SHERIFFDOM OF LOTHIAN AND BORDERS

IN THE ALL-SCOTLAND SHERIFF PERSONAL INJURY COURT

[2021] SC EDI 27

PIC-PN679-20

JUDGMENT OF SHERIFF CHRISTOPHER DICKSON

in the cause

YVONNE ROSE FORREST

Pursuer

against

ICELAND FOODS LIMITED

Defenders

Pursuer: Harris; Allan McDougall Solicitors
Defender: Hennesy (sol adv); Keoghs Scotland LLP

Edinburgh, 15 March 2021

The sheriff, having resumed consideration of the proof, finds the following facts admitted or proved:

Finds in fact

1. That the pursuer is Yvonne Rose Forrest. She is 73 years old and is a retired civil servant. The defenders are Iceland Foods Limited. That the defenders have, for a number of years, operated a retail unit from a property at 40-42 Piershill Terrace, Portobello Road, Edinburgh, EH8 7BL. The defenders leased the said property. The property is located on the corner of Piershill Terrace and Northfield Broadway, Edinburgh. The property consisted of, amongst other things, a retail building and land to the front of the building (the retail

building and the land to the front of the building are collectively referred to as "the store"). The public entrance doors to the retail building (hereinafter referred to as "the entrance doors") were located in the corner of store and faced Piershill Terrace. The land to the front of the retail building contained two pedestrian access routes to the entrance doors and a car park. Both pedestrian access routes were located near to the entrance doors. The first pedestrian access route allowed access to the entrance doors from Piershill Terrace via a ramp (hereinafter referred to "the first pedestrian access route"). The second pedestrian access route allowed access to the entrance doors from Northfield Broadway (hereinafter referred to as "the second pedestrian access route"). The majority of the land to the front of the retail building was used as a car park for the use of customers of the retail building. The entrance doors could be accessed from the car park.

2. That there was a shallow ramp (hereinafter referred to as "the ramp") situated at the end of the car park that was closest to the entrance doors. The ramp ran from the surface of the car park and very gradually inclined towards the retail building. The ramp faced Piershill Terrace, was about 3 metres in length and was opposite the windows of the retail building. One side of the ramp was bounded by a wall that separated the first pedestrian access route from the car park. The other side of ramp was situated in the car park. The car park side of the ramp had an exposed rising edge that protruded from the surface of the car park (hereinafter referred to as the "rising edge"). The rising edge inclined from the surface of the car park and was approximately 200 millimetres in height at its highest point. The rising edge: (i) was not painted or marked; and (ii) did not have any form of barrier, wall or handrail.

3. That the ramp was a similar colour to the majority of the rest of the surface of car park and there was little contrast between the two areas and the change in levels. The

similarity in colour between the ramp and the majority of the surface of the car park made it more difficult to see the rising edge. The position of the entrance doors meant that pedestrian customers using or entering the car park were likely to have to negotiate the ramp to approach the entrance doors. Customers using or entering the car park could approach the rising edge at a variety of angles. The lower part of the rising edge was less noticeable than the higher part of the rising edge.

4. That about 11.40 hours on 22 February 2019 the pursuer parked her car in a nearby Morrisions car park and made her way to the store on foot. The weather was dry and quite dull. The pursuer entered the car park of the store and made her way across the car park towards the entrance doors. At this time the windows of the retail building displayed advertising posters. These posters had the potential to distract the attention of a customer approaching the ramp. The pursuer's route resulted in her walking towards the ramp. The pursuer did not see the ramp. The pursuer tripped on the rising edge at a point near to where the rising edge commenced inclining from the surface of the car park.

5. That at the time the pursuer tripped on the rising edge she was either looking straight ahead or looking at the advertising posters in the window of the retail building.

6. That as a result of tripping on the rising edge, the pursuer fell to the ground and sustained the injuries detailed in finding in fact 14.

7. That after the pursuer tripped on the rising edge she was helped up by another customer of the store. The manager of the store, Alex Hollinsworth, came out to assist her. Mr Hollinsworth provided the pursuer with a chair to sit on and provided first aid to her. The pursuer initially declined an offer to call an ambulance and asked Mr Hollinsworth to call her husband. The pursuer subsequently requested that an ambulance be called. Mr Hollinsworth obtained an account of the accident from the pursuer and completed an

accident report form in her presence. At paragraph 9 of the accident report form Mr Hollinsworth recorded the description of the accident as "Lady Tripped [*sic*] on side of ramp in car park going into store". The pursuer's husband arrived and, as he was walking from his car, said to Mr Hollinsworth something like "What has she done now".

8. That the ramp has been situated within the car park for at least six years. The defenders completed, as a minimum, weekly checks of the car park. These checks were mainly conducted by Mr Hollinsworth. Mr Hollinsworth did not consider the rising edge to be a risk and did not identify it as such when doing his regular checks of the car park.

9. That between 15 February 2019 and 1 March 2019, 5809 customer transactions were conducted at the store. Some of the customers conducting these transactions would have been with other persons. Those customers and other persons could have approached the entrance doors from: (i) the first pedestrian access route; (ii) the second pedestrian access route; or (iii) the car park. The average number of transactions in a two week period at the store in 2019 was in the region of 5809 transactions.

10. That save for the pursuer's accident, the defenders have not been made aware any of accidents at the ramp in the last 5 years.

11. That the defenders have not made any changes to the ramp since the pursuer's accident.

12. That the pursuer had been to the store on about two occasions prior to 22 February 2019. On those occasions she had successfully negotiated the ramp. Her most recent visit to the store, prior 22 February 2019, was about one year before that date.

13. That as a result of tripping on the rising edge the pursuer sustained fractures to her right wrist and left knee. Both injuries required surgery but have gone on to heal well.

However, the pursuer now has post traumatic arthritis of her right wrist and left knee, which results in stiffness and pain.

14. That other establishments have protected an exposed rising edge of a ramp by the installation of a handrail or a low wall.

15. That Appendix 1 is a photograph of the store taken shortly after the pursuer's accident showing: (i) the entrance doors; (ii) the two pedestrian access points; (iii) the ramp (with the rising edge visible); and (iv) part of the car park.

Finds in fact and law

1. That the defender was an occupier of premises, namely the store at 40-42 Piersfield Terrace, Portobello Road, Edinburgh, for the purposes of section 2 of the Occupiers' Liability (Scotland) Act 1960 (hereinafter referred to as "the 1960 Act").

2. That the defenders knew that the rising edge: (i) was not painted or marked; and (ii) did not have any form of barrier, wall or handrail along its length. In that state, the rising edge was a danger due to the state of the premises for the purposes of section 2 of the 1960 Act.

