SHERIFFDOM OF LOTHIAN AND BORDERS AT EDINBURGH

IN THE ALL-SCOTLAND SHERIFF PERSONAL INJURY COURT

[2022] SC EDIN 8

PIC-PN1213/19

JUDGMENT OF SHERIFF K J CAMPBELL QC

in the cause

GLENDA MACKENZIE

Pursuer

against

THE HIGHLAND COUNCIL

Defender

Pursuer: Nicholson-White, adv; Dentons, Edinburgh
Defender: Connelly, adv; Ledingham Chalmers, Edinburgh

Edinburgh, 16 February 2022

Findings in Fact

1. On the morning of 22 September 2016 the pursuer attended a practical CPD course in Physical Education at Millbank Academy, Inverness to participate in a training course run by the defender. The course title was "Primary PE: Outdoor Learning Approach". The course was scheduled to run from 10am to 12 noon.

2. The course was devised and instructed by Rona Young, an employee of Argyll and Bute Council. The course was organised by Steven Holmes, an employee of the defender.

3. Prior to the course, Steven Holmes prepared a risk assessment for the course. The risk assessment was in a generic format at JB530-532. He discussed the course including risk assessment with Rona Young prior to 22 September 2016.

4. During the course, the pursuer participated in a game called "Alligator Tag" and was injured in the course of her participation. The game formed part of the course.

5. The game was played in a tarmacadamed area measuring approximately 10 metres by 15 metres. The playing area was marked out with plastic cones and the participants were directed to play within that area. There was a grass covered sports field adjacent to the tacramacadamed area.

6. The grass sports field was not a suitable area for the alligator tag activity to take place. It was damp, and therefore a slipping risk. It was also not representative of the facilities available at the schools at which most of the participants would be returning to teach.

7. A description of the game "Alligator Tag" is found in the "No Limits Outdoor PE Resource Pack (2016) at pages 24-25:

> "Task: Like a normal game of tag apart from once you have been tagged you assume the press up position, this must be held until a free player assumes the press up position next to you and taps your hand, then you are free to move again. The game continues until everyone is caught or people are too tired."

8. In the game the pursuer had the role of "tagger": she was to run after the other participants and make contact with them with her hand. There was at least one other "tagger".

9. At the start of the activity, Rona Young told the participants to take care and in particular to be aware of their surroundings.

10. In the course of the game, the pursuer fell onto the tarmacadam. The pursuer did not see Dawn Asher's legs. She tripped over Dawn Asher's legs at around Ms Asher's ankles.

11. The pursuer initially did not appear to be injured. She got to her feet immediately. She indicated she was fine and that she did not was to make a fuss. A short time after, the pursuer felt unwell. She left the activity area and went to the toilet. She had cuts to her knees and elbows. She was aware of pain in her right elbow.

12. Steven Holmes completed an accident report on 24 October 2016. 6/33 is a copy of the accident report.

13. As a result of her injury the pursuer required to leave the course early and attended Accident and Emergency Department at Raigmore Hospital. She was seen at 11.54am on 22 September 2016. On examination she was tender over the right proximal radius. Her right elbow was x-rayed. The x-ray showed that she had sustained a minimally displaced fracture of the radial head of the pursuer's right elbow. The fracture was managed conservatively. The pursuer was given a radial head fracture advice sheet. She had also sustained a soft tissue injury and abrasions to her knee and right elbow.

14. The pursuer is right hand dominant.

15. On 23 September 2016, Mr James Simpson, Consultant Orthopaedic Surgeon Department of Orthopaedics, Raigmore Hospital, confirmed by letter to the pursuer's GP, Dr Thin, Strathpeffer Medical Practice, School Road, Strathpeffer, IV14 9AG, that no arrangements had been made to follow up the pursuer in the fracture clinic at Raigmore Hospital at this time. In October 2016, the pursuer commenced physiotherapy and at the time of her discharge on 29 December 2016 had 115 degrees of active flexion and a fixed flexion deformity of 30 degrees.

16. On 16 January 2017, the pursuer was seen by Mr Simpson at Raigmore Hospital in connection with the failure of her right elbow to return to a full range of motion. X-rays revealed a mildly maluniting fracture of the radial head. Mr Simpson noted reduced range of motion in the right elbow and reduced supination/pronation. Mr Simpson advised the pursuer that her options were to continue as she was or opt for arthrolysis.

17. On 7 July 2017, the pursuer had radial head excision and manipulation and arthrolysis at Albyn Hospital, Aberdeen.

Findings in fact and law

1. The accident suffered by the pursuer on 22 September 2016 was not caused by the fault and negligence of the defender, or of those for whom it is in law responsible.

2. The accident suffered by the pursuer on 22 September 2016 was not caused by the defender's breach of duties under the Occupiers' Liability (Scotland) Act 1960.

Introduction

[1] This case concerns an accident which occurred on 22 September 2016, in which the pursuer suffered a fracture to her right elbow, as well as some cuts to her knees. The pursuer is a teacher, and the accident happened while she was participating in an outdoor skills training course with other teachers. There is no doubt the pursuer had an accident on 22 September 2016, and as a result she suffered an unpleasant injury to her right elbow. The questions for the court in this case are whether the accident was due to the fault of the defender, the pursuer's employer, and, if so, what is the proper measure of damages.

[2] I heard proof by WebEx videoconference on 14-17 December 2021. Having concluded the evidence on 17 December, I appointed parties to prepare written submissions and to exchange these in draft by 24 December, and thereafter to lodge finalised submissions with the court by 10 January 2022. Having reviewed the written submissions, I determined that a further oral hearing was not required, and on 11 January 2022, I made avizandum.

[3] Parties helpfully agreed a number of factual matters, as well as the provenance of most of the documentary productions in a Joint Minute, number 25 of process. Parties also agreed some elements of damages in the event that the court found liability established.

