

SCOTLAND / JUDGMENT

Cochrane v. Gaughan [2004]

ScotCS 62 (09 March 2004)

[2004] ScotCS 62

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[2004] ScotCS 62 [New search] [Help] Cochrane v. Gaughan [2004] ScotCS 62 (09 March 2004)
OUTER HOUSE, COURT OF SESSION A2054/02 OPINION OF LORD BRODIE in the cause
MRS CAROL DALL or COCHRANE Pursuer; against JOHN GAUGHAN Defender:

Pursuer: Olson; Drummond Miller, W. S. Defenders: Mackay, Q. C., Laing; Simpson & Marwick,
W. S. 9 March 2004

Introduction

[1] The pursuer's date of birth is 18 October 1957. On 31 January 2001 she was working in the course of her employment with the defender as a cook at Wilby House Residential Home, 111 Loughborough Road, Kirkcaldy. Her shift began at 9.30 am and ended at 5.30 pm. The pursuer had been in that employment since July 1997. The residents of Wilby House were elderly persons requiring care, but not 24 hours a day nursing. Wilby House could accommodate up to 40 residents. [2] The residents of Wilby House took their lunch in a dining room at about 12 noon or a little before that. The dining room was situated on the first floor of what was referred to as the new wing of the home. The new wing had been opened in about February 2000. The kitchen where the pursuer worked was situated on the ground floor of the new wing. At about 11.45 pm on 31 January 2001 the pursuer left the kitchen to go to the dining room carrying an omelette on a plate. The route which she planned to take led from the door of the kitchen and, once she had decided not to take the lift giving access to the first floor, along a carpeted corridor (passing on her left a corridor leading to bedrooms and on her right the door of the lift), into the hall of the new wing, and (having turned to the right) across part of the hall and up carpeted stairs to the first floor. The hall had what was described in evidence as a "laminated floor". The pursuer walked along the carpeted corridor. She put the heel of her left foot onto the laminated floor. At that

point she fell, landing on her back. As a result she sustained injury. In this action the pursuer sues her now former employer for reparation in respect of this injury. Her pleadings include a case of negligence at common law but that is not insisted upon. She relies on a case of breaches of regulations 5(1) and 12(3) of the Workplace (Health, Safety and Welfare) Regulations 1992. She avers, inter alia, that: "As the pursuer stepped on the laminated floor the pursuer slipped falling onto her back and sustaining loss, injury and damage. The laminated floor was slippery because it had just been washed by a domestic called Teri." It is admitted by the defender that the pursuer fell, under explanation that the precise circumstances in which she fell are not known and not admitted. It is admitted that the laminated floor had been washed by a domestic called Terry Tasker just before the pursuer fell. [3] At proof on 20 January 2004 and the three following days and, at an adjourned diet, on 11 February 2004, I heard the evidence of the pursuer; Mr Ian Weir, consultant orthopaedic surgeon; Anne Hughes, Colette Fagan (a witness for the defender who was interposed during the pursuer's proof), Anne McCallum and Karen Inglis, all fellow employees of the pursuer at the time of her accident; Alana Cochrane, the pursuer's daughter; and Mr Gordon Cameron, a rehabilitation case manager. Of these witnesses, Colette Fagan, Karen Inglis and Gordon Cameron were led for the defender, the remainder being led for the pursuer. Terry Tasker, the domestic referred to on record did not give evidence. I understood that parties had been unable to discover her whereabouts. Evidence and findings [4] The door to the kitchen, the carpeted corridor leading from that door towards the hall, the hall and the bottom of the stairs leading to the first floor of the new wing of Wilby House are illustrated in four photographs (numbered, respectively, 1, 2, 3 and 4) which are attached to a report which bears to be prepared by David Wood, produced as 7/4 of process. Mr Wood did not give evidence. No reference was made to the terms of the report by any of the witnesses. The report is not an agreed document. The terms of the report therefore do not form part of the evidence. Witnesses, however, made extensive use of the photographs when giving their evidence. While the date on which they were taken cannot be said to have been proved, I have proceeded upon the basis that they post-date the accident. Subject to only two matters, witnesses agreed that the photographs accurately illustrate the layout of the carpeted corridor and hall as it was at the date of the accident. The first matter is the position of the armchair, upholstered in green material, which appears in photograph number 2. It was uncontroversial that, on the day of the pursuer's accident, this chair was positioned at that point in the hall (to the left, from the photographer's standpoint, of the red fire extinguisher) which, in photograph 1, is occupied by what appear to be large cardboard boxes. More controversial was what had been the position of the yellow sign which, in photograph 4, appears standing on the laminated floor in the hall. I shall have to return to this matter which was the focus of a significant portion of the evidence. [5] The relative positions of the kitchen door and the carpeted corridor leading from it towards the hall can be seen in photograph 3. In that corridor there is a door to a lift. This lift can be used to gain access to the first floor of the new wing where the dining room is situated. The captions with attached arrow signs which have been superimposed on photograph 3 accurately show the location of the kitchen door, the lift door and the

beginning of the laminated floor. A doorway is shown immediately to the right of the kitchen door, looking from the standpoint of the photographer. This opens onto the corridor leading to bedrooms. Subject to what I shall have to say about the yellow sign, photograph 4 shows what would be apparent to a person, such as the pursuer, who had walked some of the distance along the carpeted corridor leading from the kitchen. The photographer who took photograph 4 would appear to have been standing on the carpeted corridor looking through a doorway (which I shall refer to as the "doorway into the hall ") and into the hall. Beyond that part of the laminated floor which is visible in this photograph is a rectangle of coconut matting, positioned in a shallow well in the floor. Beyond the matting is the front door of the new wing. There are glass panels in the door and further glass panels on either side of the door. These panels allow the illumination of the hall with natural light. Photographs 1 and 2 are taken from within the hall or, in the case of photograph 1, perhaps from the carpeted stairs leading from the hall to the first floor, which are illustrated in photograph 2. The captions which have been superimposed on photograph 1 accurately identify the laminated floor, the coconut matting and the door giving access to the kitchen by way of the carpeted corridor. As I have already indicated, on the day of the accident, the chair shown in photograph 2 was in the position occupied by the cardboard boxes in photograph 1. To the right of that position (from photographer's standpoint) is a red fire extinguisher. To the right of the fire extinguisher can just be seen part of a white radiator. Photograph 2 has been taken from a position within the hall where the photographer has his back to the wall against which the fire extinguisher is placed. Again, the captions which have been superimposed on photograph 2 accurately identify the positions of the stairs, the laminated floor, the coconut matting and the doorway into the hall (referred to by the caption: "door giving access to kitchen via corridor"). [6] An alternative way for the pursuer to get from the kitchen to the first floor dining room on 31 January 2001 would have been to take the lift. Had she done so she would not have had to step on the laminated floor. The defender relies on her failure to do so as inferring contributory negligence on her part. The defender avers that the normal and correct procedure would have been for the pursuer to use the lift, whereas the pursuer avers that she was following usual practice when she did not use the lift. The evidence was that when quantities of food were being taken from the kitchen to the dining room, they would be transported in a food trolley in which food could be kept warm. It was uncontroversial that the food trolley would be taken to the first floor by way of the lift. The evidence from the pursuer in examination-in-chief was that there was no rule that she had to use the lift in circumstances when she was not using a food trolley, but, prior to December 2000 when she had been spoken to by Colette Fagan, who was the care manager, she had used the lift all the time, irrespective of whether she was using a food trolley, because it was easier than going up the stairs. According to the pursuer, on an occasion in December 2000 when she was carrying a sandwich on a plate and had used the lift, Colette Fagan had inquired whether her "legs were paralysed", thereby implying that she should not use the lift. In cross-examination the pursuer confirmed her account of what Colette Fagan had said, explaining that she was frightened for her job and, indeed, that everyone was terrified of the defender "for their jobs". Nevertheless, the pursuer accepted that when she