3. That the defenders knew or ought reasonably to have known that the rising edge was a danger due to the state of the premises for the purposes of section 2 of the 1960 Act.

4. That it would have been apparent to an ordinary reasonable occupier in the position of the defenders that a reasonable and probable consequence of their failure to either: (i) paint or mark the rising edge; or (ii) position a barrier, wall or handrail along the length of the rising edge; would be harm to the pursuer.

5. That the defenders omitted to either: (i) paint or mark the rising edge; or (ii) position a barrier, wall or handrail along the length of rising edge. Their failure to do so resulted in the defenders not taking care that was reasonable in all the circumstances.

6. That, accordingly, the defenders have not taken care as in all the circumstances was reasonable to see that the pursuer did not suffer injury or damage as a result of the danger caused by the rising edge and, as such, have acted contrary to section 2 of the 1960 Act.

7. That but for the defenders' omission identified at finding in fact and law 5, the harm to the pursuer would not have occurred.

8. That the damage suffered by the pursuer resulted partly from the pursuer's own fault and, as result, her damages shall be reduced, in terms of section 1(1) of the Law Reform (Contributory Negligence) Act 1945, by 25%.

9. That the pursuer is entitled to damages of £11,250 (inclusive of interest to 2 March 2021).

Finds in law

1. That the defenders, having acted contrary to section 2 of the 1960 Act, are liable to make reparation to the pursuer in the sum of £11,250 (inclusive of interest to 2 March 2021).

NOTE

Introduction

[1] In this action the pursuer seeks damages for injuries she suffered as a result of tripping over the exposed rising edge of a shallow ramp situated in the defenders' car park.

[2] The proof was heard over two days, between 2 and 3 March 2021. The parties had agreed quantum, on a full liability basis, at £15,000 (inclusive of interest to 2 March 2021)

and had helpfully agreed a number of other matters in a joint minute of agreement (see paragraph [22] for the key matters agreed in the joint minute of agreement). The pursuer called the following two witnesses to give evidence:

1. The pursuer;
2. Gordon Morris, Chartered Engineer.

The defenders called the following witness to give evidence:

1. Alex Hollinsworth, Manager of the relevant store of the defenders.

The Evidence

The pursuer's evidence

[3] The pursuer gave the following evidence. The pursuer was 73 years of age and was a retired civil servant. She explained, under reference to photograph 3 and 4 of page 4 of Mr Morris' first report (production 2 of the joint bundle), that about 11.40 hours on 22 February 2019 the pursuer parked her car in a nearby Morrisions car park and made her way to the store on foot. The weather was dry and quite dull. The pursuer entered the car park of the store and made her way across the car park towards the entrance doors, which were in the far corner of the retail building. The pursuer's route resulted in her walking towards the ramp. The pursuer did not see the ramp. The pursuer tripped on the rising edge at a point near to where the rising edge commenced inclining from the surface of the car park. The pursuer noted that the ramp was difficult to see because it was the same colour as the car park. She did not think the sun was shining. The pursuer thought it was more than likely that she was looking at the advertising posters in the windows of the retail building when she tripped and noted that these advertising posters were there to attract

your attention. The pursuer also said, later in her evidence, that she may have been looking straight ahead when she tripped.

[4] As a result of tripping on the rising edge of the ramp the pursuer fell onto the concrete. The pursuer was helped up by another customer and the manager of the store came to assist her. The pursuer remembered speaking to the store manager, phoning her husband and her husband subsequently arriving. The pursuer also recalled sitting on a chair waiting on the ambulance to arrive. The pursuer had been to the store on about two occasions prior to 22 February 2019. She accepted that she probably would have used the ramp on those previous occasions but noted that it was not something that she would have thought about. Her most recent visit to the store, prior to 22 February 2019, was about one year before that date.

[5] The pursuer did not think the accident was her own fault. She thought the rising edge could have been highlighted by painting it with white or yellow paint, or that a hand rail or wall should have been located at the rising edge. If some of these foregoing warning signs had been in place she did not think she would have tripped. As a result of her trip the pursuer broke her right wrist and left knee. Both had to be operated on and she underwent a lot of physio.

Gordon Morris' evidence

[6] Gordon Morris was called as an expert for the pursuer. He was a chartered engineer who was a: (i) Fellow of the Institute of Mechanical Engineers; (ii) Member of the Academy of Experts; (iii) Member of the Chartered Institute of Arbitrators; (iv) Member of the Institution of Electrical Engineers; and (v) Member of the American Society of Heating, Refrigeration and Air-conditioning Engineers. He was a design engineer with 43 years'

experience. He had designed a number of ramps for both buildings and vehicles. He had designed 6 ramps for vehicles and 10 to 15 ramps for buildings. He had investigated 12 slipping accidents. Between 1994 and 2004 he had held a part-time teaching appointment at the University of Edinburgh in the Department of Architecture. This work involved teaching both undergraduate and post-graduate students and developing building services course work.

[7] Mr Morris, under reference to his first report, noted that his instructions were to

> "… consider the construction of the ramp and analyse the area in question and to comment on what cold [*sic*] or should have been done by the occupiers at Common Law and in terms of the Occupiers [*sic*] Liability (Scotland) Act 1960".

Mr Morris explained that he had not completed a site inspection prior to completing his first report but that he had subsequently done so. When he conducted his site inspection he found that the ramp was in exactly the same condition as it had been in the photographs he had been supplied with (which had been taken shortly after the pursuer's accident). His site inspection had not caused him to alter the opinion he had reached in his first report.

Mr Morris noted that he had not taken measurements during his site inspection but he explained that the ramp was approximately 3 metres in length and the rising edge was approximately 200 millimetres in height at its highest point.

[8] Mr Morris considered the photographs of the ramp taken shortly after the pursuer's accident. Mr Morris noted: (i) that the retail building was north facing and therefore would have been in shadow at the time of the pursuer's accident, which would have made any contrast between the ramp and car park surfaces difficult to discern; (ii) that the car park surface and ramp were of similar colours and that there was little contrast between the two areas and the change of levels; (iii) that the combination of shadow and a lack of contrast between the changes in level could make it difficult for pedestrians approaching from the

car park side of the ramp to have a visual cue about the hazard of the rising edge; (iv) that if a pedestrian was not looking directly at the side of a ramp, low contrasting surfaces in deep shadow may not be registered in their peripheral vision; and (v) that for reason set out in paragraph 8 (iv) above, changes in levels in pedestrian routes are fitted with high visibility edging. Mr Morris explained that ramps are provided as an aid for wheelchair users and others but can create a hazard if not correctly constructed. Those hazards are falling off an exposed rising edge of a ramp or tripping over an exposed rising edge when approaching it from the side. Mr Morris had referred in his report to: (i) the Building Standards (Scotland) Regulations 1981; (ii) the 2005 Technical Handbook for Compliance with the Building Regulations (Scotland) 2004; (iii) the 2017 Technical Handbook for Compliance with the Building Regulations (Scotland) 2004; and (iv) the HSE Approved Code of Practice L24 2013 2nd Edition; however, these had, unfortunately, not been lodged. Mr Morris explained that his only purpose of referring to these resources was to give examples of ramps being recognised as potentially creating a hazard in the way he had described.

