SHERIFFDOM OF LOTHIAN AND BORDERS AT EDINBURGH

IN THE ALL-SCOTLAND SHERIFF PERSONAL INJURY COURT

Case Ref: PIC-PN2668-24

NOTE

by

SHERIFF GRAEME WATSON

in the cause

DARREN ESPOSITO

Pursuer

against

PANMURE FORESTRY PARTNERSHIP

Defender

Edinburgh, 21 October 2025

Introduction

[1] This is a personal injuries action. The action concerns an accident on 11 June 2021. The pursuer avers that he was walking within Panmure Estate. Within the estate is a folly. The folly comprises artificial ruins constructed of stone. There is a turret with an internal staircase. The defender avers, and the pursuer admits, that the internal staircase consists of five stone protrusions attached to one side of the interior wall. The pursuer avers that he entered the turret, ascended the staircase, then started to descend. He put his hand on the turret wall. The stone crumbled, causing him to lose his balance and fall six feet, to his injury.

[2] The pursuer avers that the defender was in breach of their duty to take reasonable care at common law and in breach of section 2 of the Occupiers' Liability (Scotland) Act

1960. The defender avers the accident was caused by the sole fault of the pursuer. Reference is made to section 2(3) of the Act and to the principle of *volenti non fit iniuria.*

[3] The case called before me on 20 October 2025 on the defender's opposed motion for summary decree under OCR 17.2(3)(b). The defender submitted that the pursuer's action was bound to fail. Summary decree should be granted. The pursuer submitted that evidence was required and the matter should proceed to proof.

Submissions for the defender

[4] The defender submitted that the pursuer's action was bound to fail. The pursuer had no real prospect of success and there was no other compelling reason why summary decree should not be granted. The court should have regard to the pleadings and to the parties' productions. Under reference to *McGlone* v *British Railways Board* 1966 SC(HL) 1, the court's assessment of what was reasonable in the circumstances required consideration of the facts in the round. The folly and staircase were obvious hazards. Reference was made to the photographs lodged by both parties and to the pursuer's expert report, 5.3.9 of process, Report by Stan Johnston, Consultant Engineer. The defender submitted this underscored the obvious nature of the risks from the folly. He was not exercising any special skill as an engineer in saying it was a danger; he was calling on his experience as an adult. No duty arose to take positive steps as averred by the pursuer. With reference to *Graham* v *East of Scotland Water* 2002 SCLR 340, there was no duty to guard against established, permanent and familiar features of the landscape. Longstanding artificial features which were not concealed or unusual and did not involve any exposure to special features did not create any duty upon the occupier to guard against them. Even if a risk assessment ought to have been undertaken, that would have resulted in a recommendation to repair. However, to a reasonable adult it was clearly an abandoned historical site. There was no duty to guard against it and the pursuer's case was bound to fail. Further, with reference to section 2(3) of the Act, the danger was so obvious that by entering the folly and deciding to climb it the pursuer had assumed the obvious risk of injury.

Submissions for the pursuer

[5] The pursuer likewise submitted that the court has to consider all the material placed before it: *Grier* v *Chief Constable of Police Scotland* 2020 SCLR 619. The mere existence of a dispute of fact will not preclude the granting of summary decree, but the court must be satisfied that even if the pursuer succeeds in proving the substance of his case, he must fail. With reference to *Graham* v *East of Scotland Water*, caution should be exercised regarding the proposition that longstanding artificial features which are neither concealed, unusual nor involve any exposure to any special features do not create a duty upon the occupier to guard against them. Lord Emslie was referring to topographical or landscape features. He drew a distinction between those and artificial features. The facts take this case outside the observations of Lord Emslie. The hazard in this case arose from an artificial feature. Further, the folly's staircase was a danger that was unusual, unseen and unfamiliar. There was no way for the pursuer to know it would crumble. The folly could have been fenced off or had warning signs erected. With reference to the website screenshot lodged as 5.3.14 – which the pursuer accepts is not a website operated by the defender – it was entirely foreseeable that members of the public would be enticed to enter it and climb the stairs. With reference to the report of Mr Johnston, the pursuer submitted that he was an engineer: there was no way for the pursuer to know it would crumble as it did. As for section 2(3) of the 1960 Act, the pursuer's written submissions stated that the staircase was liable to crumble beneath him. In oral submissions it was said that while that might have been apposite if the staircase had crumbled, and if that risk had been obvious, in reality it was the wall which gave way and that was not a risk he willingly accepted. There was no way for the pursuer to know that a stone in the wall would crumble. There was nothing to suggest he knew the risk and willingly accepted it. Whether he appreciated the risk could not be determined without evidence.

