SHERIFF APPEAL COURT

[2020] SAC (Civ) 6
[PIC-PN1432-17]

Sheriff Principal M Stephen QC
Sheriff Principal D Pyle
Sheriff Principal C Turnbull

OPINION OF THE COURT

delivered by SHERIFF PRINCIPAL M STEPHEN QC

in appeal by

ANDREW WRIGHT

Pursuer and Appellant:

against

NATIONAL GALLERIES OF SCOTLAND

Defender and Respondent:

Pursuer and Appellant: Galbraith, Advocate; Digby Brown LLP
Defender and Respondent: McMillan, (sol adv); Brodies LLP

3 July 2020

[1] This is the pursuer's appeal against the sheriff's interlocutor of 28 February 2019 granting decree of absolvitor in favour of the defender.

[2] The pursuer sustained injuries when delivering milk to the Scottish National Portrait Gallery ("the gallery") in Edinburgh on 19 November 2016. The defender, being the National Galleries of Scotland, controls and occupies these premises, at least as averred on record by the pursuer. The gallery is an art gallery and public attraction with a café situated within

the premises. The pursuer is employed to deliver milk and dairy products to various locations including the gallery. The milk was for use in the café within the gallery. He made his delivery early in the morning before the gallery, and therefore the café, was open to the public. He used a cage on wheels onto which the milk was loaded. His usual practice was to put the milk into a fridge which was located in the rear corridor close to and on the same level as the rear fire exit.

[3] The pursuer is employed by a well-known supplier of milk, Graham's Family Dairy. He had delivered to the gallery many times. Usually, he made his delivery of milk via the rear fire exit to the gallery with the assistance of the defender's staff who allowed him access to the rear corridor where the fridge was located and into which he would unload the milk. He used this method of delivery until 18 November 2016 at which point he was required by the gallery to make his deliveries via the main front entrance to the gallery on Queen Street. This alteration to the delivery arrangements was effected for the first time, as far as the pursuer was concerned, the day prior to the accident. As indicated the deliveries were usually made early in the morning before any catering staff had arrived and when the night shift gallery attendants were on duty. On the day of the accident the pursuer arrived to make his delivery to the gallery at about 6.40am. After being allowed access by the gallery attendants on duty he proceeded towards the kitchen area through the café pushing the wheeled cage in front of him. It was approximately half full of milk. He, therefore, approached the fridge, into which he usually placed the milk, from the opposite direction. As the cage was only half full he could look ahead and see where he was going but did not see a step down to the rear corridor where the fridge was located. When he encountered the step the cage suddenly dropped down causing him to fall forward as a result of which he was injured. This background is derived from the sheriff's findings in fact. The delivery

arrangements prior to 18 November 2016 are recorded in findings in fact [14] and [15]. The alteration to the method of delivery came about as a result of a security review by the defender (finding in fact [16]). The sheriff also made findings in fact relating to Heritage Portfolio Limited, who operate the café in the gallery, and the steps taken by the defender's duty manager to inform the café manager of the new access arrangements who in turn spoke to someone at the pursuer's employers premises (findings in fact [4] and [17]).

[4] The pursuer raised proceedings against the National Galleries of Scotland only. The pursuer's case is based upon the gallery falling under the control of the defender who decided to alter the out of hours access arrangements. The defender does not admit having control of the premises but admits introducing a new system of access on 17 November 2016 whereby deliveries before 7am were to be made via the front of the premises due to security concerns. The pursuer's case is based on the defender's common law duty to take reasonable care for his safety and the breach of that duty together with the breach by the defender's employees of their duty of care to the pursuer for which the defender is vicariously liable. The pursuer also pleads a case based on the defender's breach of its duty under section 2 of the Occupiers' Liability (Scotland) Act 1960 ("the 1960 Act"). The defender denies liability pleading sole fault on the part of the pursuer which failing contributory negligence.

[5] The sheriff sitting in the All Scotland Sheriff Personal Injury Court in Edinburgh heard parties' proof on 5 and 6 February 2019. Quantum had been agreed and the issues for proof were therefore liability and contributory negligence. The sheriff issued an interlocutor together with findings in fact and a note dated 28 February 2019 assoilzing the defender.

