident, but it was not an effective means of cleaning the slipway below the waterline. After wire scrubbing, the slipway might only remain free from algae for a period of days and at times longer.

[25] There had been no previous accidents on the slipway, with about 1,800 visitors a year.

[26] The method of cleaning the slipway below the waterline with wire brushes was labour intensive and not effective for any reasonable time. That cleaning method was not a reasonable precaution for the defenders to take. It was unlikely to have prevented the pursuer's accident.

[27] The system of annual power washing of the slipway above the waterline and warning briefings and signs were reasonable precautions in all the circumstances.

Findings in Fact and Law

[28] The slipway below the waterline was slippery, but was not a danger which had arisen as a result of something done or not done by the defenders.

[29] The removal of algae from the slipway below the waterline prior to the pursuer's arrival at the Centre was not a reasonable precaution for the defenders to take in all the circumstances.

[30] The annual power washing of the slipway, with warning briefings, signs and dynamic risk assessment were reasonable precautions taken by the defenders in all the circumstances.

[31] There were no reasonable alternative precautions the defenders could have taken, which would have prevented the slipway being slippery below the waterline and prevented the pursuer's accident.

[32] The pursuer having failed to establish fault on the part of the defenders under section 2(1) of the Occupiers' Liability (Scotland) Act 1960 or at common law, grants decree of absolvitor in favour of the defenders.

[33] Reserves all questions of expenses. The sheriff clerk will fix a hearing on expenses.

Witnesses

1. Mrs Morag (Elizabeth) McCann

[34] Mrs McCann was a teacher at Troqueer Primary School in Dumfries in 2016. She retired in April 2019. On or about 19 April 2016 she was with her pupils ("children") at the Centre to take part in sailing activities. Mrs McCann had previously been to the Centre about five or six times. The accident happened on the slipway. Mrs McCann had previously used the slipway four or five times.

[35] Mrs McCann was the only teacher from the school. She had a parent-helper, Mr Rain. There were two groups of children. Mrs McCann's group were to use small fun boats. Mr Rain's group were using kayaks and canoes.

[36] Mrs McCann took her group to the top of the slipway where the instructor, Robbie Garside, gave a safety talk. He told the children to take particular care on the

slipway and not to go into the water on the slipway because it could be slippery.

Mr Garside told the children he had slipped a few days before and fallen in the water.

Accident

[37] Before the accident, Mrs McCann moved across the slipway from the left hand side over to the right hand side where it was drier, and towards where the water lapped onto the slipway. On the left hand side, wetness on the slipway came from movement of the boats. On the right hand side, the slipway became wet in places from the lapping of water from Mr Hex bringing up the rescue boat.

[38] Immediately prior to the accident Mrs McCann was standing on the right-hand side of the slipway facing the loch and waiting to step onto the boat, which was being brought up to the slipway by Mr Hex. She was standing where Mr Hex had indicated she should stand. She stood on the joint between the first and second concrete sections, descending to the loch. The third section was partially submerged in the loch.

[39] Photograph 6/2/5 showed the slipway, but not as it would have looked in 2016. There were tufts of grass shown whereas there was none at the time of the accident.

[40] Where she was standing was dry, but the slipway was splashed with water as Mr Hex manoeuvred the boat to the right hand side of the slipway to enable her to get on board.

[41] When Mr Hex indicated he was ready, he stood up in the boat and put out one of his hands. She extended her right hand and arm to take his hand. She did not think she managed to take his hand.

[42] At the same time she lifted her right leg approximately 15-16cms, about the height of the side of the boat, with a split step, keeping herself steady with her left foot on the

slipway. She did not make contact with the boat. She slipped before making contact with Mr Hex or the boat.

[43] It all happened very quickly. Mrs McCann did not think she had moved her left foot slightly. She was concentrating on keeping her body steady. The next thing she knew she was lying on the ground, on her back and in pain. Mr Hex helped her to get up.