Analysis and decision

[6] Applications for summary decree are governed by OCR 17.2. The rule provides, insofar as relevant:

> "**Applications for summary decree**
> 17.2. (1) Subject to paragraphs (2) to (4), a party to an action may, at any time after defences have been lodged, apply by motion for summary decree in accordance with

rule 15.1(1)(b) (lodging of motions) or rule 15A.7 (lodging unopposed motions by email) or rule 15A.8 (lodging opposed motions by email) as the case may be.

(2) An application may only be made on the grounds that—

(a) an opposing party's case (or any part of it) has no real prospect of success; and

(b) there exists no other compelling reason why summary decree should not be granted at that stage.

(3) The party enrolling the motion may request the sheriff—

(a) to grant decree in terms of all or any of the craves of the initial writ or counterclaim;

(b) to dismiss a cause or to absolve any party from any crave directed against him or her;

(c) to pronounce an interlocutor sustaining or repelling any plea-in-law; or

(d) to dispose of the whole or part of the subject-matter of the cause.

[…]"

[7] There was no dispute over the test that I ought to apply. The legal framework was set out by Lord Bannatyne in *Grier* v *Chief Constable of Police Scotland* 2020 SCLR 619 at [18], albeit with reference to a motion brought by the pursuer:

> "[18] The following propositions in respect to the approach to summary decree motions were agreed by parties to set out the legal framework in respect of which the motion before the court required to be considered:
>
> (a) the degree of satisfaction that is the tipping point for the court is less than certainty, but more than probability;
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> (b) the court can take into account documents other than the pleadings;
>
> (c) while the court at the stage of the summary decree motion should not trespass on what is actually a matter for proof, it is in a quest to see if there is a genuine defence and not merely a relevant defence pled. Accordingly, a defender might state a defence, but if the facts appear to the contrary then the court can grant summary decree. Accordingly, the reverse of *Jamieson v Jamieson*, as it were, does not apply; and
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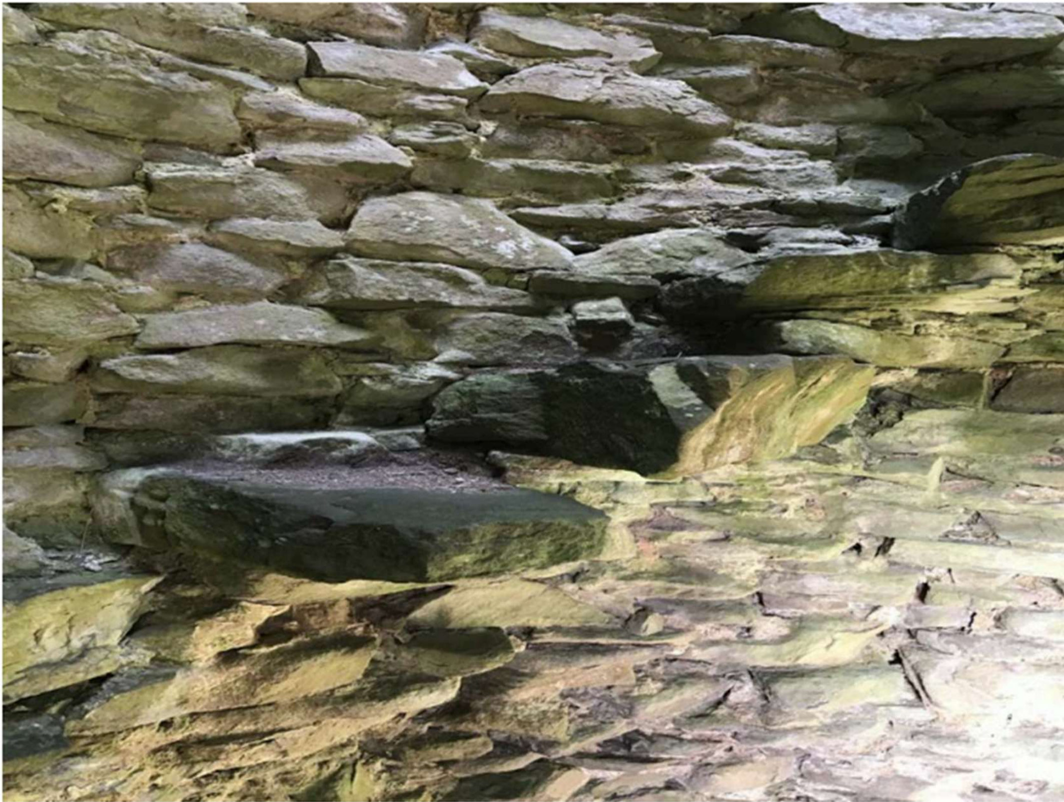
> (d) summary decree is not limited to those cases where there is no defence stated at all or the stated defence is plainly irrelevant; the court is not barred from pronouncing decree simply because the defender makes unspecific assertions which, if established, would provide a defence where the defender does not offer to prove it."