Submissions for the appellant ("pursuer")

[6] Counsel for the pursuer adopted her written note of argument and presented an outline written submission which she amplified by oral submission. Essentially, the pursuer's case against the gallery is based on a breach of its common law duty of care towards the pursuer, in particular its duty to take reasonable care towards a person such as the pursuer entering the gallery both at common law and under section 2 of the 1960 Act. The pursuer's case on record sets out clear averments as to the defender's occupation and control of the gallery (see *Wallace* v *City of Glasgow District Council* 1985 SLT 23). It rests on the defender having control of the gallery. The findings in fact point to the defender having such control. The evidence underscores that proposition. The defender accepted that it had control of the locus in the minute of the pre-trial meeting. It is the obvious conclusion to reach on the facts. The sheriff erred in failing to accept that proposition.

[7] What may or may not have been the contractual arrangements between the gallery and Heritage Portfolio and between Heritage Portfolio and the pursuer's employer Graham's is neither here nor there. The pursuer's case is directed solely towards the defender on whose premises the accident occurred.

[8] The sheriff's findings in fact [4] and [6] support the averment that the defender was in control of the gallery. The defender and their attendants had complete control over access and altered the access arrangements effective the day prior to the accident (finding in fact [16]). Despite it being obvious that the defenders had control of the gallery the sheriff erred in not making a finding in fact (or finding in fact and law) to that effect. The sheriff also erred in the conclusion he reached in his discussion of the Workplace (Health, Safety and Welfare) Regulations 1992 ("the 1992 Regulations") (which inform the nature and extent of the defender's duties at common law). The sheriff erred in making the observations he

does at paragraph [34] of his note and by qualifying the defender's *de facto* control to "an element of control over access to the workplace". Heritage Portfolio may well have been an occupier of the kitchen and café area of the gallery but that is in addition to the defender. However, that is not relevant to the issue which the sheriff had to decide as Heritage Portfolio and their staff were not present at the time deliveries are made (see discussion at paragraph [38] of the sheriff's note). Accordingly, the sheriff's analysis of the regulations at paragraphs [31] – [36] is inconsistent with the evidence and the findings in facts he makes, especially findings in fact [14] and [15] which narrate the previous system of access used by the pursuer when he was delivering milk to the gallery. These findings clearly point to the defender having both control and knowledge of the pursuer's workplace and system of work when making deliveries to the gallery including his method of accessing the fridge where he would store the milk in the place most suited to the product (see finding in fact [19] – milk being perishable).

[9] Throughout his discussion the sheriff conflates the concept of "control" with "knowledge". Although both are important they are distinct propositions when determining the scope and extent of an occupier's duty of care. This is obvious from the sheriff's reasoning at paragraphs [35] and [36] where he discusses the application of the 1992 Regulations. The pursuer's position is that the defender's duty of care was informed by its obligations in terms of Regulation 17. Regulation 17(3)(a) requires that the workplace is to be organised in such a way that pedestrians and vehicles can circulate in a safe manner. Traffic routes shall not satisfy that requirement or the requirement of sub-paragraph (2) unless suitable measures are taken to ensure that:

> "(a) pedestrians or, as the case may be, vehicles may use a traffic route without causing danger to the health and safety of persons that work near it."

The sheriff was plainly wrong to disregard the pursuer's case based on the 1992 Regulations. His reasoning is inconsistent with his findings in fact.

[10] The sheriff conflating the concepts of control and knowledge can also be seen in his reasoning in paragraph [36] where he states:

> "It has not been established in this case that the 'circulation of traffic' within those areas at the time when the pursuer was using them was a matter which was under the control of the defender: Regulation 17(1). In short, it is not proved the defender knew or should have known that the pursuer was likely to use that route".

