**SHERIFFDOM OF LOTHIAN AND BORDERS**

**IN THE ALL-SCOTLAND SHERIFF PERSONAL INJURY COURT**

**[2020] SC EDIN 17**

**PN146/19**

JUDGMENT OF SHERIFF R B WEIR QC

in the cause

LEE BIRCH

Pursuer

against

GEORGE McPHIE & SON LIMITED

Defenders

**Pursuer: B. Fitzpatrick; Digby Brown LLP**
**Defender: Rolfe; Clyde & Company (Scotland) LLP**

EDINBURGH, 18 February 2020

The Sheriff, having resumed consideration of the cause:-

**Finds in fact:**

1. That the pursuer is 41 years old.

2. The defenders are a company incorporated under the Companies Acts and have a place of business at Pardovan Yard, Philpstoun, Linlithgow, West Lothian, EH49 7RU.

3. The pursuer became an employee of the defenders shortly after moving to Scotland in November 2017.

4. On 10 May 2018 the pursuer was working in the course of his employment with the defenders as a labourer and general assistant. His duties had required the pursuer to attend at a property in Bathgate to assist with certain renovations to a bungalow in Bathgate.

5. The pursuer returned to the defenders' yard between 1630 and 1700 hours. He was still wearing work overalls which had become covered in plaster dust as a result of the day's labouring activities.

6. On his return to the yard the pursuer encountered the now deceased George McPhie.

7. George McPhie was then the principal of the defenders.

8. Shortly before the pursuer's return from Bathgate, George McPhie had received from Fife Council a request for a job reference on the pursuer.

9. The pursuer and George McPhie became involved in an altercation, the subject matter of which was the request by Fife Council for the reference, to which request Mr McPhie had taken exception.

10. During the altercation George McPhie communicated to the pursuer words to the effect that, if he (the pursuer) had another job to go to then he should just leave now.

11. Following the aforementioned exchange, the pursuer proceeded to a small workshop on the defenders' premises which was used by employees as a place to wash and change out of work clothes.

12. There was a small sink within the workshop. Hot water to the sink was provided by means of a Sadia Water Heater ("the water heater"). The water heater was affixed to the wall over the sink.

13. The water heater had been in use in the small workshop on the defenders' premises at Pardovan Yard since at least 1986.

14. The outflow from the water heater was controlled by a black plastic tap. When turned, hot water flowed along a horizontal pipe (the orientation of which could be altered) and thence through a spout and into the sink.

15. Cold water to the sink was delivered through a separate cold water tap which was positioned on the sink unit itself.

16. The water heater and associated plumbing are shown in the photographs comprising no 5/5 of process.

17. Intending to wash his hands, the pursuer placed his left hand under the pipe leading from the hot water heater. He turned the hot water tap with his right hand. This resulted in an effusion of hot water which scalded the top of the pursuer's left hand.

18. The pursuer immediately placed his left hand under the cold water tap and turned it on.

19. Production no 5/7 of process comprises a sequence of photographs of the pursuer's left hand taken by him at various dates in the aftermath of the injury which the pursuer sustained as a result of being scalded by hot water from the water heater on 10 May 2018.

20. In order to cause such an injury as that sustained by the pursuer the temperature of the water would require to have been between 60 and 70 degrees centigrade.

21. The temperature of the hot water produced by the water heater was tested annually by Aquarius Systems Limited as part of a more general gas safety installation inspection.

22. Prior to the accident on 10 May 2018 there had been no reported occurrences of any burns to employees of the defenders as a result of hot water delivered by the water heater.

23. Prior to the accident on 10 May 2018 there had been no reported complaints about the temperature of the water delivered by the water heater.

24. At about the time of the accident another employee of the defenders, Steven Murphy, regularly used the water heater up to three times per working day.

25. On 5 March 2018 the temperature of the hot water was tested by Graham Malcolm of Aquarius Systems Limited. The test involved placing a digital thermometer into the flow of hot water emerging from the hot water outlet. The temperature measured on that occasion was 37.4 degrees centigrade.