left kitchen on the day of her accident, it was her initial intention to use the lift. Colette Fagan emphatically denied the pursuer's account of an encounter in December 2000 when she had asked the pursuer whether her legs were paralysed. She stated that there were no specific rules on the transportation of food but there was a "practice in force" which was to use the lift. She had been in the dining room in the new wing at about 11.20 pm on the day of the pursuer's accident. She had used the stairs to get there rather than the lift. Anne Hughes, in examination-in-chief, when asked if food was always taken up in the lift, stated, "Normally, unless residents were going up in the lift." Anne McCallum thought that the rule was that everything had to go up by lift. Karen Inglis stated that basically the rule was that all food should go up in lift. Staff would be told that at induction training. On that evidence it may be that the pursuer has not proved her averment that she was following usual practice when she did not use the lift nor, indeed, her earlier averment that food had to be taken from the kitchen to the dining rooms across the laminated floor, but, at best for the defender, I cannot find it to have been in any way incorrect or in breach of any enforced rule, for the pursuer to have taken a single plate up to the first floor by the route that would take her onto the laminated floor and up the stairs. There was simply no evidence to allow the inference that simply by doing so she was failing to take reasonable care for her own safety. There is no question but that the laminated floor was part of the pursuer's workplace and a traffic route in that workplace. I did not understand it to be contended otherwise on behalf of the defender. [7] The yellow sign referred to in paragraph [4] above is, as I have indicated, illustrated in photograph 4. It has two constituent components, attached at their upper ends in such a way as to form a hinge. The lower ends of the two components of the sign can be pushed apart, one from the other, permitting the sign to stand on a level surface such as a floor. When the lower ends are pushed apart, the sign has, in section, the appearance of an inverted "V". The lower ends of the two components of the sign can also be brought together, with a view to facilitate storage. In that position the sign could not stand unless supported in some way. It is admitted on record that a sign (and the evidence was that it was the sign illustrated in the photograph) was in the new wing of Wilby House on the day of the pursuer's accident. It is further admitted that it bore the words: "Caution - wet floor." The unchallenged evidence of the pursuer was that it also bore a representation of a man slipping. She estimated it as being about 2 feet high. As I have indicated, there is an issue as to where precisely the sign was situated at the time of the pursuer's accident (albeit that, when it came to submissions, Mr Olson, on behalf of the pursuer, did not insist on the position taken in averment, that the sign was not visible to the pursuer at the point she was at when she fell). According to the pursuer, she had not seen the sign prior to her fall (and until she fell she had not been aware that the floor had been washed). Subsequently, after Colette Fagan had arrived to assist her and, according to the pursuer, was shouting: "Where is the sign? Where is the sign?", the pursuer saw the sign at a point between the frame of the doorway into the hall and the carpeted stairs, some 2 feet from the frame of the doorway and some 4 to 6 inches from the wall. The pursuer used the caption "Laminated Floor" in photograph 2 as a reference. She said the sign had been located close to the point of the arrow attached to that caption. In that position it would not been visible to someone coming

through the doorway into the hall until that person was through the doorway and had turned to the right. According to the pursuer in examination-in-chief, the sign had been in that position for days. In cross-examination she described it as being in that position 24 hours a day, 7 days a week. She "had to guess when the floor was wet". This sign was the only one in the new wing. In examination-in-chief the pursuer said that if she had a spill in the kitchen she would take the sign from where it was kept on the laminated floor and place it on the kitchen floor ("we always put the sign up"), albeit that in cross-examination she said that it was not the case that she would take the sign and put it in the kitchen when the floor had been mopped. This apparent discrepancy may be explained by the fact that it was not part of the pursuer's job to wash the kitchen floor. This was done by Anne Hughes who finished her shift at 6.30 pm, an hour later than the pursuer. However, the pursuer's evidence that the sign was sometimes put up in the kitchen is a qualification of her assertion that the sign was kept in the position indicated by her by reference to the Laminated Floor sign in photograph 2 "24/7", as she put it. When it was put to her in cross-examination that at the time of her accident the sign was in the position illustrated in photograph 4, the pursuer responded by saying that had it been in that position when she fell she would have kicked it and she did not kick it. [8] Anne Hughes indicated the same point in photograph 2 as had the pursuer when asked where the sign was normally kept. When asked if she saw the wet floor sign that day, Anne Hughes stated, "I think I did". When asked where she had first seen it that day, she replied "Where I have shown you on the photograph." Later in her evidence she explained that she first saw the sign that day after she had transported food to the dining room. She had been coming down the stairs when she saw it. She did not remember seeing it later that day. Notwithstanding her evidence at proof that she had seen the sign on 31 January 2001, Miss Hughes accepted that, on 23 May 2001, in the course of an internal investigation into the circumstances of the pursuer's accident, she had said to Colette Fagan that she could not remember having seen the sign at all on the day of the accident. When she came to give evidence Colette Fagan explained that, prior to the pursuer's accident she had seen the sign, probably exactly where the sign could be seen in photograph 4, on occasions when the laminated floor was being washed. She had seen the domestics put it up. She had also seen it used in the kitchen. When it was put to her that the sign was kept in the position described by the pursuer in her evidence, Miss Fagan said that she would have to disagree and described that as "a silly position". Had it been positioned there people would not have been able to get up or down the stairs. Had she seen it in that position she would have instructed the domestics to put it away if the floor was dry, but she did not recall ever having to give that instruction. She could not remember having seen the sign when she had gone up the stairs to the dining room shortly before the accident, at about 11.20 pm on 31 January 2001. She did not remember having to go round it or having fallen over it (as might have been the case had it been positioned close to the foot of the stairs), but neither did she remember seeing it anywhere else. When it was put to her that she had shouted "Where is the sign, where is the sign?" She denied having done so. That, she said, was not possible at all. She would have been interested in the condition of the pursuer rather than where the sign was. Anne McCallum, who impressed me by her demeanour and the terms of her answers as

being a particularly fair, thoughtful and intelligent witness, both credible and reliable, said that when she came at the request of Colette Fagan to assist the pursuer she did see the sign. She had two images of the position of the sign. Her first recollection after the accident was of the sign being in the middle of the coconut matting. Her second recollection was of the sign being over by the wall where the fire extinguisher and radiator were situated in photograph 1. The floor had been washed. It looked as if it was a little bit wet. The "wet sign" would not have been there if the floor had not been washed. It was normally kept in the kitchen where it would be used last thing at night. The only other place where Mrs McCallum had ever seen the sign was on the laminated floor. It would only go up when the floor had been washed. On occasion she had seen it and walked past it. When the floor was dry, the sign would be taken back to the kitchen. When the pursuer's evidence of the sign remaining in the position indicated in photograph 2, 24 hours per day, 7 days per week, was put to her, Mrs McCallum said that that was not true. She had never ever seen the sign there. In cross-examination it was suggested that the reason why Mrs McCallum had two recollections of the position of the sign was that when she first saw it the sign had been on the coconut matting and that thereafter someone had moved it in order to clear the way for the ambulance crew. Mrs McCallum thought that that is what she had got into her mind. Karen Inglis also denied that the sign was usually left in the position indicated by the pursuer. As to the day of the accident, it was her evidence that she had gone to the kitchen for some juice. She had seen Terry Tasker putting the sign out about 11.30 am, she having mopped the floor. She described the floor as being damp. The sign was positioned on the laminated floor approximately opposite the middle of the doorway into the hall. That is to place it close to where the sign is shown in photograph 4. However, in contrast to what appears in photograph 4, according to Miss Inglis, the sign was positioned face on, so that someone coming from the direction of the kitchen could read it. It would have been clearly visible to someone coming from that direction. Miss Inglis was the first on the scene after the pursuer's accident. It was her evidence that she then required to move the sign in order to get to the pursuer. It had been knocked over and was lying on the floor. Miss Inglis moved it to a position against the wall shown in photograph 1. When Colette Fagan arrived Miss Inglis did not hear her shouting: "Where is the sign? Where is the sign?" Had Miss Fagan shouted, Miss Inglis considered that she would have heard her. [9] In relation to the matter of the sign and other material matters where she was unsupported by other witnesses, it was submitted by Mr Mackay, on behalf of the defender, that the pursuer should be held to be both incredible and unreliable. He made the same submission in relation to Anne Hughes. It is convenient first to consider Mr Mackay's submission in relation to Miss Hughes. I take the view that it would not be right to conclude that she was dishonest but I have concluded that she cannot be regarded as reliable. Mr Mackay relied on Miss Hughes's uncertainties and difficulties in memory when describing her movements on the day of the accident and her acceptance that she had told Colette Fagan that she could not remember seeing the sign that day, whereas her evidence at proof was that she had seen the sign. Her use of the phrase "24 hours a day" regarding the presence of the sign on the laminated flooring, and her assertion that the sign was "normally there 24 hours a day" did not square with her evidence regarding