It was submitted that this is a fundamental flaw in the sheriff's reasoning and that the two issues are separate. The sheriff was in error by making them interchangeable. If the defenders were in control of the gallery and the corridor is a traffic route then Regulation 17 is engaged and a duty is thereby imposed. The defender's state of knowledge may inform the scope and the nature of the duty. However, control and knowledge are two distinct propositions. The sheriff's reasoning on the 1992 Regulations runs contrary to the evidence and his findings on the evidence. It appears that the sheriff's reasoning was to the effect that the defender's lack of particular or specific knowledge that the visitor who delivered milk required access to the fridge corridor means it was under no obligation to consider the safety and suitability of the route to the fridge (see paragraph [47] of the sheriff's note). Paragraph [47] raises two particular issues which point to error on the sheriff's part. Firstly, the sheriff's reasoning to the effect that the defender had not been told that the fridge corridor must be accessed is contradicted by findings in fact [14] and [15]. Secondly, reliance on the lack of prior accidents is of little or no relevance given that the system of access had changed only the day before his accident. Paragraph [47] forms an important part of the sheriff's reasoning. The sheriff accepts that the step was a "hazard" but not one which

required any specific action given the defender's state of knowledge. The defender's state of knowledge appears to be predicated on the lack of prior incident or accident. However, the sheriff accepts that had the defender been told that the fridge corridor must be accessed that might have put it on notice that the kitchen might be used as a route and therefore "created an obligation to think about whether that could be done reasonably safely." The sheriff's reasoning in this paragraph betrays the inconsistency in his decision making and his conclusions regarding the defender's knowledge do not accord with the findings he makes. The sheriff has fallen into error. The conclusion he draws at paragraph [48] is flawed.

[11] The defender clearly had knowledge of the pursuer's previous access and delivery route (pre 18 November 2016). The pursuer simply required access to the fridge to deposit the milk. The defender knew that due to its own employees' attendance and involvement in allowing the pursuer access and indeed assisting him transfer the milk to the fridge. With that knowledge the defender falls under an obligation to consider a suitable safe route to allow delivery to the fridge when the point and direction of access is altered. The defender owes a duty of care to "visitors". The pursuer in this case was a regular and known night-time visitor who required access to restricted areas.

[12] Counsel for the pursuer concluded that the sheriff having erred in the application of his own findings in fact to the legal context - in particular the extent of the defender's control of the gallery and its duty of care to those entering the premises - it was therefore open to this court to consider, of new, the duty of care owed to the pursuer. The court should find that on the facts and circumstances of this case the defender owed such a duty to delivery drivers such as the pursuer and had breached its duty to consider the delivery route and provide him with a safe means of access. It is not the pursuer's case that the step required to be altered but rather that the route could have been altered as was done following the

accident and in light of the accident by using the west corridor to access the fridge in the rear corridor. That access route did not involve negotiating the step but did require an attendant to open a security controlled door. The fact that the defender specified this access route itself following the accident to the pursuer demonstrates acceptance of a duty of care to provide a safe access route and their compliance with it, albeit too late, would have avoided this accident. Alternatively, the simple measure of highlighting the existence of the step as a hazard or properly illuminating the area were reasonable measures which the defender might have put in place in order to discharge its duty of care to the pursuer and others making deliveries.

[13] We were invited to allow the appeal, recall the interlocutor of 28 February 2019 and grant decree in favour of the pursuer for the agreed damages of £2,500 less 25% being the sheriff's assessment of contributory negligence - no issue being taken with the sheriff's conclusions at paras [63] and [64] of his note. Interest at the judicial rate of 8% from 5 February 2019 should be applied to the net award of damages.

Submissions for the Respondent ("Defender")

[14] Miss McMillan, solicitor advocate for the respondent, adopted the defender's note of argument and presented an outline written submission. The defender's motion is to refuse the appeal; affirm the interlocutor of the sheriff dated 28 February 2019 together with the interlocutor of 27 May 2019 on expenses and sanction for counsel and to award the expenses of the appeal to the defender. The appeal is suitable for instruction of a solicitor advocate.