26. Since the measured temperature was within what Aquarius Systems Limited deemed to be acceptable limits (ie 38-40 degrees centigrade) no other investigations were undertaken into the condition of the water heater, or any improvements recommended.

27. On 8 April 2019 the temperature of the hot water was again tested by Graham Malcolm of Aquarius Systems Limited. Using a digital thermometer the temperature measured on that occasion was 39.9 degrees centigrade.

28. Since the measured temperature on this occasion was within what Aquarius Systems Limited deemed to be acceptable limits (ie 38-40 degrees centigrade) no other investigations were undertaken into the condition of the water heater, or any improvements recommended.

29. In about October 2018 the defenders installed a new shower and hand washing facility in the larger workshop on their premises. The hand washing facility can be seen in photograph 7 of the report comprising no 5/4 of process.

30. When Andrew Hill, consultant forensic engineer, visited the defenders' premises on 14 August 2019, there was affixed to the wall, immediately to the right of the water heater, a sign which stated "Caution Hot Water".

31. Following the accident the pursuer entered the tea hut on the defenders' premises in order to retrieve his coat and footwear. While there, he encountered Steven Murphy.

32. The pursuer showed Steven Murphy the hand injury which he had sustained. Mr Murphy told him that the pursuer should go to hospital and get it seen to.

33. The pursuer then attended at the reception area of the main office on the defenders' premises.

34. The pursuer was advised by a secretary who was stationed there that the defenders did not have anything in the first aid box to deal with burns.

35. The pursuer declined George McPhie's offer of a lift to hospital. Instead, the pursuer drove himself home to Rosyth.

36. On arrival he was in pain and his left hand showed visible evidence of scalding.

37. The pursuer and his wife travelled together to the minor injuries unit at Queen Margaret Hospital, Dunfermline, in order that the pursuer's hand could be treated.

38. On examination at 1850 hours on 10 May 2018 the pursuer was found to have a de-roofed blister with surrounding erythema on the dorsum of the left hand. A dressing was applied and the pursuer was given wound care advice, with further advice to see the GP practice nurse in five days' time.

39. The pursuer continued to apply dressings to the injury to his left hand for a period of between two and three weeks from 10 May 2018.

40. The pursuer applied moisturising cream to the site of the blistering, and incurred costs in that respect.

41. For a period of between four and six weeks the pursuer's enjoyment of running and attending the gym was disrupted by reason of the discomfort he experienced at the site of the blistering.

42. For a period of between four and six weeks the pursuer received general assistance from his wife with domestic chores such as washing (including protecting the dressings from getting wet), dressing, changing the hand dressings, and cleaning around the house.

**Finds in fact and law**

[1] That the water heater comprised work equipment for the purposes of the Provision and Use of Work Equipment Regulations 1998.

[2] The pursuer has suffered loss, injury and damage as a result of the fault of the defenders in providing, for the use of employees such as the pursuer, a water heater which was unsafe in respect that it delivered, on 10 May 2018, excessively hot water and caused a scalding injury to the pursuer's left hand.

[3] The pursuer is entitled to reparation from the defenders therefor.

[4] The pursuer is entitled to an award of damages for *solatium* in the sum of £2,750, together with interest to the date of decree in the sum of £195.

[5] Services under sections 8 and 9 of the Administration of Justice Act 1982 are properly valued at £400, inclusive of interest.

[6] The pursuer is entitled to a sum of £50 by way of reimbursement for costs incurred in the purchase of moisturising cream for the injury he sustained.

THEREFORE:

(i) Finds the defenders liable to the pursuer in the sum of THREE THOUSAND THREE HUNDRED AND NINETY FIVE POUNDS (£3,395) STERLING with interest at the rate of eight per cent a year from the date hereof until payment;

(ii) Reserves meantime the question of expenses and appoints parties to be heard thereon, if necessary, on a date to be afterwards fixed.