Pursuer's evidence

[4] The pursuer gave evidence, and led evidence from Dawn Asher, Steve Holmes, Rona Young, Alistair MacTaggart, Alistair Farquhar and Wendy Riggs.

The pursuer

[5] The pursuer is a primary school teacher and is now 48 years of age. It was a matter of agreement that on 22 September 2016 she attended a practical training course with other teachers at Millbank Academy, Inverness. Then and at the time of the proof, the pursuer was employed by the defender. The course took place on a large tarmac playground area to the back of the school. An area about 10 by 15 metres had been marked out with plastic cones. It was a matter of agreement the pursuer was injured while participating in an activity called alligator tag. This was one of a number of activities forming part of the course, and the pursuer thought she had played a number of other games before alligator tag. The pursuer explained this was a version of the game of tag, in which one or more catchers chase other participants; when a catcher touches another player, the latter assumes

the plank position until released by another person who has been tagged. The pursuer said she had thought all participants would take part in the game, but in fact a number chose to observe. She described them as forming a fence around those participating.

[6] The pursuer could not recall what safety instructions had been given. She thought participants had been told to be careful, but could not remember the exact words. She could not recall whether participants were told to be spatially aware while playing alligator tag. She could not recall whether participants were told to be aware of their surroundings or other attendees.

[7] The pursuer was in the role of "tagger", pursuing other participants. She was sure there was at least one other tagger. The game was played at a fast pace because the taggers had to run after other players. While the pursuer was running, a person who had been tagged and was in the plank position lifted a leg, and the pursuer tripped over the leg. The pursuer did not see the leg come out and tripped over and fell.

[8] After she fell, the pursuer jumped back up. She felt embarrassed, and said "I'm fine" to Rona Young. The pursuer said she would stand at the side. Steve Holmes came out of the school building and spoke to the pursuer, and she said she would stand at the side. The game carried on. After a few minutes, the pursuer felt "something was not correct", she felt something trickling on her arm. She spoke to one of the other participants, and went indoors to the toilets where she found she had cuts to her knees and elbows. She felt there was something wrong with her elbow. She went to find Steve Holmes indoors. She found him and told him she did not feel good, and there was something wrong with her arm. She said she would drive to hospital to have it checked out. Steve Holmes said that was fine and she should let him know how she got on. She went outside and told Rona Young also. By this point, the pursuer was tearful. The pursuer said she was not offered first aid.

Steve Holmes did not offer to drive her to hospital, which she had been expecting. The pursuer drove herself to Raigmore Hospital, which was about five minutes' drive away from the school.

[9] At Raigmore, the pursuer's right elbow was x-rayed, which showed that she had sustained a minimally displaced fracture of the radial head of her right elbow. The fracture was managed conservatively. She had also sustained a soft tissue injury and abrasions to her knee and right elbow. On 16 January 2017, the pursuer was seen by Mr Simpson at Raigmore Hospital in connection with the failure of her right elbow to return to a full range of motion. On 7 July 2017, the pursuer had radial head excision and manipulation and arthrolysis at Albyn Hospital, Aberdeen. She has incomplete extension of her right arm. She has continuing discomfort.

[10] The pursuer had not seen the accident report 6/33 until the week prior to the proof. She did not complete that report. She recalled Steve Holmes visiting the school where she was teaching in the autumn of 2016, and wondered if he had completed the form at that time.

[11] In cross-examination, the pursuer said she was sure Rona Young would have given instructions to participants about being aware of their surroundings, but she could not recall what was said. The pursuer said Ms Asher said she put her leg out to the side, she agreed that Ms Asher was in the press-up position and she (the pursuer) tripped. The pursuer was initially unable to say what part of Ms Asher's leg she had come into contact with. She agreed it was possible she did not see Ms Asher's leg. The pursuer said she was sure Steve Holmes asked if there was anything he could do to help, but she could not remember his exact words. She was sure he did not offer to drive her to hospital.

Dawn Asher

[12] Dawn Asher is a primary school teacher, and is now 52 years of age. She was a participant in the same outdoor learning training event as the pursuer at Millburn Academy, Inverness on 22 September 2016. She could not recall whether there was safety briefing at the start of the course, but there normally would be. Ms Asher recalled the alligator tag activity, and confirmed she had participated in that game. She recalled the participants laughing as the activity progressed. Some participants were going slowly, others were running around. Ms Asher could not recall whether participants were told be spatially aware, but imagined they were told that. As adults they should have a bit of common sense and look around. She thought that she had looked around. A lady tripped over her leg, she had come from Ms Asher's left, and had got tangled in her legs. She tripped and fell. Ms Asher could not recall clearly, but thought she had been tagged and was in the process of going down into a press-up position when the lady got her feet tangled and tripped. Ms Asher was putting her legs down behind her at that point. The game stopped, the lady left, came back and said she was leaving the course.

[13] In cross examination, Ms Asher confirmed it was not compulsory to join in the individual games. The area where the game took place was a normal playground. Ms Asher was asked about a version of events in which it was suggested she had been in a plank position and had raised one of her legs, and she said she was pretty sure she would not be able to do that. She was asked about a version of events in which it was suggested she had put a leg out to the side, and said she might have because she was hunkering down when the lady got tangled in her legs. Ms Asher thought the lady had made contact with her ankle. She thought the lady had probably scraped her knees and possibly her hands and arms; she had no idea at the time that her injuries were worse.

Steven Holmes

[14] Steven Holmes is a semi-retired teacher. He is now 58 years of age. In 2016, he was the lead officer for PE for the defender, which was a role to support the development of PE teaching in the defender's council area. He organised the event at Millburn Academy on 22 September 2016. Mr Holmes was familiar with Millburn Academy, and had gone round the grounds thinking about the purpose of the event. It had to be outdoors, and to relate to what staff participating might have available at their schools. The grassy area was not suitable because it was slippy, and also because some of the staff would only have tarmacked areas and did not have access to grass fields.