[15] The solicitor advocate for the defender submitted that the pursuer cannot succeed even if his propositions as to (i) control of the premises; (ii) the 1992 Regulations; and (iii) the respondent’s state of knowledge as to deliveries are correct. The pursuer's argument

as set out in paragraph 6 of this note of argument speaks about the only two possible options to access the fridge area – either by walking through the unlit kitchen (and negotiating the step) or by using the "west corridor" which opens directly on to the fridge corridor (thus avoiding passage through the kitchen and therefore the step). The pursuer in his note of argument asserts that there was a locked door between the café and the west corridor and that a swipe card was required to open it. The pursuer would require to be accompanied by a member of the defender's staff. The argument goes on to refer to the change in delivery method or route following the pursuer's accident, namely, that access should be along the west corridor. However, this is not the pursuer's case on record. In any event, the sheriff made no finding in fact to the effect that the door leading to the west corridor was locked at the material time. In these circumstances the pursuer cannot rely on the argument that the west corridor was not a suitable level route available to him on the day of the accident.

[16] It is accepted that the defender had a measure of control over the premises in line with the sheriff's own view. The solicitor advocate for the defender did not go as far as to accept that the defender had control of the relevant area. The defender had control over access and egress to and from the building but that is as far as the evidence goes. The pursuer has failed to prove any more than the control which the defender had over who entered the building and how they entered the building. The reference by the pursuer to the incident report prepared by the defender following the incident does not support the contention that the gallery had the requisite control over the premises and over the routes to be taken by the pursuer and others when walking to the rear corridor. The incident report was not spoken to at proof. Instead Heritage Portfolio, who operate the café, had control over the café and kitchen area. The sheriff made finding in fact [18] which has a clear bearing on control. It states "Heritage does not allow deliveries through the café kitchen for

hygiene reasons because it is a food production area." That is sufficient to point to Heritage having the requisite control over the café and kitchen area and, therefore, the route to be taken by those making deliveries to the café.

[17] There is no finding by the sheriff that the step was a hazard. The sheriff's discussion of the step in the context of the access route at paragraph [47] is merely discussion and not a finding in fact. Likewise, there is no finding that the lighting was inadequate or that the step was obscured or that the pursuer's view was obscured by the cage of milk he was pushing in front of him. On the contrary, the sheriff made finding in fact [24] that the pursuer could see where he was going. The cage containing the milk was only half full. These represent further reasons why the pursuer cannot succeed in this appeal.

[18] Whether at common law or under the 1960 Act any duty of care incumbent on the defender did not extend to determining where the milk should be left and the route to be taken by the pursuer to get to the point where the milk should be left. This is a matter between Heritage Portfolio and Graham's. The sheriff makes a finding in fact that the manager of Heritage Portfolio had spoken to Graham's and advised them of the change of access which was acknowledged by the pursuer's employers. No issue is taken with that. The sheriff's assessment of the limited nature of the duty of care which the defender owed to the pursuer was that it had been discharged by advising Heritage as to the change in the point of entry or access to the building. There was no reason for the defender to go further as it owed no duty of care to the pursuer with regard to the access route to be taken to the fridge. The pursuer was familiar with the fridge and, in any event, accepted that he knew where he was going. The sheriff made finding in fact [12] that the night time gallery attendants were able to do their rounds safely through the kitchen without requiring to switch on lights. There had been no prior instances of anyone tripping or falling on the step.

There was no reason for the defender to anticipate that the step was a hazard as the pursuer, himself, was aware of the layout (see findings in fact [23] and [24]). In any event, the sheriff was not satisfied that the step presented a danger or hazard and therefore the pursuer cannot succeed either in terms of the 1960 Act or at common law (whether or not Regulation 17 of the 1992 Regulations applies).

[19] The sheriff was correct to doubt whether the kitchen and fridge corridor was a "traffic route" (Regulation 17 of the 1992 Regulations). Regulation 17 relates to the organisation of traffic routes and therefore is of doubtful relevance in the current circumstances. The purpose of the regulation is to ensure that vehicular and pedestrian traffic are organised into traffic routes. The regulation is not concerned with the condition of the traffic route itself. Regulation 12 is more apt to cover this situation. The 1992 Regulations only have relevance as to the extent of the defender's common law duty if there had been a finding that the step in question posed a hazard or danger such that there was a risk of injury. No such finding is made. If the regulations are relevant they add nothing to the common law (*Mullen* v *Kerr and South Eastern Education and Library Board* [2017] NIQB 69 – a decision of the Queen's Bench Division in Northern Ireland). In *Mullen* the court considered the suitability of a traffic route concluding (at paragraphs 29 and 30) that

> "the court has an obligation to carry out a broad qualitative assessment of suitability so that the extent of the duty in negligence and under the Regulation is very similar."