**Note:**

**Introduction**

[1] The pursuer in this action seeks to recover damages in consequence of an injury sustained by him at the defenders' premises on 10 May 2018. The action called before me for proof. In the pursuer's proof I heard evidence from (1) the pursuer himself; (2) the pursuer's wife, Alison Birch, and (3) a former colleague, Steven Murphy. In the defenders' proof I heard evidence from (1) a director of the defenders, Lorna McPhie; (2) a heating engineer, Graham Malcolm, and (3) a consulting forensic engineer, Andrew Hill (who appeared originally on the pursuer's list of witnesses). The evidence of the pursuer's expert, Mr Lam, consultant plastic surgeon, was agreed by joint minute.

[2] Mr Fitzpatrick, Advocate, appeared on behalf of the pursuer. Mr Rolfe, Advocate, appeared on behalf of the defenders. Both liability and quantum were disputed.

**The issues**

[3] The proof gave rise to two essential questions:- (i) did the pursuer suffer a scalding injury to his left hand when he placed it under the hot water supplied by the defenders' water heater, and (ii) if so, do the circumstances give rise to liability on the part of the defenders to compensate the pursuer for the injury so caused? (Parties appear to have been unable to agree quantum, which I will address separately).

*Did the pursuer suffer a scalding injury?*

[4] For the defenders it was submitted that the pursuer had failed to prove that water left the water heater at a temperature of between 60-70 degrees centigrade. That was the temperature which would have been required to produce a scalding type of injury of the kind exhibited by the pursuer. The defenders also submitted that there were aspects of the pursuer's evidence which should cause the court to hesitate before accepting the pursuer's account of what happened. Conversely, it was submitted, on his behalf, that the pursuer was a credible and reliable witness whose account of the circumstances in which he came to be injured should be accepted.

[5] It is unnecessary to rehearse the evidence of the witnesses in any detail. In so far as material, and relevant, that evidence is set out in the findings in fact narrated above. I heard evidence which touched on the background to the deteriorating working relations between the pursuer and his employers, and aspects of the accuracy of the pursuer's recollection of the incident and its aftermath, and his conduct on that occasion. None of these exchanges detracted from what I considered to be an essentially credible and reliable account of the circumstances in which the pursuer came to be scalded on his left hand.

[6] The evidence disclosed that, on 10 May 2018, the pursuer was working in the course of his employment with the defenders as a labourer. During the course of the day he had been working on the renovation of a bungalow in Bathgate. Towards the end of the afternoon he returned to the defenders' premises in order to change, wash, and go home. On arrival it appears that the pursuer had an encounter with the now deceased George McPhie. Mr McPhie appears to have been upset that the pursuer had expressed an interest in working for Fife Council. There was something in the nature of an altercation before the pursuer headed off towards the small workshop on the defenders' premises where

employees were provided with basic washing and changing facilities. Hot water was provided by means of a Sadia Water Heater ("the water heater") affixed to the wall behind the wash hand basin in the small workshop. Placing his left hand under the horizontal hot water pipe leading from the water heater, the pursuer turned on the hot water tap with his right hand. He instantly suffered a painful scalding type injury on the dorsum of his left hand. Such are the essential facts which give rise to the present action.

[7] There were no witnesses to the pursuer's accident. However, there was independent support for the pursuer's account of what happened. Steven Murphy observed the pursuer's injury before the pursuer left the defenders' premises on that date. (I was sceptical of, and did not accept, Lorna McPhie's evidence which attributed to Mr Murphy an account of having seen the pursuer remove the surface skin at the site of his injury when the pursuer and he were in each other's company after the accident). An entry made by George McPhie in the defenders' accident book on 10 May 2018 made reference to a slight burn to the pursuer's left hand. Indeed, in her evidence, Mrs Birch provided what was, in effect, a *de recenti* account of what her husband told her on his return from work on the day of the incident. It was consistent with what the pursuer stated in evidence. That was the case notwithstanding the parties' separation some six months before the proof. The pursuer was challenged about when he took the photographs comprising no 5/5 of process. In cross-examination, Steven Murphy was also asked to compare the pursuer's injury, which he observed on the day of the accident, with what those photographs appeared to show. It was not clear whether the purpose of that questioning was to dispute the occurrence of an accident at all (that not being a matter of admission in the pleadings). The records of Queen Margaret Hospital were, however, agreed in advance of the proof by joint minute. They record the pursuer as having received, on the day of the accident, treatment for a de-roofed

blister with surrounding erythema on the dorsum of the left hand. Moreover, paragraph 6 of the joint minute recorded the parties' agreement that the photographs comprising no 5/5 of process showed the pursuer's left hand on various dates "*in the aftermath of the burn injury referred to on record*" (my emphasis).