[9] Mr Morris' opinion was as follows: (i) that the ramp did not have any measures in place to prevent a user falling off or tripping on to the ramp; (ii) that no handrails or balustrade were provided on either side of the ramp; (iii) that the materials used in the construction of the ramp and the surrounding car park area were similar in colour; (iv) that the area of the ramp was in deep shadow by virtue of its northerly orientation; (v) that there was a low contrast between the rising edge of the ramp and the surrounding area and there was no visual cue for pedestrians to warn them of the step; (vi) that the lack of any visual cue at the ramp, a bright edge or a barrier, was further exacerbated by the distraction of the window display of the retail building; (vii) that the window display seen in the photographs taken shortly after the pursuer's accident was bold and bright and designed to attract the

attention about the goods on offer; (viii) that such displays are likely to distract someone entering the shop when walking from the car park to the shop entrance; (ix) that the rising edge constituted a trip hazard for those persons accessing the retail building from the car park; (x) that this type of hazard is commonly recognised and that no measures had been taken by the occupier of the premises to mitigate the hazard.

[10] Mr Morris was asked to confirm the ways which the risks of the rising edge could have been avoided. Mr Morris explained that the lowest cost option would have been painting the rising edge yellow and black, with concrete paints being readily available at builders' merchants. A more effective measure would have been installing a balustrade or a small upstand wall along the length of the ramp.

[11] Mr Morris explained that he received further instructions from the pursuer's agents to consider photographs, taken by pursuer's agent, of other ramp installations at a tanning shop and a hotel. Mr Morris explained that after receiving these further instructions he conducted a site visit of the two ramp installations. Mr Morris produced a supplementary report (production 3 of the joint bundle) commenting on the photographs he had been supplied with. Mr Morris noted that the tanning shop had used an upstand wall to prevent a user of the ramp tripping on the rising edge of the ramp or falling off that edge. Mr Morris noted that the hotel had used a combination of a balustrade and a dwarf wall for the same purpose. Mr Morris noted that these measures could have been taken to obviate the risk of the pursuer tripping over the ramp at the store.

[12] Mr Morris confirmed, under reference to the declaration that he had made at the end of his first report, that he understood that his primary duty, in both written reports and when giving evidence, was to the court, rather than any party who engaged him. Mr Morris

explained that he received instructions from both pursuers and defenders and that he would have given the same opinion, in this case, if he had been instructed by the defenders.

[13] In cross examination Mr Morris accepted that he was not an expert in depth perception or neuro psychology. He confirmed that he was not giving an opinion on whether or not the ramp complied with the Building Regulations and that he was not in a position to provide such an opinion. Mr Morris agreed that he did not know when the ramp was constructed or whether the defenders constructed it. He accepted that: (i) he did not know what the intended use for the ramp was; (ii) the ramp could be used for trolleys; (iii) he did not know what likely footfall on the ramp was; (iv) he did not any have information to suggest there had been a previous accident on the ramp; and (v) many things encountered in day to day life could be a hazard, including a kerb. As regards his supplementary report, Mr Morris noted that the two ramp installations would comply with the current Building Regulations. He accepted that the upstand wall at the edge of the ramp of the tanning shop could be tripped over if someone was not paying attention. Mr Morris did not consider that the lack of a history of previous accidents at the ramp at the store resulted in it being safe. Mr Morris re-iterated that he considered that the rising edge was a trip hazard for a person coming from the side of the ramp and a fall hazard for wheelchairs and trolleys. In response to this answer Mr Morris was asked "Despite that it has never occurred?" and he replied "Well it has occurred now".

Alex Hollinsworth's evidence

[14] Mr Hollinsworth gave the following evidence. He was born in 1978 and was currently the store manager of the relevant store. He had worked at the store for 6 years and had been the manager for 5 years. His role and responsibilities were: (i) the safe running of

the store; (ii) achieving the defenders' key performance indicators; and (iii) the general running of the store. Mr Hollinsworth explained, under reference to the defenders' form "Health and Safety & Food Safety (FLO) Checks" for the week commencing 16 February 2019 (production 5 of the joint bundle), that daily checks were done both inside and outside the retail building for the safety of both staff and customers. If the person doing the check came across a slip or trip hazard that would be documented on the form and fixed straight away. Mr Hollinsworth explained that the external areas of the store were checked weekly and usually more often than that. He normally did the check of the external areas himself, save for when he was on holiday. Mr Hollinsworth confirmed that he had initialled the said form to confirm that he had done the weekly check of the external areas of the store during the week commencing 16 February 2019.

[15] Mr Hollinsworth, under reference to a document detailing the number of customer transactions in the store between 15 February and 1 March 2019 (production 7 of the joint bundle), noted that the number of customer transactions between those dates were 5809. The figure of 5809 transactions was about average for a two week period. Mr Hollinsworth explained that customers often don't shop alone and therefore the 5809 figure would normally be multiplied by 1.5 to get an approximate figure for footfall between those two dates.

[16] Mr Hollinsworth was on duty when the pursuer's accident occurred. He was told by a security guard that someone had fallen. Mr Hollinsworth went outside and saw the pursuer. He got a first aid kit and gave the pursuer a chair to sit on. Mr Hollinsworth provided first aid to the pursuer and managed to stop her hand bleeding. Mr Hollinsworth obtained ice for the purser. Mr Hollinsworth asked the pursuer if she wanted an ambulance but she declined and asked Mr Hollinsworth to call her husband. The pursuer subsequently

requested that an ambulance be called. Mr Hollinsworth obtained an account of the accident from the pursuer and completed an accident report form in her presence. At paragraph 9 of the accident report form Mr Hollinsworth recorded the description of the accident as "Lady Tripped [*sic*] on side of ramp in car park going into store". The pursuer's husband arrived and, as he was walking from his car, said to Mr Hollinsworth something like "What has she done now".