Mrs McCann sustained a fracture of the left wrist.

[44] Mrs McCann could not say if the slipway was dry or wet at the point she fell.

[45] Mrs McCann provided details of the accident for the accident report form, production 5/2/12:

“The dingy was held steady by the OE leader. Facing the loch, standing with my right side parallel to the dingy, I lifted my right leg approximately 15cm. As I did this my left foot slid on the slipway, and I fell backwards. On impact my left hand took the weight of my body”.

Assessment

[46] Mrs McCann was doing her best to tell the truth about her accident in 2016, nearly five years ago. It was difficult for her to be precise about where she was standing on the slipway at the point when the accident happened. I had doubts about her reliability over certain aspects of the circumstances of the accident. Mrs McCann was aware the slipway was very slippery below the waterline and that she must not place her feet below the waterline. Where there were inconsistencies, I preferred the evidence of Mr Hex.

2. John Rain

[47] Mr Rain was employed as a fire engineer. In April 2016, he had a son at Troqueer Primary School. He assisted Mrs McCann as a parent-helper on the trip to the Centre.

[48] Mr Rain was not a witness to the accident. He was involved in kayaking at the time.

[49] Mr Rain was familiar with the slipway. There was a safety briefing for all the children before any water-based activities. The children were told that below the waterline it was very slippery as anything below that was going to be covered in algae. The slipway below the waterline was like ice. There was a build-up of algae because of flooding over a number of months, which had gone into the loch. The algae caused the slipway below the waterline to be slippery.

[50] Mr Rain nearly ended up on his backside when he was below the waterline. It was either when the boats were coming into the slipway or going out from the slipway.

3. *Edward (Ed) Hex*

[51] In 2016, Mr Hex was an outdoor instructor for the Outdoor Education Services, Dumfries and Galloway Council. He was based at the Centre but worked elsewhere as well. From Easter until the October holidays, he was involved in water-based activities such as kayaking, canoeing and sailing.

[52] The slipway was constructed of precast slabs made of concrete. The purpose of the slipway was as a launch point to get boats in and out of the water for sail boats and the rescue boat.

[53] The slipway was power washed annually by council employees who came with equipment. This was usually in the Easter holidays before the start of the summer season. The power hosing was to make the area clear and slip free as far as possible from detritus from the loch, weeds, leaves and bits of trees. The slipway above the waterline was not slippery and did not get slippery if water got on it.

[54] Mr Hex accepted there was no power washing in 2016 prior to the accident, but that did not make the slipway above the waterline any more slippery than in any other year.

[55] The slipway had three sections. The upper section was always dry. The middle section was sloping into the water. Above the waterline the slipway was not slippery. Below the waterline the slipway was always slippery. That was what was explained in the safety briefings to Mrs McCann and the children.

Accident

[56] It was a sunny day. The loch was flat calm at the time. The children were given a safety briefing by Mr Garside not to go into the water on the slipway as it was very slippery. Mr Hex came across to where the children were on the slipway and reiterated the warning that the children must not cross the waterline. Mr Hex said Mr Garside had slipped the day before on the slipway, below the waterline, and that his clothes had been stained as a result. He told the children they must not go where Mr Garside went. Immediately after that, the children were assisted into the boats.

[57] Mr Hex remembered the accident very well. After all the children were in the boats, Mrs McCann stood on the right hand side of the slipway waiting to get onto the rescue boat. Mr Hex brought the rescue boat towards the slipway at an angle. He brought up the boat to be secure against the slipway. Mr Hex probably did say to Mrs McCann she was standing in a reasonable position above the waterline. She was facing towards the loch with the boat against her right hip.

[58] Mr Hex was standing in the water at the back of the boat, holding the boat at the rear right hand side. That was the best position to manoeuvre the boat, slide the boat against the slipway, then steady the boat from the back so that Mrs McCann could then step onto the boat.