[8] In summary, the only conclusion I felt able to draw from the evidence was that the pursuer did suffer a scalding type injury on 10 May 2018. I believed the pursuer when he said that the injury was caused by the water emanating from the water heater. No other plausible explanation was advanced for how the pursuer could have come by the injury which resulted in treatment in hospital. It was a matter of agreement that I should accept Mr Lam's professional opinion that, to produce an injury of the kind displayed by the pursuer, the water would require to have been at a temperature of between 60 and 70 degrees centigrade.

***Are the defenders liable in damages to the pursuer?***

[9] Having reached that conclusion, it is necessary to consider the question whether the circumstances of the accident give rise to any breach of duty on the part of the defenders.

***Submissions for the pursuer***

[10] Mr Fitzpatrick submitted that, in assessing whether a breach of the defenders' common law duty of care had been established, the court should draw an inference, adverse to the defenders, from the acknowledged absence of any risk assessment relative to the water heater and its use. Risk assessment, which employers remained under an obligation to undertake in terms of regulation 3 of the Management of Health and Safety at Work Regulations 1999 ("the 1999 Regulations"), was one of the fundamental principles of health

and safety law (see e.g. *Kennedy* v *Cordia Services Limited* [2016] UKSC 6, paragraphs [80], [81], and [85]). What was required of employers was not only an evaluation of risk but the identification of preventive measures thereby assuring an improvement in the level of protection afforded to workers.

[11] As a consequence of section 69 of the Enterprise and Regulatory Reform Act 2013 ("the 2013 Act"), there was no longer a self-standing cause of action for breach of the health and safety regulations relied on by the pursuer (being the 1999 Regulations and regulations 5, 6, 7, 8, 9 and 11 of the Provision and Use of Work Equipment Regulations 1998 ("PUWER 1998")). That change in the law did nothing to dilute importance of risk assessment in considering whether an employer had exercised its common law duty of care for its employees.

[12] In the instant case, it was accepted that the mechanism by which excessively hot water had been delivered by the water heater had not been established. However, the pursuer had undoubtedly suffered a scalding type injury. In undertaking a proper risk assessment the primary responsibility on the defenders was to avoid the risk of injury. The defenders' approach was entirely reactionary. There was no evidence that the defenders, as part of any risk assessment, had considered whether there was more suitable equipment available capable of delivering hot water without the risk of such an injury occurring. That the pursuer did suffer a scalding type injury was demonstrative of the unsuitability of the equipment provided. It was for the defenders to show that the consequences for the pursuer from the accident could not have been avoided despite the exercise of reasonable care on their part (cf. *Kennedy* v *Chivas Brothers Limited* 2013 SLT 981, paragraphs [17] – [20]). They had not done so.

[13] I was also invited to conclude that the circumstances of the accident disclosed a breach of section 1 of the Employer's Liability (Defective Equipment) Act 1969 (*Edwards* v *Butlins Limited* 1998 SLT 500; *Knowles* v *Liverpool City Council* [1993] 1 WLR 1428), for which the defenders bore responsibility.

[14] Finally, on an *esto* basis, Mr Fitzpatrick invited the court to apply the maxim *res ipsa loquitur* and to find liability established on the basis that, an accident having been proved to have occurred as a result of the delivery of excessively hot water, an inference of negligence arose which fell to be negatived by the defender, and that the defender had failed to do so. This alternative case proceeded on the basis that the cause of the effusion of excessively hot water could not be established, and that the conditions for the application of the maxim were satisfied.