[15] Mr Holmes said the course was his course. He had identified the site, arranged the venue and arranged for the course to be publicised. Mr Holmes carried out a risk assessment for the course. He was trained by the defender in risk assessment in 2013, and had had subsequent refresher training from one of the defender's health and safety officers in 2014-15. His training had been directed towards his developing risk assessment for class-based PE teaching. His risk assessment for the course had been carried out over a period of time, from the planning onwards. He had visited the venue a couple of weeks prior to the event. He had discussed the course with Rona Young, and he had the resource pack (5/16, JB533) available to him. Mr Holmes had used a template developed for previous in-service training events as the basis for discussions with Rona Young. When making the risk assessment, he had regard to matters including the audience, the reasons for running the course, the intention and purpose, the course setting, hazards and who would be affected, what measures were in place, and the residual risks. The main risks were slips, trips and falls.

[16] Mr Holmes had previously attended a version of the course run by Rona Young in her own council area, Argyll & Bute, and had also invited her to attend a Highland Council event in 2015. From those events, he had the course materials available to him at the time of considering risk assessment for the course. It was always necessary to think about safe numbers in classes, and he considered the venue could safely cope with the numbers on the course. He was also mindful of having numbers that would allow conversations among staff participating. By an oversight, he had initially specified different maximum numbers of participants for the morning and afternoon versions of the course. Following a call from administration, that was resolved and, 24 specified for both sessions. Mr Holmes was not aiming for a specific number, but for a number he felt was safe and which would enable participants to feel involved.

[17] Mr Holmes did not see the pursuer's accident. He had been made aware of it and came out of the school building. He asked her if she was alright, and she said she was. He asked if she wanted to come inside, and she declined. There was no sense that this was a serious accident. The pursuer did not want a fuss. She had come into the building some time after and said she was going to get her arm checked. He had offered to take her to hospital, and she had declined. He did not think the pursuer was tearful; he would not have let her go alone if she was upset. The pursuer said her arm was sore, she was going to get it checked out, and hoped to be back for the afternoon session and she wanted the course materials.

[18] Mr Holmes did not make a record in the school accident book at the time. He did not have the accident book. He had subsequently made an accident report on 24 October 2016 (6/33) which he sent to the defender's health and safety team. He did not know why it had taken that amount of time to complete. He had not realised the time gap was as long as it

was. At the time, Mr Holmes had felt compelled to complete the "recommendation" box. He thought this had been an accident and they had measures in place. He had felt the question was asking for something that would have stopped the accident. The recommendation of going at walking pace would have prevented the accident, but any movement carried risk of collision and that could not be removed completely. He now felt more confident in leaving this section blank if that was appropriate.

[19] In cross-examination, Mr Holmes confirmed that the defender's policy about risk assessment allowed the use of generic risk assessment. The framework should be adapted to a new situation. His knowledge from having participated in an earlier iteration of the course was part of his risk assessment. Mr Holmes did not think including assessment of the risk of individuals not looking where they were going was appropriate for the audience on the course, but different considerations would apply to younger school pupils.

Rona Young

[20] Rona Young is a retired teacher, and is now 69 years of age. Prior to retiring in 2020 she was employed by Argyll & Bute Council in a development role for PE teaching. She devised and led the course at Millburn Academy on 22 September 2016. Steve Holmes had sent her photos of the venue ahead of the course, and she arrived early to check the venue. She was delighted with the space allocated, as she had delivered the course in smaller spaces at other schools. She had delivered the course to groups larger than the 24 registered on 22 September 2016.

[21] Ms Young had experience of carrying out risk assessments in her time as PE lead officer in Argyll & Bute. She was not sure how long risk assessment documents were retained; they were kept by the education department rather than by her. Steve Holmes did

the risk assessment for this course as he was the organiser. He shared it electronically with Ms Young. They had had numerous conversations about the organisation of the event, and Ms Young could not recall the point at which risk assessment had been discussed. She had discussed the risk of participants colliding during the games with Steve Holmes on the morning because that would be a standard sort of thing to cover, along with numbers, the space available, first aid and housekeeping.

[22] The 'No Limits Outdoor PE' Resource Pack (JB533-630) was something Ms Young devised for primary schools with restricted facilities indoors and limited equipment. In the alligator tag activity, the participants who were tagged were to take up a press-up position, either full press-up or from the knees as they felt able. Decisions about balance and control were part of the activity, as they would be for school pupils. Ms Young had spoken to participants about safety, emphasising balance and control. Before the games she emphasised safety generally, reminding participants to think of others, to have spatial awareness, and not to go too fast. She emphasised safety at the start of each game as an example of good teaching practice. Before each practical activity, Ms Young told participants it was for them to make their own decision about participating. She also asked if anyone had major health concerns, and no-one came forward. People opted in and out of the practical activities as they felt appropriate.

[23] In terms of the likelihood of collision between participants, as measured on the scale of 1, 2 or 3 in the defender's guidance on risk assessment (JB499), Ms Young considered the considered the risk was low (or "1") because the event was not competitive, because of the way participants were behaving, because the pace was not fast, and because she had emphasised body position. She had never had an issue with this in her experience of teaching. She did not accept that "could well happen" (or "2") was appropriate; her risk

assessment was dynamic and therefore continuing. If she thought it would happen, she would reduce the number of participants or catchers, or increase the area. She did not agree that it would be safer for those participants who had been tagged to move to the edge of the playing area, because part of the game was to develop spatial awareness. It would not have been appropriate to do the exercise on the grassy area. It was soaking wet, so there was a greater slip risk.