[59] Mrs McCann was to the front of the boat. She took a small step forward with her left foot into the water. She went to lift her right foot to get onto the boat. He did not see her right foot, but at that point she fell down. In all likelihood, Mrs McCann slipped on algae.

[60] Mr Hex did not assist Mrs McCann onto the boat. He was standing at the back steadying the boat. She looked very capable. He did not give her his hand.

Cleaning of the slipway

[61] It was not practical to power wash the slipway below the waterline. There was no effect on the surface below the waterline, as there was no pressure.

[62] Manual cleaning was tried using a scrubbing brush with a long handle. That removed the top surface below the waterline, but not the black surface below. The staff then tried a wire brush on hands and knees. It was effective, but very hard work. They then tried two wire brushes attached to a board and fitted the board onto the end of a brush handle. That temporarily removed just about everything, but it was very slow and time consuming. The water became very opaque. You had to wait until the water was clear. It took five hours to do this the day following the accident. You could not see what you were doing, so patches were left.

[63] The effect of cleaning was only temporary. It could be a couple of weeks; it could be a couple of months as the slipperiness came back slowly. That was the method used. It was to make the slipway below the water useable for instructors and staff, making it easier to launch boats. The staff still had to take care underfoot.

[64] Mr Hex said "everything in our world is a slip and trip hazard." No one had previously slipped on the slipway and sustained injury. The staff made every effort they

could but they could not control all the risks. A warning was the control measure. They had complied with the risk assessment for Carlingwark Loch, production 5/2/13.

Risk assessment

[65] Mr Hex had a reasonable understanding of risk assessment. He read through the risk assessments every year. The most important risk assessment was a dynamic risk assessment on the day. Safety was the first priority, applied rigorously.

Assessment

[66] Mr Hex was an assured witness. Health and safety was a priority at all times for him. He was a credible and reliable witness. Mr Hex's recollection of the circumstances of the accident was persuasive. On a balance of probability, Mrs McCann took a small step forward with her left foot as she was about to step onto the rescue boat. Her left foot went below the waterline and she slipped on algae on the slipway.

4. *Mike Taveren*

[67] In 2016, Mr Taveren was lead officer of Outdoor Education Services for Dumfries and Galloway Council. He was mainly based at the Centre.

[68] Mr Taveren was not present when the accident happened but he was about the Centre that day. He had responsibility for health and safety.

Risk Assessment

[69] Mr Taveren prepared the risk assessments he was qualified to do. Others would write some and he would countersign. At times he would write a risk and his manager

would countersign. Risk assessments were reviewed every year and after accidents or near misses. In addition to written risk assessments, all staff would carry out dynamic risk assessment as required.

[70] Mr Taveren was responsible for the following:

1. Document headed "Dumfries and Galloway Council, Outdoor Education Service – Carlingwark Loch Water Sports" dated 16 February 2016, production 5/2/15, being the Safe System of Work ("SSOW") for water sports on the loch;
2. RA20 dated 9 February 2016 which was the risk assessment for using the loch for water sports, production 5/2/13;
3. RA20b dated 3 February 2017, which was a generic risk assessment for water sports, production 5/2/14.

[71] The slipway was not slippery except when covered in water below the waterline, when it would be slippery underfoot. Even if you stepped one cm into the water below the waterline it could be ridiculously slippery, like ice covered in oil.

[72] The dry area of the slipway was power washed annually. Within a short time after the Centre opened, Mr Taveren was aware the power hose would not clean the slipway through water. The only method to clean the slipway below the waterline was by scrubbing. That was "horrendously hard work". Within four or five days, the slipway would be slippery again.

[73] Mr Taveren did not consider it was a reasonable step to scrub the slipway below the waterline with a brush when it took five hours on hands and knees and when the slipway would only remain non-slippery for a matter of days. Scrubbing with a brush continued after the accident, but only for a few times.

General comments

[74] The centre had 1,800 visitors a year. There had never been any other accidents on the slipway.