***Submissions for the defenders***

[15] Mr Rolfe invited me to reject both the common law and statutory bases for the pursuer's claim. He noted that the pursuer's common law case rested on the proposition that "[T]he defender knew or ought to have known that water being released from the tap at such a high temperature was likely to give rise to a risk of injury to employees such as the pursuer as in fact occurred." Accordingly, it was for the pursuer to establish facts and circumstances from which it could properly be inferred that it was reasonably foreseeable that water at a temperature of 60-70 degrees centigrade would be emitted at the material time in the absence of preventative measures.

[16] The pursuer's case appeared to be that, had a reasonable risk assessment been carried out, it would have identified the need for measures such as (i) the undertaking of regular water temperature checks to ensure the delivery of water at the "correct" temperature, or

(ii) the installing of more appropriate washing equipment altogether. Neither of the desiderated precautions assisted the pursuer. There was neither specification as to what the "correct" temperature of the water should have been, nor evidence to that effect. There were no averments as to what constituted more appropriate washing equipment. In any event, the evidence was that the actual water heater was the subject of annual inspection by a specialist contractor without any faults being recorded. Neither Mr Malcolm, the heating engineer, not Mr Hill, the pursuer's expert consulting engineer, identified the water heater as presenting a risk to employees, and there were no reported occurrences of any complaints about the performance of the water heater prior to the accident. Indeed it was used without incident after the accident. In short, the water heater did not at the time of the accident present a foreseeable risk of injury to an employee in the position of the pursuer.

[17] In relation to the pursuer's case under reference to regulations 5, 6, 7, 8, 9 and 11 of the PUWER 1998, I was reminded that breach of those regulations did not automatically give rise to liability. Such was the effect of section 69 of the 2013 Act, which removed strict liability. The underlying duty was one of reasonable care in the particular circumstances of the case including the circumstances of the accident itself (cf. *Gilchrist* v *Asda Stores Ltd* [2015] CSOH 77, paragraphs [12], [14]; *Cockerill* v *CXK Limited* [2018] EWHC 1155 (QB), paragraph [18]; *Dehenes* v *T Bourne and Son* 2019 SLT (Sh. Ct.) 219, paragraphs [10], [14]; *King* v *Common Thread Limited* [2019] SC EDIN 76, paragraphs [98] – [100]). The same considerations as I have related in paragraph [15] disclosed no failure on the part of the defenders to exercise reasonable care for their employees.

[18] In relation to the statutory case, Mr Rolfe submitted that the pursuer's reliance on section 1 of the Employers' Liability (Defective Equipment) Act 1969 was misconceived, there being no evidence that the water heater suffered from a defect which was wholly or

partly attributable to the fault of a third party. (It is worth, however, observing that it is a matter of admission in answer 4 that certain duties under section 1 of the 1969 Act *were* incumbent on the defenders with the explanation that the tap was not defective.)

[19] Finally, Mr Rolfe submitted that the pursuer's reliance on the maxim *res ipsa loquitur* did not assist his case. The maxim was, in appropriate cases, capable of raising a presumption of negligence (*David T Morrison & Company Limited* v *ICL Plastics Limited* 2014 SC (UKSC) 222, at paragraph [98]), but that presumption was rebuttable. Those facts on which the defenders relied in defence of the primary common law claim applied with equal force. Any inference of negligence arising from a finding that water was delivered at a temperature of 60-70 degrees centigrade had, on the evidence, been rebutted.

**Analysis and decision**

[20] The pursuer's averments in support of his common law case merit repetition and are in the following terms:

> "…The defenders knew or ought to have known that water being released from the tap at such a high temperature was likely to give rise to a risk of injury to employees such as the pursuer, as in fact occurred. Had the defenders undertaken and implemented a reasonable risk assessment, then the obvious risk of an individual's hands being burned due to very hot water pouring out of the tap would have been identified. Measures, such as undertaking regular checks to ensure the water was at a correct temperature or installing more appropriate washing up equipment would have been implemented and the accident ought to have been avoided. Reference is made to regulation 3 of the Management of Health and Safety at Work Regulations 1999. The defenders also failed in their duties under regulations 5, 6, 7, 8, 9 and 11 of the Provision and Work Equipment Regulations 1998. Although said Regulations no longer confer civil liability, they provide an established benchmark for the standard of care owed by employers in exercise of reasonable common law duties…"

[21] The averments just quoted acknowledge that, with effect from 1 October 2013, the regulations averred do not give rise directly to civil liability (2013 Act, section 69). During the pursuer's submissions, there did not seem to me to be a ready acknowledgment that the

2013 Act had brought about any significant change in approach at all. In pleading terms, the use of expressions such as "an established benchmark" does little, in my view, to illuminate the position.