[24] Ms Young did not see the pursuer fall, but was made aware and stopped the game. She spoke to the pursuer, who did not want to be the centre of attention and wanted the activity to continue. Steve Holmes came out to help so that that Ms Young could continue leading the activity. First aid was available in the school building. Mr Holmes dealt with that rather than Ms Young. Ms Young considered that if the pursuer fell it was not because of the nature of the activity; the activity was safe.

[25] In cross-examination, Ms Young said dynamic risk assessment meant assessment all the time, having regard to what people were doing, how they were moving in space, whether they were becoming highly competitive in which case she would have used more space. She had no concerns about the number of people attending the event, nor about the numbers participating in the alligator tag activity. Those not participating in the game were on the tarmac to one side, outwith the coned area; if they had been too close, she would have asked them to move back. Ms Young did not agree that having the tagged participants move to the side and go into a press up position there until released might reduce the risk of tripping. That might increase the speed participants moved at, or the catchers might be hovering at one side.

[26] Ms Young helped the pursuer up after she fell. She was initially happy to continue observing the game and for others to carry on. The pursuer did not say much other than she

had fallen and would be alright and wanted to be left alone. If Ms Young had known the pursuer had suffered a fracture, she would have stopped the activity, and would have taken the pursuer inside and got appropriate help and assistance.

Andrew MacTaggart

[27] Andrew MacTaggart is now 65, and before his retirement in April 2021, was a health and safety advisor with the defender, a post he had held since 1994. He said the usual practice following an injury at work was for the person leading the event to complete an accident report form. A copy would be sent to his team as part of the Council's health, safety and welfare policy. Copies would also be sent as appropriate, including to the injured person's manager. Copies were generally kept for three years. Mr MacTaggart was asked if he had seen a Specification of Documents (15 of Process) and associated order of the court (JB761-769). He had not. He did not recall being asked by colleagues to produce documents in response to the Specification.

Wendy Riggs

[28] Wendy Riggs is a clerical assistant at Southlodge Primary School, and is now 56 years of age. She has worked at Southlodge since 2003, and in her current role since 2012. She has known the pursuer since she worked at Southlodge as a probationary teacher in 2015-16. She was aware the pursuer was injured in the course of an in-service training day on 22 September 2016 at Millburn Academy, Inverness. In the week prior to the proof diet, she had located the accident report form 6/33 in the accident report folder at the school. She could not now recall who had provided this to her originally. She had not forwarded the principal to the defender as that was not her responsibility. She had very recently recalled

the existence of the accident report, and had forwarded a copy by email to the pursuer's agent. Ms Higgs had been off work for health reasons from July 2020 until the beginning of May 2021. At no time prior to the week before the current proof diet had anyone asked her for the accident report form.

Alistair Farquhar

[29] Alistair Farquhar is now 68. He was formerly a teacher with more than 20 years' experience in promoted posts, and thereafter with 12 years as Head of Educational Resource Services for Moray Council. Since 2012 he has been a self-employed consultant on employment, staffing, disciplinary, grievance, health and safety and education policy matters. He prepared a report for the pursuer in this case, dated 16 November 2020, which is 5/11 of process. He adopted his report in evidence. Since preparing his report, Mr Farquhar had come to learn the maximum number of participants on the course was 24, not 15. Mr Farquhar had no difficulty with the number of participants being 24, the question was whether the risk assessment for 15 participants had been revisited for 24.

[30] The generic risk assessment template covered the risks Mr Farquhar expected to see. He was content with "2" for severity for the entry for collision. The generic risk assessment indicated the risk of staff colliding was "1" or "unlikely". He thought that was unrealistic, and would have assessed the risk as "medium" or "could well happen". There were 17 people in a restricted area, though the view was adequate. They were running from one, two or three catchers, and some were in a press-up position. He had no difficulty assessing the likelihood as "could well happen". As a teacher, he would expect children to collide, and he would be expecting to give information to minimise the possibility of collision. That would include instruction to be aware of others around you. There was no reference to that

in the instructions for alligator tag, though it was included for some of the other activities. Mr Farquhar considered the risk could be reduced by asking those tagged not to go into the press-up position in the area being used. He understood why that was included in the design, thought it was another obstacle to see and avoid, but it increased the risk. The effect could equally be achieved by adopting the position on the boundary of the game area. The second step to reducing risk would be playing game at walking pace.

[31] Mr Farquhar did not agree with the defender's expert Professor Wood's analysis that because participants were running away from the taggers there was less risk of collision. People were not all moving in the same direction, particularly as there were several taggers. In addition to being chased, the participants also had to dodge those who had been tagged and were in the press-up position. Nor could it be assumed that because the participants were adults the pace was slower than it would be if played by children. While it could be argued adults are more spatially aware, there was excitement, and, he imagined, an element of competitiveness. Mr Farquhar did not agree that the flow of the game would be disrupted if those who had been tagged had to go to the side of the area before getting into the press-up position. The game could continue while they did so. While it might not be clear who had been tagged till they got to the side, it would be clear then.

[32] It was possible to carry out a risk assessment without full knowledge of the corporate risk assessment policy. The person completing the risk assessment should know the detail of the activity being assessed, and the context and purpose of risk assessment. At the time he prepared his report, the accident report 6/33 was not available. He confirmed he had seen a copy the week prior to the proof. In his view, a gap of one month between the date of accident and submission was unwelcome and unnecessary.

[33] In cross-examination, Mr Farquhar agreed it was common sense to expect people to be spatially aware; that was a daily requirement. He would have expected guidance to be given at the start of the event. The course was an opportunity to learn how to deliver the activities to children, and he would expect Rona Young to give instructions to children. If her evidence was that she had given advice to participants as participants and for children that would meet his expectation. Mr Farquhar would not expect risk assessment to include participants not looking where they were going, but one could assess for the risk of collision.