her use of the sign when washing the kitchen floor and the storage space provided for it in the kitchen. Mr Mackay further submitted that Miss Hughes had unnecessarily elaborated on her answers in order to introduce material which coincided with the pursuer's position. In examination-in-chief, she was asked if she had "seen the floor, on a normal day, after Terry had cleaned it?" She answered "Sometimes, depending if the sun is shining. If the sun is shining you don't see floor actually wet. Only when you go onto the laminate floor do you see it wet." That answer, which was not very obviously suggested by the terms of the question, can be compared with the pursuer's averments at page 8 A to B of the Closed Record. Miss Hughes was asked what the Pursuer wore on her feet after she changed for work. She answered "clogs bought from a catalogue - Whites Catalogue apparently". She was anxious to give evidence that someone was in the lift that day, despite the fact that she accepted that she did not know that herself. I attach no significance to her disinclination to respond to a request for precognition by the defender's agents, a further matter founded on by Mr Mackay, but I do consider that otherwise there is substance in his criticism of Miss Hughes. In cross-examination it was put to her by Mr Mackay that she was a suggestible person. She agreed. In re-examination she said that she did not in fact know what that was meant by being suggestible. In giving her evidence she did indeed come across as someone who was perhaps suggestible, although at the same time intent on putting forward a particular version of events which did not appear to have been entirely based on her own observation and recollection. I do not go the distance of suggesting that Miss Hughes had been deliberately tutored (although the flavour of her evidence was that it had been learned rather than remembered) but I did not find her evidence to be sufficiently thoughtful, spontaneous, consistent and independent to allow me to have any confidence whatsoever in her reliability as a witness. [10] In inviting me to find the pursuer incredible as to material facts in dispute Mr Mackay drew my attention to the discrepancies between her evidence and that of the other witnesses in relation to the position of the wet floor sign, and the use of the lift to take food up the first floor dining room. He also contrasted the evidence of the pursuer to that of Colette Fagan as to the pursuer's account of a conversation during which Miss Fagan was alleged to have made a reference to the pursuer's legs being paralysed and as to the pursuer's account of Miss Fagan having shouted "Where is the sign?" The allegation that Miss Fagan had shouted "Where is the sign?" had not been supported by Karen Inglis who had been present at the relevant time. These remarks had been attributed to Colette Fagan at a time, Mr Mackay emphasised, when the pursuer was aware that Colette Fagan had not been traced by the pursuer's solicitors and therefore when it was thought unlikely that she would be available to give evidence. Moreover, Mr Mackay reminded me that whereas the pursuer had said in cross-examination that everyone was "terrified of John Gaughan for their jobs", this was contradicted by the evidence of Colette Fagan, Anne McCallum and Karen Inglis, and, indeed, by the pursuer herself when she stated that, after the accident, she was told by Colette Fagan and another senior employee, Lorraine Bellamy, that, if she was having problems lifting and Anne Hughes was not there to assist she was to "give a phone up and someone would come and help me". This was not indicative of the defender being an unsympathetic employer. In relation to the wetness of the floor, the

pursuer had stated originally in examination-in-chief that there had been "small pools" of water as it had not been "wrung off hard enough". However, she later stated in re-examination that she had "never seen it as wet as it was that day." This was to be contrasted to what had been said by other witnesses. Karen Inglis referred to the floor as being "damp" before the pursuer's accident. Anne McCallum referred to it as being "a little bit wet" after the accident. [11] Before turning to what was said by Mr Olson in response to Mr Mackay's attack on the pursuer's credibility and reliability, I would note two specific allegations bearing on the credibility of, first, the pursuer and, second, the defender's witness, Karen Inglis. It is averred on behalf of the defender, at page 10 A of the Closed Record, that after the accident, the pursuer offered Karen Inglis money to say that the wet floor sign was not in place at the time of the accident. When Karen Inglis came to give evidence she did not support that averment and Mr Mackay, as was entirely proper, unreservedly withdrew the allegation that the pursuer had attempted to persuade a witness to make a false statement. He accepted that it had not been established. The second allegation was directed at what was said to have been said by Karen Inglis, in the presence of the pursuer's daughter, Alana Cochrane, on an occasion on 12 September 2003. At the time of her giving evidence Miss Cochrane was 22 years of age. She was waiting to find out if she had been accepted into a nursing course. She had, however, completed Higher National Certificate courses in law and public administration and legal services at the University of Abertay. According to Miss Cochrane she had been out with friends at "Sticks", a public house in Victoria Road, Kirkcaldy on the evening of 12 September 2003. She had arrived at the public house at about 9.30 pm. At about 10.30 pm or 11.00 pm she was in the ladies' toilets. Karen Inglis was also there, together with Lorraine Bellamy. It was Miss Cochrane's evidence that Miss Inglis did not speak directly to her but, in her hearing, said to Lorraine Bellamy: "Carol is not going to win. She has not got a leg to stand on because I stitched her up." It was put to Miss Cochrane in cross-examination that the statement had not been made, Miss Inglis having no recollection of having made it. Miss Cochrane responded by saying "Well I was with her that night." On further cross-examination Miss Cochrane said that she had only told her mother's legal representatives about her encounter with Karen Inglis on the morning on which she gave evidence. She had told her mother about it the previous evening. She had not previously said anything to her mother so as not to upset her. When she had first given a statement to her mother's solicitor she had not thought it of any relevance. She did, however, accept that she had interpreted what she said Miss Inglis had said to be a statement to the effect that Miss Inglis was going to do something dishonest and that that was of importance. She had changed her mind about the relevance of the alleged remark on thinking about it in the light of her legal knowledge. When it was put to her that what she had said was simply untrue, she said that it was not untrue. When the allegation that she had said that she was going to "stitch up" the pursuer (understood as to tell lies when giving evidence), or words to that effect, was put to Karen Inglis when she came to give her evidence-in-chief, her response was "Not that I can remember". She used the same formulation when the matter was put again during cross-examination. Before the end of the defender's proof, on 23 January 2004, a motion was made to recall Miss Inglis and to lead a further witness, Denise