Assessment

[75] Mr Taveren gave his evidence enthusiastically. He was doing his best to be helpful to the court. He was very matter of fact. He seemed genuinely concerned about matters of health and safety. He was a credible and reliable witness.

5. Robert Garside

[76] In 2016, Mr Garside was an outdoor activities instructor at the Centre.

[77] He was involved in the process of risk assessment. Mr Taveren was the manager and he had responsibility for risk assessment. Mr Garside would do the groundwork.

Mr Taveren would agree or adjust any risk assessment as necessary.

[78] Mr Garside had a slip on the slipway a day or two before Mrs McCann's accident. He was up to his knees in water, below the waterline.

[79] Mr Garside was not a witness to the accident.

Cleaning of slipway

[80] The staff would try to scrape clean the slipway below the waterline for their own purposes, whenever they got the chance. It was ongoing. They could never make the slipway below the waterline non-slippery. Groups would not go down to the slippery part

of the slipway, below the waterline. The cleaning was done to ease the launching and recovery of boats by the staff.

[81] They used wire brushes attached to longer poles to clean the slipway, sometimes on their hands and knees.

Assessment

[82] Mr Garside was very matter of fact in giving his evidence. He slipped on the slipway below the waterline prior to Mrs McCann's accident. He was a credible and reliable witness. His evidence was consistent with Mr Hex and Mr Taveren.

6. *John Stewart*

[83] Mr Stewart was a very experienced health and safety consultant with some 40 years' experience. He has given evidence as an expert on many occasions.

[84] A preliminary objection was taken by the defenders as to the admissibility of Mr Stewart as an expert witness in this case. After hearing submissions, I allowed his evidence to be heard under reservation.

[85] Mr Stewart's evidence can be summarised as follows:

- The presence of algae on the slipway was a contaminant known to the defenders, and ought to have been removed prior to Mrs McCann and her group of children arriving at the Centre.
- Warnings including warning signs were not adequate control measures.
- Mr Stewart could not comment on whether it was reasonable to take five hours to complete cleaning of the slipway, as he did not know the volume of algae to be removed, the effort to be made or the tools to be used.

- If there was no power washing for over a year that was bad management on the part of the defenders. If the power hosing was not working, the defenders should have brought in scrubbing brushes earlier.
- As the presence of algae was known, the defenders should have had a system to check the algae position every week and record that. If the algae got bad, the algae should have been removed. It was all about having a checking system and effective removal of the algae to reduce the risk of slipping.
- If the slipway were so slippery that it could not be kept clean for any time, the safest option would have been to abandon using the slipway.
- Mr Stewart provided some information about matting in his supplementary report as a method to reduce the slip risk, but the pursuer did not insist on that case of fault.

Assessment

[86] After hearing Mr Stewart, I decided the evidence was admissible, but I did not rely on his evidence.

[87] Mr Stewart had not visited the locus. He appeared to have no experience of investigating slipways. Mr Stewart demonstrated little awareness of the locus or the circumstances, despite having listened to the factual witnesses. His answers were generalised, not case specific. Most of his evidence involved brief answers to questions, repetition and no reasoning or expression of opinion in the answers. At times, his responses were terse and did not assist the court. Mr Stewart's expertise was not relevant to the facts of this case.

[88] This case is fact specific, and having regard to the factual witnesses no expertise was required.

Submissions

[89] Both parties lodged written submissions, expanded on at a hearing.

Submissions for pursuer

Motion

[90] The motion for the pursuer was to:

1. Find the defenders liable to make reparation to the pursuer and to grant decree in the pursuer's favour in the sum of £15,422 with interest thereon from the date of decree at the rate of 8% per annum;
2. Reserve all questions of expenses meantime.

[91] The action is based on fault at common law and a breach of section 2(1) of the Occupiers' Liability (Scotland) Act 1960 ("the 1960 Act"). The obligation is to take such care as is reasonable in all the circumstances to prevent injury or damage from reasonably foreseeable dangers. It is an objective test.