Defender's evidence

Professor Michael Wood

[34] Professor Michael Wood is now 62. He qualified as a primary school teacher in 1981, and thereafter held posts as assistant head and headteacher at several primary schools, as one of HM Inspectors of Schools, and Director of Education in Dundee. He was appointed Honorary Professor of Education at Dundee University in 2017, and runs an educational consultancy company. He prepared a report in connection with this case for the defender, dated 10 December 2020, 6/13 of process. Professor Wood was present throughout the evidence of the factual witnesses, but not during the evidence of the pursuer's expert Mr Farquhar. Professor Wood adopted his report in evidence.

[35] Professor Wood's view was that participants in the alligator tag activity were given adequate warning to be spatially aware; and that was part of the activity. It should also be borne in mind the participants were adults. It was made clear to those on the course that participation in the activities was not mandatory. Turning to the question of risk assessment, Professor Wood confirmed that nothing in the oral evidence from factual witnesses caused him to change his view about the appropriateness of using a generic risk

assessment. These are very common at school and education authority level. In his experience in Dundee, the authority maintained a bank of generic templates so that staff did not have to start from scratch. The key was whether the activity had changed. Asked about the distinction between a collision and a trip, Professor Wood said a collision involved impact with someone, whereas tripping over someone involved the body being propelled forward over the other. Professor Wood agreed with Mr Farquhar that it was appropriate to undertake the activity on tarmac rather than grass. It was not essential for those on the course to participate in order to learn how to teach the activity. However, active participation in training events is standard practice, because it enables teachers to learn new activities and skill, and develop their professional skill and understanding.

[36] In his view, requiring participants who had been "tagged" to move to the side of the game area would potentially increase the risk. It would add a level of complexity. People looking to free others would tend to congregate at the side, potentially creating a log-jam. His understanding of the game was that people were moving away from contact. Requiring people to move to the side would lead to uncertainty as to whether they had been tagged until they got to the side. Further the activity was about spatial awareness and body core strength. Tagged participants were in the press-up rather than the plank position. They would have been clearly visible to other participants. The pursuer had said it was possible she was not looking where she was going. That is how accidents can happen; if a person is not giving due care and attention, they may not see a person in front. That was not something which could be risk assessed. Professor Wood thought the reality on the day had been that the pursuer had a shock and was embarrassed. She wanted to get up and get on. She had said to Steve Holmes she wanted to come back for the afternoon session.

[37] Professor Wood said Rona Young's evidence was an account of dynamic risk assessment. He also noted that the Record made the point the incident was over very quickly. The pursuer got up very quickly, and there was no reason to stop the game. It was not a case of the pursuer lying prone, or unconscious. Professor Wood did not agree with Mr Farquhar's view about assessment of the risk of collision. In his view, it was relevant that this was not a competitive activity, it was instead about teachers learning skills to take back to their own classes.

[38] While Professor Wood agreed that an accident report should be completed near the time of the accident, because things are fresher in the minds of those involved. Local authority guidance would identify what to report and when. He thought Steve Holmes should have completed the accident report on the Monday following the accident when he became aware of the pursuer's injury. Even allowing for school holidays, he should have reported it sooner than he did. However, that did not lead to an inference about the quality of the risk assessment; these are two quite different things.

[39] In cross-examination, Professor Wood was challenged on whether he was an expert in health and safety. He has experience in health and safety from his time as director of the education service in Dundee. Local authorities had policies in relation to health and safety, and about risk assessment in particular. He would start with those. Professor Wood explained that he disagreed with Mr Farquhar's view the assessment of the level of risk of staff colliding should be "2" "could well happen". The course had been run a number of times previously at a number of venues. Risk assessment is dynamic and if there had been risk evident from previous activities, that should be taken into account. The participants were running away from the "tagger", which in his view heavily reduced the risk. Participants were adults, who had signed up for the course. That was very different from

running this event with children. From the evidence of factual witnesses, it was clear the participants were not moving at breakneck speed. Professor Wood agreed that both participants and defender as employer ought to avoid risks. Attendees were participating voluntarily; as adults they ought to exercise common sense and be mindful of safety. The organiser also ought to be mindful of risks.

[40] Professor Wood said that paragraph 9.3 of his report giving reasons for disagreeing with Mr Farquhar about requiring "tagged" participants to move to the side before assuming the press-up position was about safety. Point 1 was that participants in the press-up position were visible. Points 2 and 3 moving to the side might cause safety problems. It would interrupt the game, and there would be uncertainty about whether individuals had been tagged till they got to the sidelines. That was also what Rona Young had said in evidence. Professor Wood said that if an accident happened it was a judgment call on the day about whether an activity needed to be stopped or not. An accident should make the organiser consider if the activity needed change, but that was for future courses. Professor Wood considered the only criticism of the content of the accident report 6/33 was the remedial measures section. In his view, given the nature of the game and the instructions, the proposal to reduce the pace to walking pace would neuter the game, since everyone would be moving at the same pace, and it would not then be a game.

Analysis and decision

[41] As I have noted above, at the close of the evidence, I appointed parties to exchange and lodge written submissions. They are numbers 27 and 28 of process. I need not rehearse them at length, though I have considered them carefully in reaching my decision which follows, and I will refer to a number of points arising.

[42] There is no doubt the pursuer had an accident on 22 September 2016, and as a result she suffered an unpleasant injury to her right elbow. I have concluded that the facts I have found do not establish that the accident was a result of the defender's breach of duty to the pursuer at common law. Nor was the accident a result of a breach of any duty by the defender under the Occupiers Liability (Scotland) Act 1960.