[22] The effect of the 2013 Act was considered in *Cockerill* v *CXK Limted, supra.*, and I agree with what is set out in the court's judgment, at paragraph [18]:

> "[18]…In removing the claimant's cause of action for breach of statutory duty, the 2013 Act did not repeal the duties themselves. Those duties continue to bind employers in law. So they continue to be relevant to the question of what an employer ought reasonably to do. However, by enacting s.69, Parliament evidently intended to make a perceptible change in the legal relationship between employers and employees in this respect. It removed direct actionability by claimants from the enforcement mechanisms to which employers are subject in carrying out those statutory duties. What I have referred to as this 'rebalancing' intended by s.69, was evidently directed to ensuring that any breach of those duties would be actionable by claimants if, but only if, it also amounted to a breach of a duty of care owed to a particular claimant in any given circumstances; or, in other words, if the breach was itself negligent."

[23] In addressing, however, whether there was a negligent breach of a duty of care in this case, the pursuer's primary case at common law faces a fundamental difficulty. That is because the precautions which ought to have been taken by the defenders in the exercise of reasonable care depend on foresight that the water heater had the capacity to deliver water "at such a high temperature". No explanation was established in the evidence for why, on the day of the accident, the water heater delivered water which I find must have been of the order of 60-70 degrees centigrade. Neither Mr Malcolm nor Mr Hill was able to provide any such explanation. None of the tests undertaken by Mr Malcolm produced a water temperature anywhere close to that which would have been necessary to cause the pursuer to suffer injury. Put another way, the pursuer cannot prove the nature of the defect in the water heater, which resulted in the delivery of excessively hot water, and cannot therefore prove that that defect was discoverable by reasonable inspection.

[24] But that is not an end to the matter. The pursuer, in the alternative, invokes the maxim *res ipsa loquitur*. That case, as pled, proceeds on the basis of an acceptance that water at a temperature of 60-70 degrees centigrade was delivered by the water heater, that the defenders were unaware of that fact, and that the only conclusion which the court could draw was that "there must have been a fault in the water system provided for use of employees" (statement 4).

[25] The maxim applies where the occurrence giving rise to the accident is shown to be under the management of the defenders, and the accident is such as in the ordinary case does not happen if those who have the management use proper care (*Scott* v *London and St Katharine Docks co.* (1865) 3 H. & C. 596, per Earle J at p.601; approved in *Ballard* v *North British Railway Company* 1923 SC (HL) 43, per Lord Dunedin at pp.54-55). It is not controversial that once a pursuer has led sufficient evidence to invoke the maxim *res ipsa loquitur*, the court will find for the pursuer unless the defender has cleared himself of negligence *(O'Hara* v *Central SMT Company Ltd* 1941 SC 363, per Lord President Normand at p.379). It is a necessary factor in the application of the maxim that the pursuer does not know, and cannot reasonably be expected to know, the cause of the event giving rise to the accident (*Gloag and Henderson: The Law of Scotland,* 14th Edition, paragraph 26.08).

[26] It was clear from his evidence that the consultant forensic engineer, Mr Hill, who was originally instructed on behalf of the pursuer to provide expert evidence about the water heater and its operation, was unable to explain why, at the material time, the temperature of the water was so high as to cause a scalding type of injury. The water heater appears never to have been the subject of any internal inspection, at least in the time when it was subject to water temperature testing by Aquarius Systems Limited. It was not even clear in the evidence that such an examination would have been possible, never mind what it might

have revealed. In my opinion, the requirement for the application of the maxim, that the pursuer does not know, and cannot reasonably be expected to know, the cause of the event giving rise to the accident, has been satisfied.