Rattray, in the light of information which had come to hand after Miss Inglis had given her evidence. I granted the motion and heard further evidence from Miss Inglis and the evidence of Miss Rattray, the service manager of Cupar Outreach, on 11 February 2004. From that evidence it clearly appeared that Miss Inglis had been working during the evening of 12 September 2003 and overnight until the morning of 13 September 2003, sleeping over in order to provide domiciliary care to a handicapped client of Cupar Outreach. I accordingly find it proved that she was not in a public house on the evening of 12 September 2003. While the form of words used by Miss Inglis: "Not that I can remember" might be thought to be an unusually restrained response to an allegation of the sort which had been made against her, accepting Mr Mackay's submission on the point, I have concluded that it can be regarded as reflective of her care in answering questions, coupled, perhaps, with her somewhat phlegmatic personality. I consider it proper to regard Miss Inglis as a credible and reliable witness. In contrast, I did not find Miss Cochrane's evidence satisfactory. Her late disclosure of the allegation despite having been precognosced as a potential witness for the pursuer, was remarkable, particularly having regard to the legal knowledge that she claimed for herself. Had it been necessary for me to do so, I would have had to examine any other evidence she had given with some care. However, her evidence was not relied on, on behalf of the pursuer, for any other purpose and I do not intend to say anything further in relation to Miss Cochrane. [12] Returning to the assessment of the pursuer as a witness, I have not recorded all Mr Mackay's criticisms of her evidence but, on the basis of what I have recorded, if the evidence of Anne Hughes (to which I do not give weight) is left to the side, I consider that Mr Mackay was correct to say that the pursuer was contradicted by the evidence of the other witnesses in relation to the matters mentioned in paragraph [10] above. Indeed, Mr Olson, on behalf of the pursuer, accepted that her evidence and that of her witnesses did not entirely coincide. Moreover, in relation to the position of the sign at the time when the pursuer fell, he did not maintain that the position spoken to by the pursuer in her evidence: that the position of the sign immediately prior to the accident meant that it was not visible to her as she approached and walked through the doorway into the hall, had been established. Mr Olson nevertheless submitted that I should take the pursuer to be a credible and reliable witness who had been doing her best to remember what had occurred. I am unable to accept that submission without qualification. Mr Mackay made it clear to the pursuer that he was challenging her credibility. It was put to the pursuer (twice) in cross-examination that she was lying when she said that the sign was in the position described by her at the time of her accident. It was put to her that her account of Colette Fagan saying "Where is the sign?" did not happen. Having regard to the evidence that is discussed above, I find that the sign had been in a position close to where the sign is shown in photograph 4 in plain view of a person, such as the pursuer, walking from the kitchen towards and into the hall. I find that Colette Fagan did not shout or say "Where is the sign?" when she came to assist the pursuer after the pursuer had fallen. These findings are contrary to what the pursuer spoke to in evidence, although Mr Olson may be correct when he submitted that the pursuer's evidence was open to the interpretation that she did not go beyond saying that she had not seen the sign before she fell and that when she did see it the

sign was in the position that she had indicated on photograph 2, it having perhaps been knocked or pushed aside. I therefore have not accepted the pursuer on these matters. I do not accept her evidence of the sign being kept in the position indicated by her, 24 hours a day, 7 days a week, or, indeed, on any other long-term basis. Neither do I accept her to be accurate when she spoke of an encounter with Colette Fagan in December 2000 which included Miss Fagan effectively forbidding the pursuer from using the lift when carrying food on a plate. I do not accept the assessment she offered, as to his staff's view of the defender. On all these matters the pursuer was contradicted by witnesses whom I find to be credible and reliable and whose credibility and reliability were not seriously challenged by Mr Olson. None of this, however, leads me to the necessary conclusion that the pursuer was deliberately lying when she gave her evidence and I am not inclined to make an adverse finding in relation to her credibility. Although perhaps not very important, I was in fact at one point struck by the frankness of the pursuer when asked, during examination in chief, whether she would have been able to work between January and 14 October 2003 when she was suffering from an episode of vertigo unconnected with the injury sustained in the accident. She immediately accepted that she might not have been able to work during that period. I am therefore prepared to accept the pursuer as a witness who, in Mr Olson's words, was doing her best. I do not however regard her as a witness who is to be regarded as necessarily reliable on matters where she is not corroborated by others. My impression of the pursuer's account of the background to and circumstances of her accident is that they have been simplified and to an extent dramatised at the expense of accuracy. That is so notwithstanding that the pursuer appeared to be an intelligent person who was capable of being appropriately robust in response to questioning. As instances of what I have referred to as a simplified and to an extent dramatised account I would refer to her evidence of the encounter with Colette Fagan in December 2000 when Miss Fagan was said to have asked it the pursuer's legs were "paralysed"; everyone being "terrified ...for their jobs"; the sign being in the position indicated by her "24 hours a day, 7 days a week"; and Colette Fagan shouting, when she came to assist the pursuer, "Where is the sign, where is the sign?" These are all matters on which I have found the pursuer to be inaccurate but in each case I was struck by the strength of the language used by the pursuer to describe what she said had happened. [13] Having regard to my findings in relation to the surrounding circumstances and my assessments of witnesses' credibility and reliability, it being admitted that the pursuer fell, I come to consider whether the pursuer has proved her averments that she slipped; that the laminated floor was slippery (because it had been washed) and, what is implicit in her averments, that she slipped because of the slippery condition of the laminated floor. On behalf of the pursuer, Mr Olson submitted that I should hold that these averments had been proved. On behalf of the defender, Mr Mackay submitted that the pursuer's averments had not been proved. [14] No one other than the pursuer was present when she fell. The pursuer's account of her accident and its immediately preceding circumstances was that she had put an omelette on a plate and opened the kitchen door, with a view to taking the omelette upstairs to the dining room. Terry Tasker was coming out of a bedroom on the corridor to the pursuer's left. Miss Tasker had been cleaning a toilet. The pursuer held the

kitchen door open for Miss Tasker. The pursuer came out of the kitchen. She heard the lift door closing and, as I understood her, the lift beginning to ascend. She had therefore "missed the lift". Having missed the lift, the pursuer walked along the carpeted corridor and through the doorway into the hall. She put the heel of her right foot onto the laminated floor. The "next thing [she] was launched into the air". She found herself flat on her back. She rolled over and got to her knees in what she described as a foetal position, facing back towards the kitchen door. She found the laminated floor to be wet. Her trousers were wet at the knee where she was kneeling on the floor. As I have already noted in her evidence-in-chief the pursuer said that there were small pools of water on the floor, indicating that it had been washed but incompletely mopped dry. At the end of re-examination this was restated as "I have never seen the floor as wet as on that day." The pursuer explained that when she fell she had been wearing kitchen clogs which had a special sort of sole so as to be water and oil resistant. The pursuer did not say in terms in the course of her evidence that she had slipped and that is why she fell. The closest she came to saying that she slipped by reason of the laminated floor being wet was in answering a question which I noted as "You had fallen and landed on your back, did you discover ...?" I noted the pursuer's response as "Not until I rolled over. I managed to get up on my knees in a foetal position. I could feel wet on my knees through my trousers." That the pursuer had later claimed to have slipped on a wet floor was spoken to by Anne McCallum in the context of her being asked about the internal investigation of 23 May 2001. Mr Weir records in his report, 6/2 of process, which he spoke to in evidence, the pursuer having given him an account of having slipped when walking over an area of laminate flooring which was wet. I therefore proceed upon the basis that I had evidence before me that prior to the proof the pursuer had complained of having slipped and that at proof the pursuer associated her fall with the presence of water on the laminated floor. The fact remains that she did not explicitly say in evidence that she slipped. Her description of her fall, which she did say occurred after she had placed her heel on the laminated floor, while again having a rather dramatic quality: "I was launched into the air", is not very helpful in understanding what the pursuer took to have happened. I would, however, accept that the account of landing on her back is at least consistent with her foot having gone forward from under her, as might happen in a slip. Before coming to a conclusion as to whether the pursuer has proved whether she slipped, I consider it appropriate to consider what evidence there was that the laminated floor was, at the material time, slippery, as is averred, or had on it a substance which might cause a person to slip, to use the expression found in regulation 12(3) of the Workplace (Health, Safety and Welfare) Regulations 1992. Mr Olson, in the course of his submissions, accepted that there was no direct evidence of the slipperiness of the laminated floor but he submitted, under reference to the decision of Lord Hamilton in *McGhee v Strathclyde Fire Brigade* 2002 S. L. T. 680, that expert evidence on the subject was unnecessary. Cognisant, no doubt, of what Lord Hamilton had said in *McGhee* supra at 684G, Mr Olson relied, as he put it, not on the bare fact of the pursuer slipping but on that fact taken with the fact that she had slipped on a wet floor, as giving rise to the inference that the floor was slippery. I immediately accept that it is unnecessary, in order to prove that a floor is slippery, to lead expert evidence on the