Assessment of witnesses

[43] At the time of the proof, the events were more than five years distant, and although I was satisfied the witnesses to fact were generally doing their best to recall events, unsurprisingly their recall was incomplete on some matters. That is unsurprising both because of the passage of time, and because the events appeared to be of limited consequence to many people there on the day, but which, with the benefit of hindsight, were of more significant impact on the pursuer.

The pursuer

[44] Counsel submitted that in all material respects the pursuer was able to give an account of the mechanism of the accident, even if there were gaps in her recall. My impression was that the pursuer was doing her best to tell the truth. However, not infrequently she failed to answer the question asked, but instead volunteered information more or less related to the topic. In her evidence, the pursuer had limited recollection of pre-accident engagement with the organisers, e.g. in relation to instructions about safety, as opposed to the accident and its immediate aftermath. Perhaps that can be explained by some parts of the sequence of events only acquiring significance later. More importantly, the pursuer's version of the mechanism of the accident, as pled on record, has changed a

number of times. No doubt those amendments were made by agents on instruction and in light of what the pursuer then recalled, perhaps in light of other information which had since come to hand. The pursuer did not really have a satisfactory explanation for that. For all of these reasons, I found the pursuer's evidence to be unreliable on a number of key matters. In particular, I do not accept her evidence about the instructions given by Rona Young at the start of the activity, and on that, I prefer Rona Young's evidence. Nor am I confident I can accept the pursuer's account about the precise mechanics of the accident, beyond the fact that she undoubtedly fell over Dawn Asher's legs.

Steven Holmes

[45] I found Steven Holmes to be a credible and generally reliable witness. He was questioned at length about risk assessment, and gave a broadly consistent account of his approach to this which was informed by the training he had received, as well as his experience as a teacher and the understanding of the practicalities of risk assessment in the teaching setting which he took from that. It was clear that his reporting of the accident was below standard, but he did not shy away from that and I do not regard that as undermining his credibility as a witness.

Rona Young

[46] I found Rona Young to be a credible and generally reliable witness. Where she was unable to recall events, she said so. She is an experienced teacher and teacher trainer. It was clear that she very much enjoyed her development role. She gave the impression of a practitioner who had given time and thought to the form and content of the "No Limits" course, and about which she had no reason to be other than straightforward and open. In

submissions, the pursuer criticised Ms Young for being protective of the "No Limits" course which she devised, and submitted this skewed her view about risk. For reasons I will come on to, I reject that characterisation. Ms Young was clear in her evidence that one of the aims of the event was to model good practice, which the participants could in turn take to their schools. She was clear about that in her evidence about giving reminders to participants about taking care and being mindful of who and what was around them. Neither the pursuer nor Ms Asher definitely recalled that, but both thought that such instruction was given. I accept Ms Young's evidence about that.

The skilled witnessses

[47] Mr Farquhar and Professor Wood were led as skilled witnesses respectively by the pursuer and the defender. I am satisfied both were qualified to speak to questions of the safe organisation of PE teacher training events of the kind with which this action is concerned. Mr Farquhar and Professor Wood were in agreement that the venue was suitable, and that subject to the specific issue of assessment of collision risk, the course design was suitable. In my view, the central issue for the skilled witnesses was the proper approach to risk assessment for the course, and in particular, assessment of the risk of participants colliding and tripping over each other.

[48] The pursuer challenged Professor Wood's qualifications to give evidence about health and safety. I was unimpressed by this line, as both Professor Wood and Mr Farquhar were led as skilled witnesses with experience in education management and leadership. As I understand it, neither was being led as a specialist in health and safety matters as such. In my opinion, both witnesses demonstrated in their reports and oral evidence an appropriate level of knowledge derived from experience both as teachers and school heads, and at senior

managerial level of health and safety in the context of delivery of education in schools. Both demonstrated clear understanding of the principles of risk assessment, and the relevance of local education authority policies in that regard.

[49] On this central question of risk assessment for the alligator tag activity, and in particular the likelihood of identified risk occurring, I preferred the evidence of Professor Wood for a number of reasons. I consider that his view that the alligator tag activity was not being played at pace, is relevant. I also prefer his view that requiring participants who had been "tagged" to move to the side of the area before going into the press-up position would have added complication in the form of additional movement, and also in the likelihood of altering the dynamic of the catching element of the game. More important from the perspective of risk, I consider that he is correct that this would have concentrated participants at the side with potentially greater risk of collision there, particularly as it would not have been evident who had been tagged until they got to the side and went into a press-up position. Finally, I consider his evidence better addressed the reality of the event on 22 September 2016. That is to say, these events occurred during a professional development course for qualified teachers. The participants were adults, with varying degrees of experience of working with primary age children. The event was not competitive, and there was no compulsion for attendees to participate in any given activity. That is reflected in the evidence of the factual witnesses to the effect that almost a third of participants observed the alligator tag game from the sidelines. Separately, I accept his evidence that it is not possible to risk assess for a person not looking where he or she is going in an activity of this kind.

Common law duty

[50] The thrust of the pursuer's case appears to be that the defender failed to discharge its duty of reasonable care to minimise the risk of injury, and in particular failed adequately to assess the risk of accident while the game of alligator tag was being played, and, presumably to act on such risk assessment. The pursuer asserts that the risk of collision between participants ought to have been given a higher weighting. I am satisfied that a risk assessment was carried out, and that it was sufficient. I accept the evidence of Steven Holmes that he carried out a risk assessment during the preparation for the event, and I am satisfied on his evidence that he had sufficient experience of preparing risk assessments for events of this kind. I accept Steven Holmes's evidence that while conducting a risk assessment, he had regard to the course materials prepared by Rona Young, his knowledge of the locus, and his experience of participating in a previous iteration of the course.