[8] The Occupiers' Liability (Scotland) Act 1960 provides:

> "**2.— Extent of occupier's duty to show care.**
>
> (1) The care which an occupier of premises is required, by reason of his occupation or control of the premises, to show towards a person entering thereon in respect of dangers which are due to the state of the premises or to anything done or omitted to be done on them and for which the occupier is in law responsible shall, except in so far as he is entitled to and does extend, restrict, modify or exclude by agreement his obligations towards that person, be such care as in all the circumstances of the case is reasonable to see that that person will not suffer injury or damage by reason of any such danger.

> […]
>
> (3) Nothing in the foregoing provisions of this Act shall be held to impose on an occupier any obligation to a person entering on his premises in respect of risks which that person has willingly accepted as his; and any question whether a risk was so accepted shall be decided on the same principles as in other cases in which one person owes to another a duty to show care."

[9] As well as parties' submissions I took into account the closed record, no. 9 of process; the photographs of the locus lodged as 6.1 and 5.3.6 and 5.3.7; and the report of Stan Johnston, Consultant Engineer, lodged as 5.3.9. I did not understand the pursuer to have any concerns over how the locus was captured in the defender's photographs. From 6.1 of process the following photographs assisted:



[10] The first photograph shows the folly, with the turret to the left. The second shows the floating steps built into the turret wall.

[11] I also had reference to the report of Stan Johnston. I was told this had been prepared from sight of photographs of the locus. Mr Johnston had not attended in person. He stated:

> "There is no evidence of the defenders having made any inspection of the tower prior to the date of the accident, nor of their having made any assessment of the risks associated with its condition. Had they carried out an inspection of the tower, it would seem very likely that they would have noted the decaying condition of the edifice. It is apparent from the photographs taken at the time of the accident, that the stonework is in poor condition, is heavily overgrown and badly worn in many places.
>
> Had the defenders used the results of any such inspection as the basis for assessment of risks, it would have been obvious that certain risks do exist in the context of the tower. Such risks clearly include that of a person being affected by the crumbling stonework. The risks thus identified would obviously require the instigation of control measures, which might be expected to include the erection of warning signage as an absolute minimum. Such signage would be very inexpensive to procure and place in position. A more effective control would, of course, be to erect a gate or barrier across the entrance doorway."

[12] In his conclusions he stated:

> "It seems highly likely that the outcome of any such inspections ought to have been a perception of risks to members of the public accessing the structure."

[13] In *McGlone* v *British Railways Board* 1966 SC(HL) 1, the House of Lords considered whether the steps taken by the respondents to fence a transformer were adequate to discharge their duty under the Act. Lord Reid held, at 11:

> "The care required is such care as is reasonable and it may be reasonable to require a greater degree of care in one such case than in another. In deciding what degree of care is required, in my view regard must be had both to the position of the occupier and to the position of the person entering his premises and it may often be reasonable to hold that an occupier must do more to protect a person whom he permits to be on his property than he need do to protect a person who enters his property without his permission."