[27] The defenders submitted that the court could nevertheless be satisfied that the accident had occurred without negligence on their part. Reliance was placed on the following factors:- (i) the engagement of Aquarius Systems Limited to "examine equipment, the workings of which were beyond the defenders' field of expertise; (ii) the annual inspection of the water heater with "carte blanche" to repair any identified repairs; (iii) the inspection on 5 March 2018 which revealed no defect in the water heater; (iv) the absence of any reported pre-accident occurrences of burns to employees; (v) the absence of pre-accident complaints about the temperature of the water, and (vi) the absence of any identified risk posed by the water heater where Mr Malcolm and Mr Hill were concerned.

[28] On this matter I am unable to agree that those factors alone displace the inference of negligence to which the maxim gives rise. In particular, I consider the pursuer to have been justified in emphasising the continuing importance of risk assessment to the fulfilment by an employer of its duty to take reasonable care for the safety of its employees. I do not view section 69 of the 2013 Act as detracting from the need for, and importance of, such an assessment, at least in the circumstances of this case. It is accepted that the defenders did not undertake any assessment of the potential risk posed by the water heater to employees such as the pursuer. I agree with Mr Fitzpatrick's characterisation of the defenders' approach as reactive only. That approach was encapsulated in Mrs McPhie's answer, on the subject of risk assessment, to the effect that the defenders assumed that anything wrong with the water heater would have been flagged up on inspection (and, by implication, addressed).

[29] The water heater appears to have been inherited by the defenders when they took up occupation of their business premises in excess of 30 years prior to the accident. Its purpose was to provide a supply of hot water for use by employees in washing themselves during the working day. The water was delivered through an outlet pipe without mixing with cold water. At some point the defenders considered it appropriate to affix to the wall beside the water heater a notice which stated "Caution Hot Water". The evidence did not reveal whether this was affixed at the time of the accident, and I cannot make any finding in that respect. But, from the simple fact that the water heater was intended to deliver unmixed hot water for the use of employees I consider, agreeing with the pursuer, that it was incumbent on the defenders, in the exercise of reasonable care, to undertake a risk assessment (otherwise required of them by regulation 3 of the 1999 Regulations), with a view to identifying the measures necessary to avoid the occurrence of a scalding type injury, and to secure compliance with *inter alia* those provisions in PUWER 1998 on which the pursuer now relies, at least in respect of inspection, maintenance, training and instruction.

[30] Standing the acknowledged failure to undertake a risk assessment, I do not consider that it could properly be disputed that the continuing suitability of the water heater safely to deliver hot water would have been a relevant consideration in any such risk assessment (albeit regulation 4 of PUWER 1998 was not directly invoked by the pursuer in the pleadings). The defenders' position was that there was no specification in the pleadings, and no evidence, as to what would have constituted "appropriate washing up equipment". In the context of *res ipsa loquitur*, however, it was not for the pursuer to make that case but rather for the defenders to establish facts demonstrating that there was no negligence on their part.

[31] In that respect, it is correct that Mr Hill did not identify any risk posed by the water heater. But that was in the context of what was known about the testing, by Mr Marshall, of the water temperature of this particular water heater. Mr Hill was not asked to consider what a risk assessment, if undertaken, may have revealed about the specification of the water heater itself measured against more recently manufactured models, or the availability of other boilers capable of regulating the temperature of the water delivered such that it did not reach unsafe limits. Moreover, I heard no evidence that Aquarius Systems Limited did any more than test the water output temperature of the water heater during their annual systems check at the defenders' premises. There was no suggestion that the water heater, in all its years of service, had ever been checked internally by anyone. Absent any kind of risk assessment, I heard no evidence, upon which I could safely rely, that such a limited process of testing the water temperature adequately met the risk of an employee being scalded by the water delivered, and, if so, why. In my opinion, it was for the defenders to undertake that assessment. They did not do so.

[32] In these circumstances I do not consider that the defenders have rebutted the inference of negligence to which I find that the circumstances of the accident gave rise.