[51] Steven Holmes said the risk assessment for the course mostly focussed on slips, trips and falls. That is borne out by the generic risk assessment document (JB530-532). There is in addition the specific entry for "staff colliding" which was the subject of extended discussion in evidence. It seems to me these entries demonstrate an appropriate appreciation by Mr Holmes of the nature of the risks in the outdoor activities on the course; the real question is therefore the level of possibility of their occurring, and the consequent management of risk.

[52] Context is important: as Rona Young explained in her evidence, the course was devised for teachers from primary schools with restricted indoor facilities for PE. Many such schools both in Argyll & Bute and in the defender's area had playground areas no larger than that used for the course. Those were typically tarmacked, and many schools did

not have access to grassed play areas. The participants were operating in an open area 10 by 15 metres, which was flat. They had been briefed on the nature of the activity, and were fully aware of what the other participants were trying to do: either tag or be tagged.

[53] I accept Rona Young's evidence that on the morning of the course, she assessed risks associated with the games to be tried by participants, including alligator tag in the setting where the course was to take place. While participants were moving at different speeds, this was not a competitive event. I accept her evidence, which is supported by Professor Wood, that the precautions proposed by the pursuer would not be practicable having regard to the aim of the game, and further that they might increase the risk of collision, by forcing the "tagged" participants to congregate at the side of the game area.

[54] I should make it clear I am not deciding this case on the basis of the debate between counsel about whether the accident was caused by a collision or by the pursuer tripping over Dawn Asher. In the context of this case, I consider that to be a semantic dispute which does not illuminate. The pursuer undoubtedly fell; she did so because she collided with or tripped over Dawn Asher. That was a foreseeable risk, and I consider that it was foreseen and accounted for by Steven Holmes. I consider that his assessment of the likelihood of occurrence was reasonable in the circumstances. Dawn Asher was putting her legs out behind her as she went into the press-up position. The pursuer was approaching from Ms Asher's left. The pursuer did not see Ms Asher's legs, but it cannot be said her legs were concealed. The pursuer tripped over Ms Asher's legs and fell.

[55] I also have regard to the fact that the participants were all teachers with experience of the school environment. As Dawn Asher said, unprompted, people needed to exercise a bit of common sense and look around them. In my view, that is correct: this was an educational activity in the form of a game played by adults, in daylight, in full view of each other, in

accordance with known instructions, and with a reminder about personal safety at the start of the activity. On the evidence of Rona Young, the latter was given for the purpose inter alia of modelling good teaching practice as well as providing a warning as such. In my opinion, both Steve Holmes and Rona Young gave sufficient weight to the risk of collision between participants in their assessment of risk, and, in the case of Rona Young, in her instructions to participants.

[56] I am satisfied the accident reporting by Steven Holmes was sub-standard, even allowing for the fact that the severity of the pursuer's injuries was not known to Mr Holmes until the week following the accident, but the discussion of the quality of Mr Holmes's accident reporting, and on the question of whether or not the pursuer was offered first aid after the accident are, in my opinion, irrelevant to the core issue because they throw no light on the accident itself and on whether it was caused by the defender's fault. The defender submitted, correctly in my view, there was no record for a case of fault arising from those matters. Further, I reject the pursuer's submission than in some way this throws light on the quality of Steven Holmes's evidence about risk assessment. Nor do I accept that the difference of recollection between the pursuer and Mr Holmes about some aspects of his response to the accident is of any assistance in relation to the central issue of risk assessment. It was in my view clear that his actions on the day were a response to the pursuer's initial presentation and her feelings of embarrassment at having fallen and what he believed to be her minor injuries. Why he then failed to make a report as soon as he learned more was explored in evidence, and does not illuminate the issue of risk assessment.

[57] In *Phee* v *Gordon* 2013 SC 379, Lord Hodge set out a helpful summary of the calculus of risk which the court requires to consider in a case like this; see p386, paragraph 28. Assessment of the likelihood and seriousness of injury are at the core of this case, and of the

evidence. I have discussed that in detail above, along with the practicalities of preventive or mitigation measures. There was a difference of view about that between parties, and I have set out my reasons for preferring the defender's analysis. The final strand of the calculus desiderated in *Phee* is the value of the activity giving rise to the risk. That was not a live issue in this case, and I did not understand there to be any dispute that the course as a whole and the individual activities were of value to the participating teachers.

[58] For all of those reasons, I conclude that the pursuer has not established that her accident was caused by a breach by the defender of a common law duty to assess risk, and to reduce risk to the lowest level reasonably practicable.

Occupiers Liability Act

[59] Section 2 of the Occupiers Liability (Scotland) Act 1960 provides:

> **"2 Extent of occupier's duty to show care.**
>
> (1) 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."

[60] In order to succeed on this limb of the case, the pursuer must establish that the accident was caused by "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". There are two strands to this, and it is convenient to consider them in turn.

[61] The skilled witnesses were agreed that the area of the playground where the course was held, and in particular the area where the alligator tag game took place, was

appropriate for the purpose. It was intended to assist teachers from smaller schools which might well only have tarmacked playgrounds to work with, so that part of the purpose of the course was to work on tarmac. There was no evidence that the tarmac surface was defective. There was clear evidence from Rona Young and Steven Holmes that the grassy area would not have been appropriate because it was wet and slippy, following rain the previous day. For those reasons, the pursuer has not established that the accident was caused by the state of the premises (i.e. the playground).

[62] In relation to the second strand of the Occupiers Liability Act case, I consider that the reasonable care in all the circumstances which an occupier is required to exercise in relation to "anything done or omitted to be done" on the premises is, in the context of this case, apt to cover the same matters as the common law duty of care discussed above; see *Phee* v *Gordon* cit. supra, at 388 per L Hodge at paragraph 36.