[20] The question of the most suitable and safe delivery route following the change to the access point is a matter not for the defender but for agreement between Heritage Portfolio and the pursuer's employer Graham's Dairy. There was no reason for the defender to believe that there was a requirement to put the milk in the fridge. Although a matter

between the pursuer's employers and the café operators the milk could simply have been left on the counter as happened the day prior to the accident. Heritage Portfolio staff generally arrived between 7.30am and 8am (finding in fact [7]).

[21] The pursuer has not proved that the step was a hazard or danger. The risk of injury was not reasonably foreseeable. The pursuer knew where he was going and asserted as much to the defender's employees on the morning of the accident. The defender's staff were entitled to rely on the pursuer's assurance that he was familiar with the premises. They owed no duty of care beyond allowing access to the premises. In the circumstances, the sheriff did not err in granting decree of absolvitor. The appeal court should not interfere with the sheriff's assessment of the witnesses and the evidence they gave. The appeal should be refused with expenses in favour of the defender.

Decision

[22] The manner in which the pursuer's accident occurred is not in dispute. He was pushing a cage on wheels which was about half full of milk through the kitchen area of the café at the Scottish National Portrait Gallery towards the fridge, into which he intended placing the milk, when the cage fell over due to a step down into the fridge corridor which the pursuer was not aware of and did not see. The cage suddenly dropped down which in turn caused the pursuer to fall forward injuring his right wrist and hip.

[23] The pursuer's case against the gallery is based on a breach of its common law duty to take reasonable care for his safety. The pursuer also pleads a breach of section 2 of the 1960 Act and a breach of the defender's employees duty of care for his safety ("the vicarious liability case").

[24] The defender does not admit being the occupier of the gallery nor having control of the entire premises. The defender maintained that position before the sheriff and on appeal. A "measure of control" in line with the sheriff's approach was accepted by the solicitor advocate for the defender at the appeal hearing but limited to who entered the gallery and in what manner. Heritage Portfolio had control of the café and kitchen area.

[25] The point of law raised in this case, in essence, is this: - did the gallery owe a duty to Mr Wright, a delivery driver, to take reasonable care for his safety when delivering milk to the fridge located in the corridor adjacent to the rear fire exit and if so did it breach that duty? The statutory term "occupier" in the 1960 Act means the same as in the common law. ("Person occupying or having control of land or other premises" section 1(1) of the 1960 Act). Therefore, an occupier is someone who has a sufficient degree of control over premises to place him under a duty of care towards those entering the premises lawfully. Clearly, the gallery, being a public attraction, will have a significant number of visitors to whom the defender owes a duty of care. The pursuer is someone who regularly delivers milk products to the café within the gallery and is nonetheless a visitor to whom the gallery owes a duty to see that he is reasonably safe whilst on the premises.

[26] The defender's control of the gallery may appear to be obvious. However, the findings in fact assist in analysing its occupation of the gallery and the extent of its control:

> The defender operates the gallery (finding in fact [4]); The gallery has 24 hour security (finding in fact [6]); the night time gallery attendants patrol during the night and as part of their rounds go through the kitchen (finding in fact [12]); prior to 18 November 2016 the pursuer when making deliveries to the gallery would be allowed entry by one of the two night attendants on duty via the rear fire exit (finding in fact [14]); following a security review by the defender there

were to be no deliveries to the rear fire exit door before 7am as it was not appropriate for a night attendant to go alone in the middle of the night to the rear fire exit to allow access. Deliveries prior to 7am were to be made via the staff door at the front entrance to the gallery on Queen Street (finding in fact [16]); On the morning of the accident the pursuer arrived at the gallery at approximately 6.40am and was firstly allowed entry into the building and then into the café by attendants employed by the defender. The door into the public area of the café is secure but can be unlocked from the control room by means of a button. It cannot be opened from the café side without a pass (findings in fact [6] and [23]). The area of the rear fire exit and fridge corridor could be accessed either through the café and kitchen or alternatively via the west corridor by a double door which was secure unless it had been left open or access through it was obtained by use of a swipe card (findings in fact [14] and [24].