[92] The slipway constituted a danger owing to the growth of algae and the failure to remove algae prior to the defenders inviting visitors, including the pursuer, to use the slipway. The algae was known to be very slippery. No attempt had been made to clean the algae prior to the accident.

[93] The authorities on obvious dangers and natural phenomena were irrelevant. There was an unusual or unseen source of danger.

[94] The use of warning signs and verbal warnings was of no materiality where the pursuer's slip was a result of an involuntary movement on her part. Any such small movement could not be seen as a wilful or negligent disregard of instructions.

[95] The fact that the slipway could have been wire brush scrubbed prior to the accident in an attempt to reduce the likelihood of a known risk materialising, combined with the fact that this was done subsequent to the pursuer's accident with the immediate effect that the slipway was no longer slippery, was sufficient to hold that the defenders were at fault for the accident and that liability had been established.

[96] There should be no finding of contributory negligence. If the court was not with the pursuer, contributory negligence should be assessed at 95% defenders and 5% pursuer.

Submissions for defenders

Motion

[97] The defenders should be assoilzied. Expenses should be reserved.

[98] The defenders had a number of propositions:

1. The pursuer has failed to establish her injury was caused by the defenders' negligence.
2. The pursuer's accident was caused by her placing her left foot into the edge of the water encroaching onto the slipway as she made to board the rescue boat brought up to the slipway by Mr Hex.
3. In the alternative, if the pursuer did not place her foot into the water and in accordance with her own evidence slipped on the section of slipway above the waterline (the junction line between two sections), then on the evidence as a whole

that part of the slipway was not covered by algae and the defenders had not failed to take reasonable precautions to prevent the risk of slipping.

4. The area of the slipway covered by water had been made slippery by the presence of algae or other deposits.

5. In the circumstances, the slippery area of the slipway was not a danger which had arisen as a result of something done or not done by the defenders.

6. The court should not find that there were any reasonable measures which, if taken, would have prevented the pursuer's accident.

7. Even if the defenders were obliged to take preventative precautions in respect of the slip risks on the slipway, they did take such measures and thereby discharged the duties incumbent on them as the occupier of the premises.

8. In the event the court was not with the defenders and holds them liable to the pursuer, in the particular circumstances of this case and in respect of the frequency of warnings issued to the pursuer and her failure to follow instructions or watched where she placed her feet, contributory negligence should be assessed at around 25%.

Note: Reasons and decision

Introduction

[99] The action is based at common law and under the 1960 Act. The pursuer's claim proceeded under the 1960 Act. The defenders admit they are the occupiers and in control of the slipway.

[100] The law is well known and settled. The standard of care is to take reasonable care in all the circumstances to prevent injury or damage from reasonably foreseeable dangers. It is an objective test. Each case turns on its own facts and circumstances.

The Law

[101] Section 2(1) of the 1960 Act provides:

“The care which an occupier of premises is required, by reason of his occupation or control of the premises, to show towards a person entering thereon in respect of dangers which are due to the state of the premises or to anything done or omitted to be done on them and for which the occupier is in law responsible shall, except in so far as he is entitled to and does extend, restrict, modify or exclude by agreement his obligations towards that person, be such care as in all the circumstances of the case is reasonable to see that that person will not suffer injury or damage by reason of any such danger.”

The accident and contributory negligence

[102] The circumstances of the pursuer’s accident have been proved, on the balance of probability. As the pursuer lifted up her right leg to step onto the rescue boat, she took a small step forward with her left foot, placing it below the waterline on the slipway. She then moved her right leg to step onto the boat. Her left foot slipped on algae on the slipway and she fell sustaining injury.

[103] The pursuer did not deliberately fail to follow warnings and move her left foot below the waterline. She moved her foot unintentionally. No contributory negligence has been established.

Liability

[104] The pursuer says the slipway constituted a danger owing to the algae growth and there was a failure to remove the algae prior to the pursuer arriving at the Centre and using the slipway.