[17] Mr Hollinsworth explained that the ramp has been situated within the car park since he started working at the store. He explained that he did not consider that the ramp was a tripping hazard when he was doing the safety checks. He advised that the pursuer's accident was the only accident that had occurred at the ramp since he had been manager. He was not aware of any other records of trips being recorded at the ramp. Nothing had been done to the ramp since the pursuer's accident and no faults had been found with the ramp.

[18] Mr Hollinsworth explained that the store was leased and the landlord inspected the store once or twice a year. Mr Hollinsworth advised that the defenders have a maintenance department that he could call out if he encountered any issues. If construction work was needed he would contact the maintenance department and head office and take it from there.

[19] In cross examination Mr Hollinsworth advised that he was sure that the pursuer had said that she tripped on the side of the ramp. Mr Hollinsworth explained that he did not think the rising edge was a risk. If he had thought it was a risk he would have contacted the maintenance department to fix it, however, he did not think there was anything wrong with the ramp and there was, therefore, nothing to report.

[20] In answer to my question Mr Hollinsworth confirmed that there were three ways to access the store, namely by way of the first pedestrian access route, the second pedestrian access route and from the car park. If a customer was coming from the car park they would encounter the ramp on their way to the entrance doors.

Submissions

[21] The solicitor for the pursuer and the solicitor advocate for defenders had helpfully prepared written submissions and both made additional oral submissions. During the evidence of Mr Morris the solicitor advocate for the defenders objected to the admission of his evidence. That objection was renewed during closing submission. I have dealt with that objection at paragraphs [32] to [39] below, therefore what immediately follows is a summary of the remainder of the closing submissions made.

Submissions for the Pursuer

[22] The solicitor for the pursuer noted that it had been agreed in the joint minute of agreement that: (i) the defenders were the occupier of the store; (ii) the pursuer suffered an accident on 22 February 2019 at around 11.40am in the area of the ramp; (iii) the ramp was not painted or marked; and (iv) the ramp did not have a hand rail. The defenders' accident report form stated that the pursuer "Tripped on side of ramp in car park going into store". In the circumstances it was submitted that the accident report form corroborated the pursuer's account; that there was clear evidence of the pursuer having tripped on the exposed rising edge; and that the only matters in issue were whether the defenders were at fault and, separately, whether there should be a finding of contributory negligence. Mr Morris' evidence demonstrated that the defenders had failed in their duty to exercise the

care which an occupier of a premises is required to show towards a person entering thereon. The evidence of Mr Hollinsworth, as regards the health and safety measures taken by the defenders, was unconvincing so far as the ramp was concerned. The inspections spoken to were cursory. There was a maintenance department which could have been alerted to the danger posed to customers by the ramp but the ramp was not considered to be a risk. The pursuer gave evidence in a reasonably clear manner and identified, by reference to the photographs, where she fell.

[23] The solicitor for the pursuer submitted that the case of *McKevitt* v *National Trust for Scotland* [2018] SC EDIN 20 identified similar considerations that would apply in this case. However, no two cases were identical and this case should turn on its own facts. In the present case there was good evidence to show that the ramp was difficult to see from the pursuer's direction of travel. It was in shadow. There was evidence that the pursuer was distracted by the advertisements in the windows of the retail building. The ramp was on a direct line from the car park to the only entrance of the retail building. Accordingly, there was a significant difference in the character of the danger between the ramp in this case and the stone in the *McKevitt* case. Even if the court found that there was not a shadow over the ramp, that was simply one factor and did not preclude a finding that the defenders were in breach of duty.

[24] As regards whether the defenders had adequately taken precautions that a reasonable person would take, this case again differed from the *McKevitt* case because the pursuer and Mr Morris made clear that the ramp was difficult to see on approach to it. The simple expedient of painting the exposed rising edge was a precaution that the defenders ought to have taken. The risk of a trip could also have been avoided by means of a low wall or a barrier and examples of both had been provided to the court.

[25] The store was a retail outlet and the pursuer was invited to attend there. She was accessing the only door leading into the retail building. It was normal that she would approach from the direction that she did and in these circumstances the ramp constituted a significant risk which could have been avoided. This was a case of negligent omission and the pursuer, unlike in the *McKevitt* case, had proved what steps the defenders should have taken. The pursuer had also proved, on a balance of probabilities, that, but for the absence of the precautions, the accident would not have happened. The pursuer might have been looking at the advertisements in the windows. That was a distraction. But for that, she might have noted the ramp. If the rising edge had been painted, the pursuer said in evidence she might have noted it. If a handrail or low wall had been installed it appears obvious the accident would have been avoided.

[26] In all the circumstances the court should grant decree for the full amount of the agreed damages of £15,000. If the court did consider that there was an element of contributory negligence it should be at the same level as would have been found in the *McKevitt* case if the pursuer had been successful, namely 10%.

Submissions for the Defender

[27] The solicitor advocate for the defenders submitted that the pursuer had not proved her accident occurred as averred on Record. Statement of claim 4 made clear that the pursuer's case was based on the fact that the ramp was in shadow. That had not been proved and there was no cogent reason why the pursuer had not seen the ramp. There was no attack on the credibility of the pursuer, however, there were issues with her reliability with it appearing that the accident had had an effect on her recollection. The pursuer knew the ramp was there because she had used it twice before. The pursuer was unsure why she

did not see the ramp and offered the possibility that she may well having been looking at posters in the window. In addition, it had not been proved where the accident occurred. In the circumstances the case began and ended with the pursuer's evidence and the pursuer had failed to prove the accident occurred as averred on Record.

[28] The solicitor advocate submitted, for the reason set out at paragraphs [32] to [33], that Mr Morris's evidence should be deemed to be inadmissible. Mr Hollinsworth's evidence ought to be accepted as credible and reliable. He had been responsible for inspecting the car park including the ramp when he was working. He did not consider the ramp to be a hazard. He did not consider that anything should be done with the ramp. The pursuer's accident was the only accident on the ramp that had occurred since he was manager and there were no other records of accidents having occurred on the ramp. When the average transaction figures were used to calculate a yearly footfall figure, that calculation provided a yearly approximate footfall of 225,000 (5806 x 26 x 1.5 = 226,551) customers (although it was accepted that there were three ways into the retail building and the footfall of the ramp would therefore be lower than 225,000).

[29] The proper approach to a case under section 2 of the 1960 Act was set out by an Extra Division in *Dawson* v *Page* 2013 SC 432, per Lord McGhie at paragraph 13 and 14. The pursuer's case is one of negligent omission and the law is summarised in the case of *Brown* v *Lakeland* [2012] CSOH 105, at para 35. Whilst it was accepted that cases under the 1960 Act were fact specific, paragraph 35 of *Brown* identified three key factors that required to be taken into account, namely: (i) knowledge of the risk; (ii) its magnitude; and (iii) the practicality and effectiveness of any preventative measures.