subject but, if the decision in McGhee is to be looked at by way of example of what might be sufficient in order to prove such a state of affairs, I consider that Mr Mackay was correct when he submitted that Lord Hamilton had significantly more evidence available to him which pointed to the slippery condition of the floor in that case, than was led before me. I would refer to McGhee supra at 684L, 685B to E, 685L to 686A, 686B to E and 686F. However, I accept what was submitted by Mr Olson, that in considering whether it has been proved that the pursuer slipped on the laminated floor, it is relevant to consider whether it has been proved that the laminated floor was slippery at the relevant time. A finding that the floor was slippery would make it easier to find that the pursuer slipped. Similarly, a finding that she had slipped would make it easier to find that the floor was slippery. Findings that the floor was slippery and that the pursuer had slipped might lead to an almost inevitable inference that the slippery condition of the floor had caused the pursuer to slip, in the absence of any other explanation. Mr Olson emphasised that no other mechanism for the pursuer's fall was suggested by the evidence. He pointed to the defender's practice of putting out the wet floor sign (with its picture of a slipping man) as indicating an acceptance that a wet floor might be slippery. The pursuer in evidence described the laminated floor as very smooth. Other than that, it being "laminated" and what could be inferred from photographs 1, 2 and 4, there was no evidence as to the nature of the surface of the floor. The appearance of the floor, as illustrated in the photographs, is of having been constructed of planks of wood or of being surfaced in such a way as to suggest that it was constructed of planks of wood. The evidence was that at the material time the floor was to some degree wet. I consider that, without more specific evidence, I am informed by judicial knowledge that when a non-porous surface, such as the laminated floor appears to be, is wet, the water which, ex hypothesi, is lying on the surface, may act to some extent as a lubricant, in other words the presence of water makes it easier for an object placed on that surface to move across the surface. I accept, as a matter of generality, that wet surfaces may be slippery. The practice of putting out the wet floor sign does not, in my opinion, take matters further than that. I do not consider that judicial knowledge can take me the distance of concluding that the laminated floor in this case must necessarily have been "slippery", if to any degree wet, or that water on this laminated floor, in whatever quantity, was necessarily an "article or substance which may cause a person to slip" (construing that expression as it is construed by Lord Hamilton in McGhee supra at 684D). I also must have regard to the evidence which pointed to the laminated floor, when wet, not being slippery. The pursuer and Anne Hughes had crossed the laminated floor when it was wet on many occasions prior to 31 January 2001, apparently without mishap. I understood Anne McCallum also to say that she had walked on the laminated floor after it had been washed and when the wet floor sign was in position. The pursuer indeed made a point of saying that she had walked over the floor hundreds of times (when it was wet) and had never slipped. No evidence was led as to other persons having slipped. Karen Inglis had negotiated the laminated floor on the day of the accident after it had been washed by Miss Tasker. This is not, of course, conclusive, but it points away from the laminated floor being taken as being slippery simply because it was to some degree wet. I do not forget that the pursuer said, at the end of re-examination, that she had "never seen it

as wet as it was that day." I do not attach much weight to that. The expression has the qualities of simplification and dramatisation to which I have already drawn attention as being a feature of the pursuer's evidence. That the floor was particularly wet on the occasion of the pursuer's accident was not supported by the other witnesses. [15] Looking at matters in the round, and having regard to all the available evidence, I conclude that the pursuer has not proved her averments that "As the pursuer stepped on the laminated floor the pursuer slipped ... The laminated floor was slippery." It follows that she has not proved that she slipped by reason of the slippery condition of the floor or that had the floor not been wet she would not have fallen. She has not proved that her workplace and the surface of every traffic route in that workplace had not been kept free from any article or substance which may cause a person to slip. At risk of repetition, I would add neither has she proved that the wet floor sign was "facing the stairs and was not visible to the pursuer at the point at which she fell." The pursuer's case in law [16] As I have already indicated, the pursuer relies on a case of breaches of regulations 5(1) and 12(3) of the Workplace (Health, Safety and Welfare) Regulations 1992. These regulations are in the following terms: "5 - (1) The workplace and the equipment, devices and systems to which this regulation applies shall be maintained (including cleaned as appropriate) in an efficient state, in efficient working order and in good repair.

- (2) Where appropriate, the equipment, devices and systems to which this regulation applies shall be subject to a suitable system of maintenance.
- (3) The equipment, devices and systems to which this regulation applies are - equipment and devices a fault in which is liable to result in a failure to comply with any of these Regulations; and mechanical ventilation systems provided pursuant to regulation 6 (whether or not they include equipment or devices within sub-paragraph (a) of this paragraph ... 12 - (1) Every floor in a workplace and the surface of every traffic route in a workplace shall be of a construction such that the floor or surface of the traffic route is suitable for the purpose for which it is used.
- (2) Without prejudice to the generality of paragraph (1), the requirements in that paragraph shall include requirements that -
 - (a) the floor, or surface of the traffic route, shall have no hole or slope, or be uneven or slippery so as, in each case, to expose any person to a risk to his health or safety; ...
 - (3) So far as is reasonably practicable, every floor in a workplace and the surface of every traffic route in a workplace shall be kept free from obstructions and from any article or substance which may cause a person to slip, trip or fall.
 - (4) In considering whether for the purposes of paragraph (2)(a) a hole or slope exposes any person to a risk to his health or safety -
 - (a) no account shall be taken of a hole where adequate measures have been taken to prevent a person falling; and

- (b) account shall be taken of any handrail provided in connection with any slope." These Regulations are intended to implement the Workplace Directive 89/654. They are supplemented by the Workplace Health, Safety and Welfare Approved Code of Practice ("ACOP"), approved and issued by the Health and Safety Commission under section 16 (1) of the Health and Safety at Work Act 1974. As appears from section 16 (1), the purpose of the ACOP is to provide practical guidance with respect to the requirements of the Regulations. [17] The text of the Regulations to which I was referred during submissions is that which is found in Redgrave's Health and Safety (4 th edition) at page 759 et seq . That text is annotated. The annotation to regulation 5 includes the information that the ACOP states that "efficient" in this regulation means "efficient from the viewpoint of health, safety and welfare (not productivity or economy)" (the text of the ACOP, printed in parallel to the text of the Regulations, which is to be found in the Encyclopaedia of Health and Safety at Work Law and Practice , published by Sweet & Maxwell, confirms the accuracy of the annotation in Redgrave's). Mr Olson submitted that in this case the workplace had not been maintained in an efficient state because cleaning by wetting the floor with water had rendered it unsafe. Whether the workplace was unsafe was a question of facts and circumstances: *McLaughlin v East and Midlothian NHS Trust* 2002 SLT 387, *Gilmour v East Renfrewshire Council* , 5 December 2003, unreported, Temporary Judge JG Reid QC, paragraph 56. The duty imposed by the regulation was absolute. If the only way of maintaining the workplace in an efficient state while cleaning premises was to place a warning sign that could, Mr Olson conceded, be to render the relevant part of the workplace safe. If a warning sign marked "Do not enter, cleaning in progress" had been in place then it might be difficult to argue that there had been a breach of the regulation but that was not the position here. There had been a breach of the statutory obligation, irrespective of what finding was made as to where the wet floor sign had been immediately before the pursuer fell. Mr Olson reminded me that in response to his question (in re-examination) as to what she would have done differently had she seen the sign in the position prior to walking onto the laminated floor the pursuer had said "I really don't know". Mr Mackay accepted that the duty imposed by regulation 5 was an absolute one. Nevertheless, it was his submission that the court should take an approach to the construction of the regulation which was "consistent with the real world" (an expression that he did not further define). Regulation 5 imposed a duty to clean (as did regulation 9). Cleaning, in compliance with regulation 5, could not amount to a breach of the regulation. A transient condition which might cause a risk of slipping is not a danger due to a lack of maintenance and is not a breach of regulation 5 if it arises during the process of cleaning a floor: *Bruce v Ben Odeco Ltd* 1996 SLT 1315. The Regulations had to be construed as a whole. Regulation 12 (3) provides adequate protection against the risk of slipping during the process of cleaning a floor. Regulation 5 should not be construed so as to elide the reasonable practicability defence afforded by regulation 1 (3) in relation to articles or substances which might come to be in the workplace and which may cause a person to slip. [18] In this case I have found that the pursuer has failed to prove that her fall was causally connected to the state of the laminated floor. Her regulation 5 case therefore fails at that point. Had it been otherwise I would then have had to consider whether the floor being wet