[14] Section 2 was further considered by Lord Emslie in *Graham* v *East of Scotland Water Authority* 2002 SCLR 340. The pursuer argued that the defender should have fenced the edge of a reservoir where it was believed her late husband had fallen into the water. I was referred by both parties to [18] and [19]. There, Lord Emslie stated:

> "18. Against that general background, I have reached the conclusion that the defenders' submissions are to be preferred, and that the action must be dismissed as irrelevant. In my opinion, the danger alleged here by the pursuer falls within the intended scope of the authorities concerning obvious dangers on land, against which no duty to fence is in law incumbent on an occupier. It may be said, of course, that the reservoir and the wall along its edge were man-made and in that sense artificial, but in my view what really matters is that by the date of the accident these were well-established, permanent and familiar features of the landscape. It is to be expected that the banks of any stretch of open water will vary in their height and configuration, and that the height and line of any wall along such banks will not be uniform. I am therefore unable to accept—at least without a history of accidents or complaints—that the danger alleged by the pursuer can properly be classified as unusual, unseen, unfamiliar or otherwise so special as to warrant the imposition on the defenders of a duty to erect fencing for the protection of the public at large. The defenders' position here is, it seems to me, stronger than that of the occupiers of a canal, a railway embankment or a jetty on the shore, and no less strong than that of the occupiers of ponds, riverbanks and cliffs who are under no duty to fence them notwithstanding the foreseeable possibility of danger to the careless or unwary.
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> 19. I agree with counsel for the pursuer that the abstract concept of 'obviousness' is not per se a satisfactory test in this area of the law. It is, however, relevant to note

> that in the earlier authorities that term has generally been used to denote features of the environment which are permanent, ordinary and familiar. Natural landscape features plainly fall into that category, and in my opinion the same applies to longstanding artificial features which are neither concealed nor unusual, nor involve exposure to any special or unfamiliar hazard. It is well settled that an occupier must fence off dangers falling within the latter category, for example the industrial machinery discussed in Dumbreck or the poisonous plants discussed in Taylor . But I think it goes too far to suggest that such a duty applies to the combination of permanent, ordinary and familiar features of the landscape on which the pursuer relies in the present action. I therefore sustain the defenders' first argument and hold that the pursuer's averments are fundamentally irrelevant on this ground."

[15] I have considered whether it can be said that the pursuer's case of breach of section 2(1) of the Act has no real prospect of success. The defender summarises the pursuer's case as being that there was a duty to risk assess the potential danger of the folly; there ought to have been regular inspections; there ought to have been repairs; access ought to have been restricted; and warning signs ought to have been erected. The defender submits that if there had been a risk assessment, it would have resulted in a recommendation to repair. That seems to me to be unlikely. If built as a folly, it may never have been in a state of repair. But more importantly, the pursuer offers to prove, in stat. 4, that the defender "ought to have either repaired the turret or otherwise restricted access to it. It ought to have erected signs warning of the danger to members of the public if they climbed the staircase." Mr Johnston's report focusses on the ease of either erecting signage or restricting access. I accept that it would be a matter for proof as to whether either would have been "such care as in all the circumstances of the case is reasonable to see that that person will not suffer injury", if indeed this was a danger which was due to the state of the premises.

[16] The second question is whether, under section 2(3) of the 1960 Act, the pursuer willingly accepted the risks from the state of the premises.

[17] I preferred the defender's submissions on this point. The pursuer avers that the folly comprises artificial ruins. From the pleadings, photographs and expert report I am satisfied that this was obviously a ruin in obvious disrepair. Mr Johnston states that had the defender inspected it, they would have noted the decaying condition. He states, based on viewing

photographs, that it is apparent that the stonework is in poor condition, is heavily overgrown and badly worn. The pursuer would draw a line when it comes to the stone he says crumbled: he did not assume that risk. I consider that pares the question too finely. The state of the folly was obvious. On his own averments he chose to enter the folly, enter the turret and climb the stone protrusions, knowing there was no handrail. I was satisfied beyond the necessary level of probability that the pursuer had willingly accepted the risks arising from the state of the premises by entering the turret and climbing the stairs and that proof was not required on that issue.

[18] The pursuer may face considerable hurdles in establishing that there was a danger arising from the state of the premises, but I concluded that even if there were any breach of section 2(1), the pursuer had willingly accepted the risks from the state of the premises.

[19] I therefore concluded that the pursuer's case had no real prospect of success and that there existed no other compelling reason why summary decree should not be granted at this stage. I therefore granted the defender's motion for summary decree.