At paragraph [34] of his note the sheriff, in the context of discussing the 1992 Regulations, accepts that the defender had an element of control over access to the workplace (the kitchen and fridge corridor). We consider that the proper conclusion to draw from the findings in fact made by the sheriff and any inferences which may reasonably be drawn from these findings is that the defender had complete control of the gallery including the kitchen and rear fridge corridor. It is the clear, obvious and rational conclusion to draw. No-one could enter the gallery without the defender's employees permitting access. During hours of closure the defender's employees had complete control of all areas within the gallery including access to the café, kitchen and fridge corridor. Access to these areas by whatever means was securely controlled (see in particular paragraphs [6] and [14]). The

pursuer was therefore unable to access the café and kitchen without an attendant facilitating that either by accompanying him or by using a swipe card to permit passage to these areas. Access to the fridge corridor by the west corridor was also controlled by a swipe card. Heritage Portfolio may well also occupy the kitchen and café but that does not derogate from the defender's overall control. Two or more entities may be occupiers and each comes under a duty of care towards persons coming onto the premises lawfully. The café was closed at the material time and no employees of Heritage Portfolio were present when the accident occurred.

[27] The next question is the nature and extent of the duty of care owed by the defender to the pursuer and whether that duty has been breached. Assessment of the existence, nature and extent of the duty is not an abstract legal concept but relies on the factual matrix arising from the evidence.

[28] The sheriff, in the context of his reasoning on the 1992 Regulations, concludes at paragraph [35] that "In this case, the precise terms or basis on which Heritage occupied the café and related premises has not been proved. But neither has it been proved to what extent to which (*sic*) the defender, as owners of the gallery, retained the power to alter the workplace and the things in it so as to comply with the regulations. In my view, this is not a matter which can be decided simply on the basis of inference. It is a matter which requires to be proved and in this case it has not been. Accordingly, I hold that it has not been established that the duty to comply with the regulations in relation to the existence and configuration of the step was placed upon the defender".

[29] The sheriff makes these observations in the context of a discussion of the extent to which the regulations are applicable to the factual situation in this case. If not applicable, they are of little or no value given that the pursuer pleads a case based on common law and

also the 1960 Act. To a significant extent the sheriff's conclusion on this point depends on his settled view as to the defender's limited control of the gallery. If applicable, "then they may very well be useful in assessing the nature and scope of a defender's duties at common law". The proposition that following the enactment of the Enterprise and Regulatory Reform Act 2013 breaches of duties imposed by health and safety regulations are no longer actionable is correct. Nevertheless, the regulations remain a source of statutory duties with which employers and occupiers require to comply. This appears to have been accepted by the court in *Gilchris*t v *Asda* [2015] CSOH 77 – a case where the court found there to be no breach of any duty by the employer - and also in *Mullen* (*supra*).

[30] It is unnecessary to examine the 1992 Regulations in detail. Regulation 17 is clearly concerned with pedestrian safety as well as vehicular routes. It applies to both and not solely to the situation where pedestrians and vehicles may be using or co-existing on the same traffic route. When delivering to the café the gallery becomes the pursuer's workplace (see para [33] and [34]) and how he gets about the gallery is a matter which his employers and occupiers of premises must take measures to organise in a way that is suitable and safe. By limiting his analysis of the defender's control to merely 'an element of control' the sheriff has fallen into error. He fetters his assessment of the defender's overall control of the gallery and ability to alter the workplace in light of health and safety regulations. There is a general duty of care on an occupier towards those who are lawfully on the premises. An occupier has a duty to take reasonable steps to ensure the safety of visitors on the premises. The argument deployed by the defender on record and before the sheriff had the objective of deflecting responsibility onto Heritage Portfolio (and Mr Wright's employers). This appears to have led the sheriff to elevate Heritage Portfolio's concurrent occupation of the café and kitchen into what appears from his reasoning in paragraph [35] to be an equal or possibly

superior control of and responsibility for the café and kitchen area. Both entities may have control over the café and kitchen area. It appears to have led the sheriff to become diverted from a full and proper analysis of the defender's occupation and control of the entire gallery and the consequential duties of care incumbent on the defender.