[30] A more recent example of a case where the above factors were considered was the case of *McKevitt*. In that case the court, in line with the approach in *Dawson,* declined to approach section 2(1) of the 1960 Act in a linear fashion (a linear approach would be first identifying the relevant danger and only thereafter considering whether the occupier had shown a reasonable degree of care with regard to it). This court should adopt the same approach, however, if the court did adopt a two stage approach it would probably not make any difference to the outcome. Under reference to paragraphs 72, 77, 78, 80, 81, 83 and 88 to 98 of *McKevitt* the solicitor advocate for the defender submitted that in the present case: (i) that the ramp was conspicuous and the pursuer may have been looking at advertising posters in the window; (ii) that the risk of harm was not foreseeable; (iii) that a trip on the ramp was only a remote possibility (with the lack of any other accident, taken with the average yearly footfall figures, being a significant factor in support of a trip on the ramp being only a remote possibility); (iv) that the extent of harm was at the lower end of the scale; (v) that there was no evidence to suggest that the precautions identified by the pursuer would have avoided the pursuer's accident; and (vi) that the proof of fault in this case was the second kind identified by the Lord President in *Morton* v *Dixon* 1909 SC 807 at page 809 and it could not be said that the precautions identified by the pursuer were so obviously wanted that it would be folly for the defenders to have neglected to provide them.

[31] In the event that liability was established the court should find that contributory negligence was significant. The pursuer could not explain why she failed to see the ramp but offered the possibility that she may very well have been looking at advertising posters. The court should find that the pursuer was not paying due care and attention. The pursuer had walked on the ramp on two previous occasions. This was a negligent failure on her part and it was a significant material factor in the accident. In the circumstances the pursuer

ought to share in the responsibility for the accident and contributory negligence ought to be assessed at 50%.

Discussion

Conclusions on the evidence

[32] It is first convenient to consider the expert evidence given by Mr Morris. The solicitor advocate for the defenders made a lengthy objection to the entirety of Mr Morris' evidence which resulted in the evidence being heard under reservation of all questions of competency and relevancy. The solicitor advocate for the defenders renewed his objection during his closing submissions. The solicitor advocate for the defenders contended, under reference to paragraphs 38 to 61 of the Supreme Court case of *Kennedy* v *Cordia (Services) LLP* 2016 SC (UKSC) 59 that: (i) Mr Morris' evidence did not assist the court; (ii) Mr Morris did not have the necessary skill and knowledge to give evidence as a skilled witness; (iii) Mr Morris was not impartial in his presentation and assessment of the evidence.

[33] As regards point (i), Mr Morris had misunderstood his function. His evidence of opinion was bare *ipse dixit*. There was no evidence of opinion which the court could not reach of its own volition. The court did not need specialist input to determine whether something was a trip hazard. As regards point (ii), Mr Morris' CV did not contain any obvious relevant knowledge and experience. Mr Morris was a building service engineer with some experience of commercial vehicle construction. Mr Morris did, however, say that he had been involved in the design and construction of ramp arrangements. He may have been suitably qualified to provide an opinion on the conformity of the ramp to the Building Regulations but, as it happened, he was unable to do so. As regards point (iii), Mr Morris' supplementary report was not the independent product of the expert uninfluenced as to

form or content by the exigencies of litigation. Rather, Mr Morris had been provided with photographs taken by the pursuer's solicitor and asked to comment upon them. It had not occurred to Mr Morris to do this. If the provisions of the photographs was a valid exercise at all, it was highly selective, at the hands of the pursuer's solicitor. Mr Morris was not qualified to offer an opinion on visual cues, peripheral vision or the effects of advertising posters on human behaviour. In doing so, he assumed, whether deliberately or otherwise, the role of advocate for the pursuer. His report was littered with assumptions and omissions of a material nature. He did not know when the ramp was constructed. He could not say whether the ramp did or did not conform to the Building Regulations. He did not measure the ramp. He did not investigate the precise point at which the pursuer alleges she tripped to determine dimensions. He felt able to offer an opinion on the tripping risk but did not even pose the question on whether there was a history of tripping accidents. The four documents that he referred to were a combination of legislation and guidance on legislation and were not before the court. In all the circumstances the court derived no assistance from Mr Morris' evidence and it should not be admitted in evidence. Further there was no Record to allow a comparison to be made with other establishments and this was an additional reason for excluding the evidence of Mr Morris flowing from his second report.

[34] I did not consider the objection to the evidence of Mr Morris being admitted to be well founded. In the case of *Kennedy* Lord Reed and Hodge state at paragraph 44:

> "44. In *R* v *Bonython* the court was addressing opinion evidence. As we have said, a skilled person can give expert factual evidence either by itself or in combination with opinion evidence. There are in our view four considerations which govern the admissibility of skilled evidence: (i) whether the proposed skilled evidence will assist the court in its task; (ii) whether the witness has the necessary knowledge and experience; (iii) whether the witness is impartial in his or her presentation and assessment of the evidence; and (iv) whether there is a reliable body of knowledge or

> experience to underpin the expert's evidence. All four considerations apply to opinion evidence, although, as we state below, when the first consideration is applied to opinion evidence the threshold is the necessity of such evidence. The four considerations also apply to skilled evidence of fact, where the skilled witness draws on the knowledge and experience of others rather than or in addition to personal observation or its equivalent. We examine each consideration in turn."

In the present case Mr Morris was giving limited factual evidence and opinion evidence. The factual evidence came from his site visit at the store and his site visits at the tanning shop and the hotel. It was unfortunate that Mr Morris did not take detailed measurement of the ramp, and in particular, the rising edge, but he was able to confirm, first, some basic approximate measurements and, second, that the ramp was in the same state as was shown in the photographs taken of the ramp shortly after the pursuer's accident.