[33] I can deal more briefly with the case advanced under section 1 of the Employer's Liability (Defective Equipment) Act 1969. That provision is in the following terms:

> **"1. Extension of employer's liability for defective equipment**
>
> (1) Where after commencement of this Act -
>
> > (a) an employee suffers personal injury in the course of his employment in consequence of a defect in equipment provided by his employer for the purposes of the employer's business; and
> > (b) the defect is attributable wholly or partly to the fault of a third party (whether identified or not)

> the injury shall be deemed to be also attributable to negligence on the part of the employer (whether or not he is liable in respect of the injury apart from this subsection), but without prejudice to the law relating to contributory negligence and to any remedy by way of contribution or in contract or otherwise which is available to the employer in respect of the injury."

[34] Such authority as Mr Fitzpatrick referred me to emphasised that the purpose of this statutory provision was to protect employees from defects in equipment in circumstances where those defects were attributable to the fault of some third party (*Knowles* v *Liverpool City Council, supra.,* p.1430; *Coltman* v *Bibby Tankers Limited, supra.*, p295C – 296B). It therefore imposed on an employer a vicarious liability for the fault of the third party as if the employer had itself been responsible for the defect. That is not the basis upon which the pursuer's case was pled. I heard no evidence that the water delivered was the product of a defect which could be attributable to the fault of any third party.

[35] Mr Fitzpatrick postulated that a reduction in water pressure, caused by neighbouring works, may have caused the temperature of the water to reach excessive levels. This was no more than speculation. However, it served to illustrate that the pursuer did not set out, in this case, to attribute blame for any defect in the water heater to any other party. Besides, what caused the effusion of excessively hot water was not established in evidence. Accordingly, I reject the pursuer's case under section 1 of the 1969 Act.

[36] In the view I have taken on the application of the maxim *res ipsa loquitur*, however, liability has been established.

**Contributory Negligence**

[37] There were no averments of contributory negligence.

**Quantum of Damages**

[38] Damages were not agreed.

[39] The pursuer's injury was described by Mr Lam as a superficial partial thickness burn which had left a patch of colour change, 5 x 3 cm, on the dorsum of the left hand. In an entry in the medical notes dated 24 May 2018 (two weeks after the accident) it was recorded:

> "Burn has healed on the left hand, no sign of infection, dry, advice given re. moisturising and massaging the area. No further review required unless deteriorates."

[40] For a period of between four and six weeks the pursuer received general assistance from his wife with domestic chores such as washing, dressing, changing hand dressings, and cleaning around the house. For a similar period of time the pursuer's running and gym routine was disrupted by ongoing discomfort. He continued to apply moisturising cream to the affected area for a short period of time and spent £6 to £8 for each tub that he required to purchase.

***Solatium***

[41] Mr Fitzpatrick sought an award of £5,000 for *solatium.* Mr Rolfe submitted that such a figure was excessive. A sum of the order of £2,000 was more appropriate (Judicial College Guidelines: chapter 10; *Upfold* v *Cem-Park Limited*, Kemp & Kemp, vol. 4, J3-033). Little material was placed before me to carry out a valuation of what was, doubtless, a very unpleasant scalding injury which, happily, appears not to have had any significant *sequelae.* An overview of the cases cited in the relevant chapter of Kemp & Kemp point to a figure of £5,000 as overstating the seriousness of the injury. I consider an award of £2,750 to be more appropriate (cf. *H (A child)* v *Wigan MBC*, Kemp & Kemp, vol. 4, J3-031). All of that sum I attribute to the past for interest purposes, bringing out a total sum in interest of £195.

*Services*

[42] As regards services there is little between the parties on what is a marginal call. Taking a broad view I consider that a sum of the order of £400 would be appropriate to cover this head of claim.

*Miscellaneous expenses*

[43] Finally, I note the absence of any vouching for the cost of moisturising creams. I accept Mr Rolfe's submission that a figure of £50 would be appropriate to acknowledge this expense.

**Conclusion**

[44] In the result I granted decree in favour of the pursuer in the sum of £3,395, together with interest at the judicial rate until payment. Not having been addressed on the matter specifically, I have reserved all issues of expenses.