[31] It is not necessary to examine the café operator's powers and duties as occupier when the action is directed against the entity with complete control of the gallery, certainly during the hours when both the gallery and café are closed. Ultimately, the sheriff concludes that the case pled in terms of both the 1992 Regulations and the 1960 Act does not add anything to the pursuer's common law case. However, the sheriff's analysis of the extent of the defender's control of the gallery and its consequential obligations at common law proceeds on a misapplication of the facts which he found established on the evidence. In other words, the error as to the nature and extent of the defender's control of the gallery has impacted on the sheriff's approach to the defender's obligation to address foreseeable risks to those making deliveries when the gallery altered the system of access.

[32] Had the sheriff recognised the extent of the defender's control of the locus at the material time that would have informed him of the nature and extent of the duty of care incumbent on the defender as occupier in terms of Regulation 17. The regulations may not add a separate distinct case to the pursuer's case at common law; however, they directly inform both the defender and the court as to the defender's duty of care to those working at the gallery and visitors. If Regulation 17 is engaged, as it appears to us to be, it points to there being a duty imposed on the defender to consider suitable and safe access or traffic routes within the gallery. The gallery knew that the rear corridor might be used for deliveries and therefore as a traffic route by those such as the pursuer. The sheriff ought not to have rejected the argument advanced by the pursuer's counsel as to the impact and effect

of the regulations and in reaching the view he expresses at paragraphs [35] and [36] concluding "in short, it is not proved the defender knew or should have known that the pursuer was likely to use that route. For these reasons, I do not consider that the 1992 Regulations can add anything to the pursuer's case" the sheriff has misdirected himself as to the relevance of the 1992 Regulations.

[33] It follows that this court may examine the extent of the defender's knowledge and its obligations to the pursuer. The points in dispute being the proper inferences to be drawn from proved facts and the application of legal principles to those facts it follows that an appeal court is well placed to undertake that analysis. The critical event was the defender's decision to alter the system by which deliveries are made to the gallery. The defender did not want employees going to the rear fire exit during the hours of darkness as they had security concerns. There is not only a reasonable inference to be drawn that the defender knew about the previous longstanding practice of using the rear fire exit for deliveries but its employees were part of that system. In the specific instance of the pursuer and his deliveries of dairy products it was known that he used the rear fire exit conveniently located close to and on the same level as the fridge into which the milk would be placed. Accordingly, this knowledge can be attributed to the defender. The change in access arrangements was principally concerned with avoiding people, such as the pursuer, coming to the rear fire exit as the gallery attendants would then have to go, sometimes alone, in the hours of darkness to open that door. This is acknowledgement that the defender was fully aware that deliveries were made via the rear exit all as explained in findings in fact [14] and [15]. When the defender altered the access arrangements the requirement to consider how to organise pedestrian routes in a way that is safe was engaged. That does not appear to have happened. At best the arrangement was *ad hoc*. The new system appears to have been

considered only to the extent that the delivery would be made by allowing access to the gallery by the front entrance (finding in fact [17]). The day prior to the accident was day one of the altered access arrangement. On that occasion, the pursuer had no wheeled cage, but instead was carrying a plastic tray which he was instructed just to leave on the café counter (finding in fact [22]). He had no requirement to access the kitchen or the rear corridor from the kitchen. However, on the day of the accident the pursuer was allowed access by the defender's attendants into the café area with the wheeled cage. He knew there was a kitchen behind the counter area with a door leading to the fridge corridor. He had not been in the kitchen area before and did not know about the step. The accident then occurred as described.