[35] As regards point (i) in paragraph 44 of *Kennedy*, I did derive assistance from Mr Morris' evidence. I found his factual evidence as regards both the basic approximate measurements of the ramp and his explanation as regards the precautions utilised by the tanning shop and the hotel, to be of assistance. I derived assistance from his identification of the hazards that an exposed rising edge of a ramp may present (namely the risk of falling off the edge and tripping over it). Whilst the precautions identified by Mr Morris (the painting or marking of the rising edge or the positioning of a barrier, wall or hand rail along the length of the rising edge) were perhaps matters of common sense, I found it helpful for a person with his engineering knowledge and experience to confirm what would be appropriate precautions and I would have found it more difficult to reach a sound conclusion on the question of appropriate precautions without his evidence. I did not consider that Mr Morris's evidence was bare *ipse dixit,* rather he explained the reasons why the precautions he identified were appropriate. He considered the factual layout of the ramp, and in particular, the exposed rising edge; he identified the hazards the exposed

rising edge presented; he identified the precautions that could be taken to reduce the risk of those hazards; and gave examples of some of those precautions being utilised in other establishments. I considered Mr Morris, despite the question posed in his instructions (see paragraph [7] above), provided me with material from which I could form my own conclusions on the relevant issues. I considered that, overall, the evidence of Mr Morris met the threshold test of necessity as explained in paragraphs 45 to 49 of *Kennedy*. I did not, however, derive any assistance from his evidence concerning a shadow being on the ramp. The pursuer did not say in evidence that the ramp was in shadow when she tripped and I therefore disregarded all of Mr Morris' evidence concerning a shadow on the ramp.

[36] As regards point (ii) in paragraph 44 of *Kennedy*, I was initially concerned that Mr Morris did not have the necessary knowledge and experience to give evidence as a skilled witness in this matter. Mr Morris was a chartered engineer with considerable experience in building services and it was not immediately apparent what expertise he had in relation to the design or construction of ramps. However, Mr Morris went on to explain that he was fundamentally a design engineer and had in fact designed 10 to 15 ramps for buildings and 6 ramps for vehicles. I considered that the knowledge and experience he had designing ramps taken with the rest of his engineering experience resulting in him having the necessary knowledge and experience to give expert evidence in this case.

[37] As regards point (iii) in paragraph 44 of the *Kennedy*, I did consider that Mr Morris was impartial. He was clear that his primary duty was to the court and explained that his opinion would have been the same had he been instructed by the defenders. It was unfortunate that the documents that Mr Morris had referred to in his report were not lodged by the solicitor for the pursuer (on which see *Main* v *McAndrew Wormald Ltd* 1988 SLT 141 - which is referred to in *Kennedy* at paragraph 59) but Mr Morris did not place any particular

reliance on these documents and explained that he had simply referred to them as being examples of where it had been recognised that ramps could potentially pose hazards. It was true that he did not know when the ramp was constructed but he did explain that he had made attempts to find this out, but had been unsuccessful. As a result, he was not able to say which Building Regulations would have applied and was unable to say whether the ramp was in compliance with whatever the applicable Building Regulations were. However, I did not consider that that question required to be resolved in order for me to determine whether the pursuer had succeeded in her claim under the 1960 Act or at common law.

[38] I did not consider that Mr Morris lost impartiality by commenting on the photographs of the tanning shop and hotel. He was instructed by the solicitor of the pursuer to comment upon them and that is what he did. I could detect no bias in his comments, which simply pointed out the precautions that had been taken by the two establishments to protect an exposed rising edge. The pursuer averred in Statement of Claim 4 that it "would have been reasonable to place a guard or protective barrier on the edge of the ramp. It would have been reasonable to paint a strip of contrasting paint on the edge of the ramp" and I considered that those averments were sufficient to allow evidence to be led of examples of those precautions being put in place at other establishments (see also the cases of *Brown* at paragraph 40, where evidence of skilled persons commenting on photographs of other establishments appears to have been admitted in evidence; and *Kennedy* at para 72, where evidence from the skilled witness appears to have been admitted in relation to him commenting on material, provided by his instructing solicitors, as regards the practices of other employers). I did not consider that it was inappropriate for Mr Morris to comment on the advertising posters and considered that Mr Morris was entitled to

highlight that the advertising posters could potentially distract a person approaching and using the ramp. However, I did consider that he went too far when he opined, at paragraph 4.1.3 of his report (which was read into evidence), that the advertising posters were "likely to distract someone entering the shop when walking from the car park to the shop entrance" and I rejected that part of his evidence. I did not, however, consider that this resulted in him being partial.

[39] In all the circumstances I have repelled the objection of the solicitor advocate for the defenders and have had regard those parts of the evidence of Mr Morris that I have not disregarded or rejected.

[40] I had no difficulty in accepting the pursuer's evidence. Her evidence was in short compass and she gave her evidence in a straightforward manner. I considered that she was, at all times, doing her best to tell the truth. She was clear that she did not see the ramp and volunteered that she may have been looking at the advertising posters or looking straight ahead. She was very clear that she had tripped on the rising edge at a point near to where the rising edge commenced inclining from the surface of the car park. It was also clear from the pursuer's evidence, taken with the photographs taken shortly after the pursuer's accident and Mr Hollinsworth's evidence, that the position of the entrance doors meant that pedestrian customers using or entering the car park were likely to have to negotiate the ramp to approach the entrance doors. I considered that the pursuer's evidence was internally consistent and also entirely consistent with her account that was recorded in the accident report form by Mr Hollinsworth shortly after the accident. Whilst this could not corroborate her evidence, I considered that this was a *de recenti* statement which enhanced the pursuer's credibility and I had no difficulty in finding that she had tripped on the rising edge at the point where she said it had occurred.

[41] As I have already pointed out the pursuer did not give evidence about the ramp being in shadow. When asked about the weather that day, she said thought it was dry and quite dull. When asked whether there was anything about the weather that made the ramp difficult to see, she said that she did not think so and advised that she did not think the sun was shining from what she could remember. The solicitor advocate for the defenders submitted that the failure of the pursuer to prove that she did not see the ramp because it was in shadow, meant that she could not prove her case on Record and therefore resulted in the failure of her claim. I did not agree with that submission. There was evidence before the court of the factors I have set out at paragraph [48], together with evidence that: (i) the pursuer did not see the ramp; and (ii) the pursuer may have been either looking at the advertising posters in the window of the retail building or looking straight ahead. The solicitor for the pursuer contended that even without evidence of a shadow on the ramp the pursuer could nevertheless establish a breach of duty on the basis of the other relevant factors. Whilst there was no Record for where the pursuer may have been looking or in relation to the ramp being a similar colour the surface of the car park, that evidence was led without objection and the grounds of fault remained as averred on Record. In such circumstances I considered that I was entitled to consider all the factors identified in this paragraph and paragraph [48] below, because they were no more than a variation, modification or development of what was averred on Record (see Lord Guest in *O'Hanlon* v *John G.Stein & Co* 1965 SC (HL) at page 42, quoting with approval *Burns* v *Dixon's Iron Works* 1961 SC 102 at page 107).