in consequence of a cleaning operation rendered it in something other than an efficient state (from the viewpoint of health, safety and welfare) with the result that it was to be regarded as not having been maintained in an efficient state, putting the defender in breach of his statutory duty. I do not find that question to be one which is free from difficulty. It is clear that the floor was part of the pursuer's workplace. The obligation imposed by the regulation, which is an absolute one, is, as Lord Macfadyen held in *Butler v Grampian University Hospital NHS Trust* 2002 SCLR 985 (followed by Temporary Judge J G Reid QC in *Gilmour v East Renfrewshire Council* supra) to secure a continuing state of efficiency of, inter alia , the workplace. I accept, as was held in *Bruce v Ben Odeco Ltd* , that "maintained" ordinarily relates to matters of structural integrity and does not extend to keeping the surface of a floor free from substances that might cause a person to slip, but in regulation 5 "maintained" is given an extended meaning by the addition of the words that immediately follow it in parenthesis: "(including cleaned as appropriate)". Accordingly it would appear that there might be a failure to maintain in an efficient state, in terms of regulation 5, if there was present on a floor a substance which rendered it less than optimal for the purpose of pedestrian traffic, which substance might have been removed by cleaning. Something might turn on the meaning to be given to the expression "efficient state". Mr Reid QC in *Gilmour v East Renfrewshire Council* supra at paragraph [52] equates not being maintained in an "efficient state" (from the point of view of safety) with presenting a real risk of harm. Mr Mackay did not demur from the approach taken in *Gilmour* (he submitting that the floor here did not present such a risk), albeit that the effect of that construction would appear to make regulation 12 (3) redundant and, in doing so, remove the reasonable practicability defence. It is a construction which makes regulation 5 a provision having considerable scope notwithstanding that, as Lord Kingarth observed at paragraph [15] of his opinion in *Delaney v Beechwood Nurseries* , a decision advised on 20 February 2004, after submissions in this case, " one does not, I think, expect an employee who has sustained an accident because his place of work was unsafe to claim that he has suffered injury because his workplace was not 'in an efficient state' ". For the purposes of this case it is sufficient that I record my finding that while I found the laminated floor to be wet at the relevant time, I did not have evidence to allow me to conclude that the laminated floor was not in an efficient state. Whatever might have been the case had I found that this floor, when wet, to be in some degree slippery, this is not such a case. For completeness, I would note that neither Mr Olson nor Mr Mackay commended to me the suggestion contained in Redgrave's annotation to regulation 5 that the duty imposed by the regulation might be usefully compared with the duty imposed under section 29 of the Factories Act 1961, now repealed, although it was part of Mr Mackay's argument that there could be no breach of regulation 5 in the present case because of the purely transient and temporary condition of the floor. [19] Mr Olson did not seek to found on regulation 12(1) or (2). He did submit that there had been a breach of regulation 12(3) by reason of the failure to keep the laminated floor free of water which, he contended, I should find was an article or substance which may cause a person to slip. For the pursuer to succeed on a case of breach of regulation 12(3) it was necessary for her to prove that she fell because there was on the floor an article or substance (water) which

presented a real risk of causing persons to slip (the expression "real risk" having the meaning explained by Lord Hamilton in McGhee supra at 684B to C). Accepting Mr Mackay's submission, I have held that the pursuer has not proved that that was the cause of her fall, nor that the water on the floor presented a real risk of causing a person to slip. The pursuer accordingly fails on this branch of her case also. Had she established her probandum, I would not have found that the defender had established his averment at page 14B to C of the Closed Record: "The floor of the workplace was kept free of substances likely to cause a person to slip or fall so far as was reasonably practicable." The only measure referred to was putting up the sign. I accept that it was appropriately positioned. I accept that there was no evidence of slipping on any other occasion than the pursuer's accident. I do not accept that that is sufficient to make out the defence, in the absence of any evidence that that was all that could practicably be done. [20] Had I required to consider the issue, I would have found the pursuer to have been contributorily negligent by reason of what I infer to have been a failure to watch where she was going as demonstrated by her failure to notice the warning sign. I accept, as Mr Olson submitted, that there was no evidence of the pursuer rushing or doing anything untoward. I do not consider that her failure to use the lift bears on the matter. She was wearing appropriate footwear and it is not averred otherwise. Nevertheless, she emphasised that she had negotiated the floor when it was wet without mishap on many occasions because, she implied, she had been put on notice by the presence of the sign and had acted accordingly. This suggests that her failure to notice the sign was of causal significance, although it is true that the pursuer was unable to explain to her counsel what she would have done differently had she seen the sign on the occasion of the accident. I consider, on the basis of her own evidence, that she is to be taken as having failed to take reasonable care to watch where she was going. [21] As will be seen, I have had regard to the pursuer's answers to Mr Olson's question as to what she would have done differently had the sign been in position. I have been prepared to consider the cases of breach of regulations 5(1) and 12(3) notwithstanding my finding that, contrary to what the pursuer maintained when giving evidence, the wet floor sign was positioned so as to be clearly in her line of sight as she approached and then walked through the doorway into the hall. I should record that Mr Mackay took timeous objection to questioning along that line on the ground that the pursuer's case on Record was that the sign was not in a position where it could be seen by the pursuer before stepping on to the laminated floor and that had it been so positioned her accident would not have happened. Accordingly, to allow Mr Olson to ask the pursuer what she would have done differently had she seen the sign was to open up a case which was not on Record and indeed was quite contrary to the case that was on Record. Mr Mackay renewed his objection in the course of submissions. The pursuer, he submitted, was debarred from arguing that esto the sign was in fact in a position where it could be seen by her as she walked through the doorway into the hall, its presence would have made no difference. It would take a very strange construction of the pleadings to allow the pursuer to advance a case of breach of the Regulations on the factual premise that the sign had in fact been in plain view when she walked through the doorway into the hall. I disagree. As I have already observed, the position of the sign was the focus of a significant amount of evidence.