[105] The defenders accept the area of slipway below the waterline covered in algae or other deposits was slippery, but it was not a danger which was as a result of something the defenders had done or not done.

[106] There was no history of previous accidents on the slipway, the Centre receiving about 1,800 visitors a year.

[107] The defenders required to take such care as in all the circumstances was reasonable in the knowledge of a foreseeable risk of injury.

[108] In *Brown v Lakeland Limited* [2012] CSOH 05 Lord Woolman refers to the case of *Murphy v East Ayrshire Council* [2012] CSIH 47 where the court stated:

“The scope of the duty is to avoid doing, or omitting to do, anything which has, as its reasonable and probable consequence, injury to others. This is a question of fact and, as such, one very much for the court of first instance to resolve in the particular circumstances of the case having heard all the evidence. There is some room for diversity of view (*ibid*). There are many factors which may be taken into account, including knowledge of the risk, its magnitude and the practicability and effectiveness of any preventative measures.”

[109] The first factor is the knowledge of the risk. The defenders knew of the risk of slipping below the waterline. That risk was reasonably foreseeable.

[110] In relation to magnitude of risk, the slipway was only slippery below the waterline. The risk was assessed as low. A person would not slip on the slipway above the waterline whether dry or wet. No one who did slip would fall far.

[111] In relation to practicability and the effectiveness of any preventative measures, warning signs were erected and verbal warnings were given at safety briefings. The pursuer

knew she must not place her feet on the slipway below the waterline. These measures were reasonable in the circumstances.

[112] Mr Taveren, Mr Hex and Mr Garside considered health and safety as a priority, addressed by repeated warnings, written risk assessments and dynamic risk assessment as and when required.

[113] The defenders tried a number of ways to remove algae below the waterline. Power washing was not effective. Manual cleaning, including using wire brushes, was very time consuming and only effective for a short time before there was fresh growth of algae. The methods of manual cleaning attempted by the defenders were not successful.

[114] There was no evidence how other operators of slipways or outdoor activity centres cleaned slipways below the waterline.

[115] Applying an objective test, manual cleaning to remove algae below the waterline was not a reasonable precaution which could have been taken by the defenders exercising reasonable care to prevent injury or damage from reasonably foreseeable dangers.

[116] Any manual cleaning was primarily for the safety of staff who had to work below the waterline to launch and bring in boats. Members of the public and visitors were not to go below the waterline.

[117] In *Dawson v Page* [2012] CSOH 33, Lord Glennie stated at para 27:

“... something which is not inherently dangerous in itself, which is in full view of a person likely to come across it, and whose characteristics are all apparent to such a person, is not likely to constitute a danger against which precautions need to be taken...”

[118] Lord Glennie applied that to the circumstances of the case where the pursuer had slipped on wet plank, continuing at para 28:

“There was no hidden danger or anything to disguise any hazard from the pursuer. It was not dark. Any risk associated from using it as a pathway was there for all to see.”

[119] There was no hidden danger in the particular circumstances of this case. The pursuer could have avoided stepping into the water below the waterline by the exercise of ordinary care. Where she was standing, she inadvertently moved her left foot below the waterline and slipped on the algae. Aware of the risks of stepping below the waterline, the pursuer could have positioned herself a short distance further up the slipway (away from the loch) so as to eliminate or minimise that risk.

[120] The court was referred to a number of authorities in relation to the 1960 Act, but each case is fact-specific and not directly in point.

[121] The system of annual power washing of the slipway above the waterline together with warning briefings and signs were reasonable precautions in all the circumstances. The pursuer has failed to prove any liability on the part of the defenders under section 2(1) the 1960 Act or at common law.

Summary

[122] The pursuer has failed to establish fault on the part of the defenders. I will grant decree of absolvitor in favour of the defenders.

[123] Expenses are expressly reserved. The sheriff clerk will fix a hearing on expenses.

Appendix

Photograph Production 6/2/5 showing the slipway (taken in 2021)