[42] I also had no difficulty in accepting the majority of Mr Hollinsworth's evidence. I accepted his evidence as regards the aftermath of the accident (where he acted entirely appropriately), the volume of customer transaction, the numerous safety checks conducted

by the defenders and the fact that the defenders were not aware of any other accidents at the ramp in the last five years. I also accepted that Mr Hollinsworth genuinely did not believe that the rising edge was a hazard but I disagreed with his assessment in that regard for the reasons set out at paragraphs [48] to [49] below.

[43] Findings in fact 1, 7 and 14 are based on the evidence of the pursuer and the agreed evidence. Findings in fact 2, 3, 4 and 16 are based on a combination of the evidence of the pursuer, Mr Morris, Mr Hollinsworth, the agreed evidence, the photographs (taken shortly after the pursuer's accident) and the reasonable inferences I drew from the combination of that evidence. Finding in fact 5 is based mainly on the pursuer's evidence, taken together with the evidence of Mr Morris. Findings in fact 6 and 13 are based on the evidence of the pursuer. Finding in fact 8 is based on a combination of the evidence of the pursuer and Mr Hollinsworth. Findings in fact 9 to 12 are based on the evidence of Mr Hollinsworth with the last sentence of finding in fact 10 being the inference I drew from his evidence. Finding in fact 15 is based on the evidence of Mr Morris.

The case in terms of the 1960 Act

[44] Section 1 and 2 of the 1960 Act provide:

> **"1.— Variation of rules of common law as to duty of care owed by occupiers.**
>
> (1) The provisions of the next following section of this Act shall have effect, in place of the rules of the common law, for the purpose of determining the care which a person occupying or having control of land or other premises (in this Act referred to as an *"occupier of premises"*) is required, by reason of such occupation or control, to show towards persons entering on the premises 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 he is in law responsible.
>
> (2) […]
>
> (3) […]

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.

(2) […]

(3) […]"

[45] In the case of *Dawson* an Extra Division considered the proper approach to section 2 of the 1960 Act. At paragraph 14 Lord McGhie stated:

> "[14] However, it is well understood that the aim of the 1960 Act was to define the degree of care required of an occupier in place of the complex situation by then arrived at under common law. The established need to identify categories of persons entering upon premises had led to fine distinctions which made little practical sense. The fundamental aim was to restore a broad test of reasonableness. The purpose of sec 2(1), as is stated by sec 1(1), is to establish the degree of care to be shown by an occupier. We do not consider that the descriptive provisions of sec 2(1) fall to be read as intended to effect a radical change to the concept of fault in so far as affecting occupiers. The familiar concept of reasonable foreseeability clearly underlies fault in this context."

[46] In the case of *Brown* an elderly female fell whilst descending steps from a shop which were not fitted with a handrail. At para 35, Lord Woolman stated:

> "The law is not in doubt. Whether or not Lakeland has breached its statutory obligation turns on whether it was negligent. The matter has recently been restated in *Murphy* v *East Ayrshire Council*:
>
> > '[19] The second question is whether the defenders breached their duty to take reasonable care for the safety of the pursuer; or, put another way, whether the particular precaution fell within the scope of the duty. That is determined according to the foresight of the reasonable man; since it is that foresight which governs what is, or is not, reasonable in the circumstances (*Muir* v *Glasgow Corporation 1943 SC (HL) 3*, Lord Macmillan at 10). 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.'"

Lord Woolman, then went on to conduct a calculus of risk in that case and concluded that the defender, in that case, had not been in breach of section 2 of the 1960 because they were not under a duty to install a handrail (a similar exercise was conducted by Sheriff McGowan in the case of *McKevitt*). In doing so, Lord Woolman placed weight on the fact that apart from one exceptional case, there had been no history of accidents in the previous 10 years.

[47] Both parties referred to the case of *McKevitt* but each case under the 1960 Act turns on its own facts (see, for example, *Dawson*, per Lord McGhie at para 22) and therefore I do not consider it necessary to conduct a detailed analysis of that case. In the present case the first question is whether it would be apparent to an ordinary reasonable person in the position of the defender that a reasonable and probable consequence of failing to either paint or mark the rising edge or position a barrier, wall or handrail along the length of the rising edge, would be harm to the pursuer? The defenders placed particular reliance on the fact that they had a yearly approximate footfall of 225,000 and that they were not aware of any other accident at the ramp in the last five years. In the English Court of Appeal case of *Searson* v *Brioland Ltd* [2005] EWCA Civ 55 Buxton LJ considered similar evidence in that case at para 23:

> "Thirdly, previous experience showed that a million people had passed across this sill without being injured …But the fact that no one has yet been injured goes only a very modest way to establishing that the object is not hazardous. As my Lord, Sedley LJ, pointed out in the course of argument, we know nothing about how many people have actually tripped over this upstand. Many people may have done so and been able to right themselves, or if they fell over, did not fall over with the consequences that affected Mrs Searson. But this lady did fall over, and so far as that had an effect more serious than may have affected other people slipping, the defendant I fear has to take this plaintiff as he finds her."

[48] In the present case whilst I accepted that there was a lack of history of any accidents at the ramp in the last five years, that did not mean that nobody had tripped over the rising edge in the last five years. I considered that the lack of history of accidents, taken with the approximate footfall figure (although that figure does not represent the footfall on the ramp given the three ways of approaching the entrance doors) was a factor to be considered along with the other relevant factors in the case (see the case of *McKevitt*, per Sheriff McGowan at paragraph 104). I considered that the other relevant factors were as follows: (i) that the ramp inclined from the car park towards the store; (ii) that the ramp was shallow with the rising edge being approximately 200 millimetres at its highest point; (iii) that the ramp was a similar colour to the majority of the rest of the surface of car park with there being little contrast between the two areas and the change in levels; (iv) that the similarity in colour between the ramp and the majority of the surface of the car park made it more difficult to see the rising edge; (v) that the position of the entrance doors meant that pedestrian customers using or entering the car park were likely to have to negotiate the ramp to approach the entrance doors; (vi) that pedestrian customers using or entering the car park could approach the rising edge at a variety of angles; (vii) that the lower part of the rising edge was less noticeable than the higher part of the rising edge; (viii) that the windows of the retail building, opposite the ramp, contained advertising posters that had the potential to distract a customer approaching the ramp; and (ix) that the rising edge was not painted or marked and did not have any form of barrier, wall or handrail running along its length. When I balanced those factors against the fact that the defenders were not aware of any other accidents in last five years, I came to the conclusion that the first question still ought to

be answered in the affirmative and that the rising edge was a danger for the purpose of section 2 of the 1960 Act.