[34] The sheriff's reliance on the chain of communication between the defender's duty manager, the café manager and Graham's does not, in our view, advance matters for the defender. In keeping with our analysis of the altered access arrangements the defender's consideration of the new access arrangements did not extend beyond the requirement to use the front entrance rather than the rear. Whatever duties may have been incumbent upon the pursuer's employers or the café operators the defender remained in total control of the gallery and access routes within the gallery. The defender's failure to consider safe pedestrian traffic routes clearly brought the step into play. Had the defender considered the end place for the pursuer's delivery they would have realised that either he had to negotiate a step or would require to be escorted to the rear fridge corridor via the west corridor as appears to have happened following the accident. At this point we address the argument advanced on behalf of the defender that the pursuer has failed to show that he was prevented from using the west corridor to access the fridge. It was suggested that the pursuer could not rely on that alternative level route not being available to him. He had not

proved that the security door in the west corridor was locked in which case he could have used that safer route. Much emphasis was placed on this argument by the defender. However, we reject that contention. There is no factual basis to suggest that the pursuer had any knowledge of this means of access. If it was considered a safer route to the fridge he ought to have had it pointed out to him. He had no reason or opportunity to know of the west corridor route. We have a complete record of the pursuer's deliveries to the gallery since the access point changed. The gallery attendants were best placed to advise him whether he could use that route on his own or whether he required to be escorted to negotiate the security controlled door to the fridge corridor. The day of the accident was the first occasion the pursuer required to push the cage to the fridge from the front of the gallery. Although the sheriff rejected the vicarious liability case he narrates the evidence of the two gallery attendants at paras [51] to [60]. The male attendant (Hallcroft) was well aware that the pursuer was heading to the fridge to deposit the milk. He thought the pursuer would use the west corridor route which might have been suitable if the door had been left open otherwise he would have had to return to ask one of the attendants to swipe him through. No reason is given why he thought the pursuer would take that route. The female attendant was of the view that all deliveries of milk were to be left on the café counter (as had happened the day before). The conclusion to be drawn from the evidence of these employees is that there was no clear understanding of what the system for access with the milk delivery was. The inference which can reasonably be drawn is that no consideration had been given to how the delivery was to be made safely.

[35] As the sheriff acknowledges, any step is a hazard and in this case a hazard which could have been avoided by using the alternative route or mitigated by means of a warning notice or ramp. The sheriff's reliance on there being no record of any prior accident

involving the step is somewhat perplexing given that the means of access had altered only the day prior. The defender was aware that the pursuer required to use a wheeled cage (finding in fact [13]). The sheriff tacitly accepts that had the defender known that the fridge corridor had to be accessed this would have put the defender on notice that the kitchen might be used as a route which would then have created an obligation to consider whether that could be done reasonably safely. Despite making findings in fact [14] and [15] the sheriff rejects the proposition that the defender knew or ought to have known that the pursuer would require access to the fridge. Mr Hallcroft did not appear to have had much doubt that the pursuer was going to the walk-in fridge. Gallery attendants had in the past assisted the pursuer by holding the fridge door open for him. The absence of this specific knowledge on the part of the defender appears to be the *de quo* of the sheriff's reasoning in finding that there was no duty on the defender to consider how deliveries could be made safely. In that regard we consider that the sheriff erred. The conclusion he draws is inconsistent with the facts which point to there being a duty on the defender to take reasonable care for those entering the premises during the hours of darkness to make deliveries including deliveries of dairy produce. The defender had the requisite knowledge as to the end point for the pursuer's delivery and ought to have considered how the fridge could be accessed safely having regard to its common law duties as informed by the 1992 Regulations.

[36] For the reasons given, we will allow the appeal, recall the sheriff's interlocutor of 28 February 2019 and grant decree in favour of the pursuer in the sum of £1,875 with interest at the judicial rate of eight per cent per annum from 5 February 2019. The pursuer is entitled to the expenses of process before the sheriff and also the expenses of the appeal procedure.

We certify the cause as suitable for the instruction of junior counsel both at first instance and on appeal.