My impression was that the pursuer considered that her case was dependent on the sign not being visible to her as she walked through the doorway into the hall. I do not see her case to have been pled in such a way that it is periled on proving that the sign was not in a position where it could be seen by the pursuer. It is true that the pursuer avers, at page 13E of the Closed Record: "Explained and averred that had the defender given the pursuer adequate warning that the floor was slippery the accident would not have occurred." That averment is not admitted. It leaves open the question of what is "adequate warning", but, more crucially, the averment follows what are sufficient averments of breach of regulations 5(1) and 12(3) which are not dependent on the absence of a warning sign. I repel Mr Mackay's objection. Damages [22] I find that the pursuer has failed to prove that her loss, injury and damage have been caused by the defender's fault. She is therefore not entitled to reparation from him. It is nevertheless necessary that I make findings as to her loss and injury and quantify the damages which would have been awarded had she been successful. [23] Immediately following her accident the pursuer was unable to get upright. She required to lean on the green upholstered chair. On the arrival of an ambulance, she was assisted to her feet and removed to the Casualty Department of the Victoria Hospital, Kirkcaldy. There she received pain relief. She was examined. That examination included X ray. She was discharged home later that day. She was prescribed cocodamol for her continuing pain. This had the effect of dulling the pain but only for two hours at a time. She obtained a TENS machine some eleven days after the accident, again to alleviate symptoms of pain. The pursuer returned to work on 25 April 2001 as her general practitioner thought this might help her symptoms but she experienced difficulty with lifting heavy items such as saucepans and the metal grills from the cooker. She could not work with her hands above head height. Whereas the pursuer's condition had improved up to the time of her return to work, it thereafter deteriorated. The pursuer stopped work on 14 June 2001 and has not worked since then. Her employment was brought to an end with her dismissal on 10 October 2001. Since then the pursuer has continued to suffer pain. Each day was different. A good day was when she required to take only four painkillers. On a bad day she might wake at 4 am, be unable to continue lying in bed and have to go and sit in her massage chair. She feels unable to go out of doors unaccompanied on any day. She has lost confidence after an occasion in April 2002 when she was knocked over by someone running past her. She is unable to walk far. A mile is about her limit. Before the accident she walked everywhere. She had enjoyed walking. Her former pleasure in going shopping is now limited. Whereas before her accident she had gone to the gym three times a week, she can no longer do so. The pursuer's ability to do housework is now restricted. She cannot change a duvet cover. She can do light dusting but cannot stretch high or bend low. She can use a vacuum cleaner downstairs but not upstairs. She has required the assistance of her daughters, Alana and Deborah in doing house-work. She described Alana as doing most of the cleaning of the house. In relation to cooking, she could do everything "at a certain level". The pursuer's family has forbidden her to use a shower when there is no one else at home in case she falls. As far as self-care is concerned, the pursuer can do everything but on bad days she cannot get socks or boots on. Marital relations have been much restricted. The pursuer cannot readily use a bus. The steps are too

high for her to negotiate. During her evidence she referred to her difficulty in getting up into the witness box. She stood while giving evidence. I understood that she found this more comfortable than sitting. [24] It was the opinion of Mr Weir that the pursuer sustained a soft tissue sprain to her right sacro-iliac joint as a result of her fall on 31 January 2000. He described her injury as having slowly improved over time but nevertheless having left her with significant symptoms, sufficient to prevent her resuming her previous work by reason of the heavy lifting and carrying which were involved. While he considered it likely that there would be some gradual further improvement, he would be surprised if she were to make anything like a full recovery. The pursuer would always have what Mr Weir described as a "sensitive" back, which would prevent her from doing heavy lifting or anything that involved more than moderate exertion. He considered that the pursuer remains fit for employment in a sedentary or light manual capacity, provided that she could achieve a suitably supported posture for her lower spine. There was no sign of structural damage as might produce future deterioration, such as by reason of the development of arthritis. The pursuer's use of a stick is for balance rather than weight-bearing. [25] The pursuer suffers sciatica on the left side. I did not understand her to attribute that to her accident. She has arthritis in the knees. She has poor eyesight. She considered that this would limit her ability to undertake retail employment in that she would be unable to read a bar-code in the event of a mechanical reader being inoperative. She had an episode of vertigo which affected her between January and 14 October 2003. This would have prevented her from working independent of the sequelae of her accident. [26] The pursuer has been in receipt of Incapacity Benefit since 10 October 2001. [27] Had it not been for her accident, it had been the intention of the pursuer to work until she was 60 or 65. She had loved her job. She likes to be with people. She would like to work again. She has taken no very determined steps to look for alternative employment. She mentioned having obtained some information from the internet but I did not understand her to have claimed to have visited a Job Centre website. [28] Mr Gordon Cameron gave evidence under reference to his report, 7/6 of process. Mr Cameron describes himself as a vocational consultant and rehabilitation case manager. His curriculum vitae appears at page 16 of his report. He interviewed the pursuer on 10 November 2003 and had sight of the Closed Record and the medical reports mentioned in paragraph 2.1 of 7/6 of process. I did not understand Mr Olson to challenge Mr Cameron's qualifications to give expert evidence beyond putting it to him in cross-examination that determining how long it will take someone to find employment is not an exact science, a proposition with which Mr Cameron agreed. Mr Cameron gave his evidence on the assumption that, as a result of the accident, the pursuer was fit only for light work. The job of a cook is classified as "medium" and is therefore more demanding than light work. In his report and in his evidence Mr Cameron discussed the position of the pursuer in terms of her being a disabled woman. However, he identified a range of transferable skills which the pursuer had developed in the course of her career which she could put to use in an alternative career. The pursuer lives in the Kirkcaldy Claimant Count Area which has a higher than average levels of unemployment. It was Mr Cameron's opinion that the pursuer might obtain employment doing light work within a period of about 12 months. Accordingly,

had she sought such work after having leaving her job as a cook in June (or October) 2001, she should have secured a lighter job in the course of the following year. I understood Mr Cameron to be of the view that it was still an option for the pursuer to undertake a search for light work which would not require any further re-training and that if she did embark on such a search she might expect to secure employment at net annual earnings of between £8485 and £9516. Were she to undertake re-training he thought she could then apply for clerical and administrative jobs commanding earnings of between £9244 and £10,638 net per annum. Such re-training might take a period of two years. [29] It was agree by Joint Minute that for the period from 31 January 2001 until 1 January 2002 the net average weekly wage of a cook employed by the defender in the same capacity as the pursuer was employed as at 31 January 2001 was £126.86; and that from 1 January 2002 until the present date 2002 the net average weekly wage of a cook employed by the defender in the same capacity as the pursuer was employed as at 31 January 2001 has been £185.25. The latter figure amounts to net annual earnings of £9633. [30] Mr Olson submitted that I should assess solatium in the sum of £20,000. He referred me to the guidelines published by the (English) Judicial Studies Board in their sixth edition at Appendix III. He contended that the pursuer's case came within the category (b) Moderate (i) which has allocated to it a range of £14,500 to £20,000. He also relied on the decision of Lord Macfadyen in *McNulty v Marshalls Food Group Ltd* 1999 SC 195 where solatium of £20,000 was awarded in respect of the consequences of a prolapsed intervertebral disc. If I was not persuaded that £20,000 was appropriate, I should award something in excess of £14,500. Mr Mackay, on the other hand, relying on the decisions in *Fallen v Lanarkshire Health Board* 1997 S. L. T. 902; *Gallacher v Lanarkshire Health Board* 1999 S. L. T. 166 and *Graham v Marshall Food Group Ltd* 1998 S. L. T. 1448, put the appropriate figure for solatium at £8,000. [31] I do not accept that Mr Olson was correct to place the pursuer's case in the Judicial Studies Board's category (b) Moderate (i). Rather, I consider that it falls more readily into category (b) Moderate (ii): "disturbance of ligaments and muscles giving rise to backache", where the suggested range of awards is £6,500 to £14,500. Nor do I consider that Mr Olson was correct in equating the present case with that of the pursuer in *McNulty* where Lord Macfadyen summarised what he was awarding damages in respect of as follows, *supra* at 207B: "I am satisfied that the pursuer has proved that the prolapsed intervertebral disc which he suffered was caused by the accident. The major part of the award of solatium which I must make will reflect the developing low back and leg pain between March and October 1995, the severe low back pain and sciatica and the associated restrictions on his movement and activities which the pursuer suffered while awaiting the discectomy between October 1995 and August 1997, the operation itself, and the residual symptoms in his back and leg which have continued since the operation, and will continue in the future. His activities remain substantially restricted. There is also a risk that the pursuer will suffer a recurrence of the disc prolapse, which risk Mr Scott assessed at 10%. The effect on the pursuer's enjoyment of life has, in my opinion, been substantial. In addition, I must reflect in the award the neck injury and the symptoms which it precipitated in the nine weeks or so after the accident. I take into account that that injury has left the pursuer more prone to recurrent neck pain, but, as I have explained, am not satisfied that I