[49] It was clear from the evidence of Mr Hollinsworth that the defenders had knowledge of the rising edge but it was not identified as being a danger because Mr Hollinsworth took the view that it was not hazardous or dangerous. I considered, having taken account of factors (i) to (ix) in paragraph [48], together with the regular inspections of the external areas of the store conducted by Mr Hollisworth, that the defenders knew, or ought reasonably to have known, that the rising edge was a danger due to the state of the premises for the purposes of section 2 of the 1960 Act (I was not referred to *Kirkham* v *Link Housing Group Ltd* [2012] CSIH 58, but I simply note that, in that case, Lady Payton stated at paragraph 34 when discussing the 1960 Act that the "… defenders must have knowledge, actual or deemed, of any danger before they can be found liable in terms of the Act")

[50] I then considered whether the defenders' conduct fell below the standard of a reasonable occupier in the position of the defenders. In doing so I considered the knowledge of risk, the probability of injury to the pursuer, the extent of the injury, the cost and practicality of precautions and the practice of others in the same business or trade.

[51] As regards both the knowledge of risk and probability of injury to the pursuer, as I have pointed out at paragraph [49] above, it was clear from the evidence of Mr Hollinsworth that the defenders had knowledge of the rising edge but it was not identified as being a danger because Mr Hollinsworth took the view that it was not hazardous or dangerous. I accepted that the lack of history of accidents at the ramp in the last 5 years was a factor that pointed against the probability of the pursuer being injured, but when I considered factors (i) to (ix) in paragraph [48] above, I came to the view that it could not be said that risk of injury to the pursuer was so slight that a reasonable occupier in the position of the

defenders would not have taken precautions to prevent persons tripping over the rising edge.

[52] As regards the extent of the injury, the question here is how serious might the harm be if the identified risk does give rise to an accident. In the present case, I agree with the solicitor for the defenders that the risk of a fall caused by a trip was at the lower end of the scale.

[53] As regards the cost and practicality of precautions, there was minimal evidence about the cost of the precautions sought but I considered that the painting or marking of the rising edge could have easily been completed at extremely modest cost. I also consider that the positioning of a barrier, wall or handrail along the length of the rising edge could have been achieved at a relatively modest cost.

[54] As regards the practice of others in the same business or trade, I accepted that the evidence regarding the tanning shop and the hotel was selective but it did show other businesses protecting an exposed rising edge of a ramp by the use of a wall and a handrail. In the case of *Morton* Lord President (Dunedin) said, at page 809:

> "I look upon this matter as one of great importance not merely for this particular case, but for cases of this sort generally. Where the negligence of the employer consists of what I may call a fault of omission, I think it is absolutely necessary that the proof of that fault of omission should be one of two kinds, either—to shew that the thing which he did not do was a thing which was commonly done by other persons in like circumstances, or—to shew that it was a thing which was so obviously wanted that it would be folly in anyone to neglect to provide it."

In the present case I considered there was evidence before the court to show that the protection of an exposed rising edge was commonly done by other persons in like circumstances and was therefore evidence of the first kind mentioned by the Lord President in *Morton.*

[55] I conducted a balancing exercise in relation to all the factors identified at paragraphs [50] to [55] and came to the view that a reasonable occupier in the position of the defenders would have either (i) painted or marked the rising edge; or (ii) positioned a barrier, wall or hand rail along the length of the rising edge. In the circumstances I therefore concluded that the defenders had not taken care as in all the circumstances was reasonable to see that the pursuer did not suffer injury or damage as a result of the danger caused by the rising edge and, as such, have acted contrary to section 2 of the 1960 Act.

Causation

[56] Having established a breach of duty the pursuer must go on to prove that the breach of duty was the cause of the harm sustained by the pursuer. The pursuer must prove, on the balance of probabilities, that 'but for' the defender's breach of duty the harm to the pursuer would not have occurred. The pursuer explained that she did not see the ramp and explained, in her view, that the rising edge could have been painted in white or yellow, or that a hand rail or wall should have been positioned along the rising edge. The pursuer advised that if some of these precautions had been in place she did not think that she would have tripped over the rising edge. In my view any of these precautions would have drawn the pursuer's eye to the danger of the rising edge and I consider that, on the balance of probabilities, the failure of the defenders to take any of these precautions caused or materially contributed to the pursuer's injury.

Contributory Negligence

[57] Section 1(1) of the Law Reform (Contributory Negligence) Act 1945 (hereinafter referred to as "the 1945 Act) provides:

> "**1. — Apportionment of liability in case of contributory negligence.**
>
> (1) Where any person suffers damage as the result partly of his own fault and partly of the fault of any other person or persons, a claim in respect of that damage shall not be defeated by reason of the fault of the person suffering the damage, but the damages recoverable in respect thereof shall be reduced to such extent as the court thinks just and equitable having regard to the claimant's share in the responsibility for the damage: …"

Fault on the part of the pursuer includes negligent actions (see section 5(a) of the 1945 Act). Therefore, a pursuer will only be contributorily negligent if their act falls below the standard of a reasonable person in the position of the pursuer. The onus lies with the defender to prove that matter. The defender must also prove that the pursuer's fault was a factual cause of the harm she sustained.

[58] In the present case the pursuer accepted that she was either looking at the advertising posters in the window of the retail building or looking straight ahead, when she tripped. In either scenario the pursuer was not looking where she was walking when she tripped over the rising edge. In the circumstances she has fallen below the standard of a reasonable person and her damages therefore fall to be reduced. When I considered the fact that the pursuer was not looking where she was walking, against factors (i) to (ix) in paragraph [48] above, taken together with the fact that the pursuer had previously safely negotiated the ramp (albeit on only approximately two occasions with the last being about a year before the accident) and that she tripped at the lower less noticeable part of the rising edge, I considered that a just and equitable reduction was 25%.

The common law case

[59] Given that I have found that the defenders have acted contrary to section 2 of the 1960 Act it is not necessary to consider the alternative common law case. Had it been

necessary for me to do so I would have found the defenders liable to make reparation to the pursuer at common law for the same reasons I have given at paragraphs [44] to [58].

Disposal

[60] For the reasons given above, I find that the defenders acted contrary to section 2 of the 1960 Act and are therefore liable to make reparation to the pursuer. Quantum was agreed, on a full value basis, at the sum of £15,000 (inclusive of interest of 2 March 2021). Contributory negligence has been assessed at 25%. Accordingly, the agreed amount of damages are reduced to £11,250. A hearing will be fixed to determine the question of expenses and certification of skilled persons.

Appendix 1