[63] That is also how the pursuer focussed her argument on this limb of the case. In short she argued that had the defender fulfilled its duty of care, it would have (i) acquired knowledge of the risk presented by alligator tag; (ii) identified the magnitude of the risk; and (iii) identified several practical and effective preventative measures to control the risk. On that basis, the defender knew, or ought reasonably to have known, that there was a danger of participants colliding or tripping over one another due to nature of persons running while others were stretching out their legs to get into the plank/press up on the ground in the restricted area on the tarmac, for the purposes of section 2 of the 1960 Act. This is in essence a re-statement of the pursuer's case at common law. For the same reasons as I have already set out in relation to that branch of the case, I conclude the pursuer has not established liability under the 1960 Act.

[64] I therefore hold that the pursuer has failed to establish liability against the defender.

Damages

[65] I turn to the question of damages, in case I should be wrong about liability. The pursuer claims damages under the following heads: (a) solatium; (b) services; (c) miscellaneous patrimonial losses. In the Joint Minute, no 25 of process, parties agreed the value of damages for services at £1500, and miscellaneous costs at £1300.

[66] In the Joint Minute, parties agreed the reports of Mr Arpit Jariwala dated 8 March 2018 and 24 June 2020 (5/1 (JB3-25) and 5/3 (JB26-43)). In addition, the pursuer gave evidence that her elbow is still not normal. She cannot stretch her arm out fully. It is uncomfortable and achy in different weather conditions. She does not have the same mobility.

[67] The pursuer referred to *Graham* v *Richard Lawson Auto Logistics Ltd* 2006 G.W.D 22-494, a welder (then in his late 40s) stepped on tubing and fell, fracturing his right elbow and suffering considerable pain. After surgery, he was left with reduced but satisfactory range of movement, continuing nagging pain and osteoarthritis. He was unfit for any job involving heavy lifting, and was unable to work as a welder. Solatium awarded £24,000 (one half to the past). Both parties referred to the *Judicial College Guidelines*, chapter 7(G), injuries to the elbow. Band (a), severely disabling injury, has a range £33,430-£46,780. Band (b), less severe injuries, has a range £13,360-£27,320.

[68] The pursuer referred to Chapter 7(G) (a) and (b), and submitted that her case fell between the top of (b) and the bottom of (a). She submitted *solatium* is reasonably assessed at £28,000 exclusive of interest (interest at 8% to 24 December 2021) is £5,900).

The pursuer's valuation was therefore:

Solatium: £ 28,000

Interest to 10 January 2022: £ 5,900

Services: £ 1,500 (inclusive of interest)

Miscellaneous costs: £ 1,300

Total: £36,700

[69] The defender submitted the case fell squarely within (b), with two thirds attributable to the past. The defender valued solatium at £15,000.

The defender's valuation was therefore:

Solatium: £15,000.

Interest to 22 January 2022 on two thirds at 4%: £2133.

Services: £ 1,500 (inclusive of interest)

Miscellaneous costs: £ 1,300

Total: £19,933

[70] Having regard to Mr Jariwala's more recent report, 5/3 and the pursuer's oral evidence, her injury has undoubtedly resulted in continued impairment of function in her elbow, but it does not, I think, amount to a significant disability. I consider that the case falls within band (b) of the Judicial College Guidelines, and I would have assessed solatium at £18,000. I would have attributed two thirds to the past, and applied interest at 4% per annum to that. That brings out the following figures for damages:

Solatium: £18,000

Interest to date on two-thirds, at 4%: £2600

Services: £1500

Miscellaneous costs: £1300

Total: £23,400

Contributory negligence

[71] The pursuer submitted that having regard to the nature of the game and the circumstances in which it was played, there was no evidence that the pursuer was not taking care for her own safety. Simply because she did not see the leg of Ms Asher outstretch into her path when she was running did not give rise to an inference of contributory negligence. She was playing the game according to the rules set by the defender, her employers. She took the role of "tagger" because she thought it would be safer. That indicates that she was thinking about her safety. It is for the defender to prove that the actions of the pursuer fell below the standard of a reasonable person in her position. The pursuer submitted the defender had failed to prove that. Her secondary position is that any contribution should be *de minimis*, no more than 10%, again having regard to the nature of the game and the circumstances in which it was played in the course of the pursuer's employment

[72] By contrast, the defender's position was that the pursuer was largely responsible for the accident and injury she sustained. If the court was not with the defender on primary liability, the defender submitted that on the evidence, the pursuer was contributorily negligent to the extent of 80%.

[73] Had the issue of contributory negligence remained live, I would have found the pursuer's contribution to be 50%. Along with the other participants, the pursuer had been briefed on the activity. The area where the activity was taking place was open and visible. It was daylight. The pursuer was aware that there might well be people who had been "tagged" and in the press-up position. She did not notice Dawn Asher, who was there to be seen.

Conclusion

[74] For the foregoing reasons, I will therefore assoilzie the defender. Parties were agreed that expenses should follow success, and I will therefore award the expenses of the action to the defender. I will certify Professor Wood as a skilled witness. I am satisfied that sanction for the instruction of junior counsel is appropriate.

Postscript

[75] In the Joint Minute, parties had helpfully agreed that the reports produced by these witnesses (5/11 and 6/13) would stand as the core of their examination in chief. I was therefore surprised that in a case where the disputed technical issues are in short compass and both expert reports are suitably detailed, the supplementary questions in chief for Mr Farquhar took almost the whole of an afternoon and much of the following morning. By contrast, the whole of examination and cross examination of Professor Wood took a little over an hour and forty minutes. The court gives encouragement to parties where possible to agree that expert reports can be treated as evidence in chief in order to promote efficient use of time at proof and to bring focus to the disputed issues and for skilled witnesses to address any new information in oral evidence. Reasonable supplementary examination in chief ought to be exactly that, supplementary.