can accept that it has been proved that the particular neck symptoms suffered since mid-1997 are attributable to the accident. Bearing all these aspects of the matter in mind I am of opinion that the appropriate award of solatium is £20,000." A closer comparator, in my opinion, is the case of *Fallen* where a 40 year old female worker sustained mechanical low back pain whilst lifting a laundry bag. She was in bed for ten days with a stiff, sore back and was off work for six weeks. On her return to work, her back deteriorated and she was again unable to move. Her employment was terminated on medical grounds. She required a back support, painkillers, a walking stick and physiotherapy. She was unable to carry out normal household chores, decorate, garden, hillwalk or dance, but was fit for light work. Her continuing symptoms were described as "persistent low grade discomfort with intermittent periods of sharper pain." She received £8,000 for solatium, 50 per cent being allocated to the past. I was advised that this award is worth approximately £8,900 in current values. I see the degree of disability in *Fallen* as broadly similar to the present case but the pursuer in the present case described rather more severe symptoms and more frequent episodes of pain than what is recorded in *Fallen*. I have expressed my views on the pursuer as a witness on the merits of the case. I did not, however, form the view that she was exaggerating in her account of her injury and its consequences. I did not understand her veracity on these matters to be challenged. There was nothing in Mr Weir's evidence to undermine the pursuer's account which I accept. I have considered the other cases cited by Mr Mackay but I think it appropriate to assess solatium at a higher figure than that awarded in *Fallen*. I would have awarded damages under this head at £11,000. Of that two thirds would have been allocated to the past and one third to the future. Interest would be exigible on the proportion of solatium allocated to the past at the rate of 4 per cent per annum from the date of the accident until the date of payment. [32] Mr Olson accepted that it was realistic to assume that the pursuer would get back into employment. However, he sought an award in relation to loss of earnings which totalled £75,257.17. I understood his calculation of the wage loss to date, inclusive of interest, to be £27,093.27. To this, in the submission of Mr Olson, there fell to be added a further five years loss of earnings at the current net wage paid by the defender to a cook to reflect two years to re-train, one year for a job search and two years' earnings to reflect the pursuer's disadvantage on the labour market due to her disability. The figure for future loss, calculated in this way, amounted to £48,164. Very helpfully, Mr Olson provided me with a quantification schedule which includes his calculations of wage loss, to which reference may be made. Mr Mackay reminded me that the pursuer avers that, but for the accident, she would have worked until the age of 60 years and that Mr Weir had found her to be fit for light manual or sedentary work in February 2002. He further reminded me that the pursuer had accepted that, by reason of vertigo, she would, in any event, have been unfit for work between January and 14 October 2003. Mr Mackay was only prepared to concede wage loss up to June 2002 by which time, on the basis of the evidence of Mr Cameron, the pursuer should have found alternative work. The figure in respect of past loss, inclusive of interest, was calculated in the Outline Submission provided by Mr Mackay at £7,736.51. Mr Mackay conceded that it would be appropriate to make an award in respect of disadvantage on the labour market to reflect that the pursuer was unfit for heavy work. This, he submitted, was a

matter that the court had to deal with "broadly, and to a considerable extent, impressionistically": *Gallacher v Lanarkshire Health Board* supra . He suggested allowing six months wage loss (say £5,000), which failing one year's wage loss (£9,632) for a disadvantage on the labour market award. [33] I am not persuaded that the pursuer has made every effort that she might have made to secure alternative employment but I do not go the distance of finding that she has failed to mitigate her damages in this respect. I would have been he prepared to allow the pursuer her wage loss to the date of proof. In making the calculation of the precise financial consequences of that, it would be necessary to bear in mind that, as is accepted by Mr Olson in the schedule of damages that he provided, the pursuer received certain payments and between January and October 2003 the pursuer was disabled from working by reason of vertigo. I would have found her entitled to interest on that element of past loss at the rate of 4 per cent per annum from the date of the accident until the date of payment. As far as the future is concerned, I consider that the pursuer probably will find work should she choose to look for it. That was essentially conceded by Mr Olson. Having regard to the evidence, I find that it may, however, take her up to a year to find suitable employment. Such employment would attract annual remuneration in the range of £8485 and £9516 net spoken to by Mr Cameron. I take the midpoint of that range as being £9000. That compares with the £9633 which she would earn as a cook in the employment of the defender. I do not find it probable that the pursuer will embark on extended re-training. She has not done so thus far. She gave no evidence to the effect that she intends to do so. As Mr Mackay accepted, by reason of her disability, the pursuer is at a disadvantage on the labour market. In these circumstances I would have considered it appropriate to award the pursuer a further one year's loss of wages to cover the period of a job search and a further year's wages to reflect disadvantage on the labour market. I would have further considered it appropriate to award a sum to reflect the slightly lower rate of remuneration for unskilled work, as spoken to by Mr Cameron, when compared with what the pursuer had earned as a cook. I would have taken that as a loss of £600 per annum over the remainder of the pursuer's working life which, for the purpose of this calculation I assume to begin in one year's time and will end with retirement at age 60. Having regard to Table 24 of the Ogden Tables, as adjusted in the way set out in Mr Olson's quantification schedule and conscious of the approximation that this involves, I would adopt a multiplier of 9 to be applied to a multiplicand of £600 to produce the sum of £5400 to compensate the diminution of the level of earnings that the pursuer can be expected to achieve in consequence of her injury. [34] The pursuer seeks awards under reference to both section 8 and section 9 of the Administration of Justice Act 1982. Understandably, no very detailed evidence was led about these heads of damage. Mr Olson explained that they were to reflect what the pursuer's daughters had required to do for her and what she could no longer do for her husband. He made specific mention of shopping and ironing as tasks with which the pursuer required assistance. He proposed that I should award £750 or £1000 per annum by way of damages to comprehend both the section 8 and the section 9 claims. Mr Mackay reminded me that there was evidence from Alana Cochrane that in 2001 the pursuer's husband had broken a vertebra and could not help in the house. Only one year later was he able to return to work.

From July 2002 he was working in Plymouth. Alana had been attending university. Under reference to the decisions in *McCluskey v Lord Advocate* 1994 SLT452 and *Duffy v Lanarkshire Health Board* 1994 S. C. L. R. 983, Mr Mackay proposed that I should make an award of £1000, inclusive of interest, for past and future. [35] I refer to paragraph [23] above for a summary of the pursuer's disabilities as they relate to what she can and cannot do, to use the expression employed by Mr Olson in the course of his submission. I accept that she is, to an extent, disabled and that, in consequence, she has received and will receive assistance from family members which would not have been necessary had she not suffered injury in the accident, although I am not satisfied that Mr Olson's examples of shopping and ironing were particularly well chosen. She can iron and she does go shopping. Indeed the assistance required by the pursuer, as described by her in her evidence, would appear to have been and to be quite limited. Such assistance can, of course, only be provided while the family members are available to provide it. The pursuer's daughter Deborah is married and no longer lives with the pursuer. Alana is hoping to begin education in nursing. The pursuer's husband works in Plymouth. No other providers of services or persons to whom the pursuer would have provided services were identified. I consider that, in the circumstances of this case, quantification of these heads of damages is inevitably a matter to be approached broadly. I would have dealt with these heads of damages by making a lump sum award of £3000, inclusive of interest, in relation to both the past and the future.

Conclusion

[36] In the event that I had been awarding damages, I would have had the case brought out by order in order to give counsel the opportunity to address me on all matters of arithmetic arising from the terms of my opinion. As it is, I shall repel the pursuer's first plea-in-law and uphold the defender's second and third pleas-in-law. I shall therefore assoilzie the defender. I shall reserve all questions of expenses. In conclusion, I would record my gratitude to counsel for all their assistance. Mr Olson's quantification schedule and Mr Mackay's Outline Submission were particularly welcome. BAILII: Copyright Policy | Disclaimers | Privacy Policy | Feedback | Donate to BAILII URL: <https://www.bailii.org/scot/cases/ScotCS/2004/62.html>

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