SHERIFFDOM OF LOTHIAN AND BORDERS AT EDINBURGH

IN THE ALL-SCOTLAND SHERIFF PERSONAL INJURY COURT

[2021] SCEDIN 19

PIC-PN1167-19

JUDGMENT OF SHERIFF KENNETH J McGOWAN

in the cause

GAVIN PRIOR

Pursuer

against

FORTH BOAT TOURS

Defender

Pursuer: Mackay; Digby Brown
Defender: Fairweather; Clyde & Co

EDINBURGH 10 March 2021

Introduction

[1] This case concerns the pursuer's claim for damages following an accident at work on 15 July 2018. It came before me for proof. Damages were agreed at £4,000.00. A core bundle of agreed documents was produced: CB 1-311. (This included some material which was tendered late but not allowed to be received: see below.) Having heard the evidence and submissions, I found the following facts to be admitted or proved.

Findings in fact

[2] The defender carries on business as the operator of pleasure cruises. It is based at Port Edgar Marina ("the Marina"). It operates two vessels, the Forth Belle and the Forth Princess. Both vessels are berthed at the Marina.

[3] The defender offers public cruises and private hires in the Forth to Inchcolm and Blackness. Inchcolm cruises leave from Hawes Pier. Blackness cruises leave from the Marina.

[4] The Forth Belle is crewed by a skipper; two experienced crew; and either one or two bar staff, depending on how busy the cruise is expected to be. Although primarily dealing with guests on board, the bar staff must be trained in certain basic nautical matters, such as emergency procedures for man overboard, fires and the like.

[5] The defender is regulated by the Maritime & Coastguard Agency ("MCA"). The MCA carries out regular inspections and audits of the defender's craft and operations. This includes reviewing employees' training records.

[6] At the Marina, the vessels berth alongside floating pontoons next to the quay. The defender has an office on the quay about 700m away.

[7] Access to the pontoons and berthed vessels can be gained by two ramps – the east ramp and the west ramp: see Appendix 1. The ramps start at quayside level and lead down to the pontoons. Access to the ramps is gained through a security gate, operated by a keypad. The gate is to prevent unauthorised persons getting access to the pontoons and any vessels berthed there.

[8] The pontoons and ramps, which are hinged at quay level, move with the tide. When the tide is high, the ramps are almost level. When the tide is low, the ramps move to a

steeper angle. The west ramp is longer and is less steep at low tide than the east ramp. The ramps are 1.4m wide and are designed to allow two trolleys (see below) to pass each other.

[9] Trolleys are provided to users of the Marina to enable them to move items from the quayside to vessels berthed alongside the pontoons and *vice versa*. The trolleys consist of a rectangular metal cage mounted on a tubular metal frame with a main handle at one end and two wheels in the centre which are joined by an axis: see Appendix 2. The basket on the trolley is 0.3m deep and 0.6m wide. Each trolley has four u-shaped metal "feet" located below the bottom corners of the basket. Pressure applied to the main handle causes the rear feet to move down and touch the ground, providing a braking mechanism.

[10] Trolleys of this type have been used at the Marina by the defender since the business began there in about 2007. It is a type of trolley used in marinas across the UK and elsewhere in continental Europe, such as Spain. The defender's employees use these trolleys on a regular basis.

[11] The owner of the defender, Donald Dewar, who is actively involved in the running of the business, considered at one stage whether a golf-buggy type trolley might be used but this was not feasible because of the limited width of the ramps.

[12] During the season which begins in about April each year, each vessel undertakes several sailings per day. Items of stock have to be taken on board and rubbish has to be removed using the trolley. This happens at all tidal levels.

[13] None of the defender's employees have had an accident with a trolley before or since the pursuer's accident (see below). The defender knows of no accidents involving trolleys among other users at the Marina.

[14] Although the property of the Marina, the trolleys were used by the defender's employees during the course of their employment with the defender's knowledge and permission.

[15] As part of its regulatory obligations, the defender is required to obtain or prepare (as the case may be) a large volume of paperwork which must be made available for audit by the MCA during regular inspections of the defender's operation. This documentation forms the defender's Domestic Safety Management ("DSM") which contains the defender's safety procedures for both onshore and off-shore activities.

[16] The MCA had approved the content of the DSM during their audits and had given the defender positive reports thereon.

[17] Much of the documentation in the DSM is concerned with the operation of the defender's vessels. The DSM also includes Risk Assessments in respect of activities and operations carried out elsewhere in the defender's business.

[18] Contained within the DSM is a risk assessment headed "Handling Boat Trolley to and from the Boat": C 28 – 29. This risk assessment identifies the hazards associated with loading and manoeuvring the trolley to and from the defender's boats, the Forth Belle and the Forth Princess. The risk assessment identifies a hazard of the "Trolley being overloaded". The control measure is specified as "Crew instructed not to overload the trolley".

[19] The risk assessment identifies a hazard of "Descent and ascent of the pontoon to the boat". The control measure is specified as:

> "Descending the pontoon, crew member to stand behind the trolley and guide it to the boat. Ascending the pontoon, the crew member is to stand in front of the pontoon (*sic*) and pull it to the top of the pontoon. Crew member to obtain assistance from a colleague when the ramp is at a steep angle".

[20] The reference in the document to standing in front of the "pontoon" when ascending is a clerical error and should be "trolley".

[21] The risk assessment identifies the hazard of "Back injury". The control measure is specified as "Manual Handling training".

[22] In relation to each hazard, the persons identified as being at risk are "Crew Members", which includes bar staff.

[23] The risk assessment was formulated on 6 April 2013. It is reviewed annually. The risk assessment was reviewed on 28 May 2018 by the defender's Sales and Marketing Manager, Alastair Baird, and Mr Dewar. The only change that was made to the risk assessment was the inclusion of the words "& Forth Princess" to reflect the fact that a second vessel had been brought into operation. Otherwise the substance of the risk assessment had remained unaltered since 2013.

[24] On commencing his employment with the defender, the pursuer underwent induction training on about 15 April 2018, delivered by the defender's Office Manager, Amy Dewar.

[25] In the course of the induction, the pursuer was trained on the parts of the DSM which were relevant to his role. Ms Dewar read out the risk assessment and went through it with the pursuer. The risk assessment that was read out to the pursuer contained the same content as to risks and control measures as the risk assessment dated 28 May 2018.

[26] On 15 April 2018, the pursuer signed and dated a document headed "Acknowledgment of Domestic Safety Management": CB 30. This bore to acknowledge that he had read and understood all the DSM documentation relevant to his role, including the risk assessment.

[27] Before the pursuer was allowed to work on his own, he shadowed an experienced colleague, Paul Clark. During this shadowing, Mr Clark told the pursuer that he should not overload the trolley. He was shown the correct use of the trolley. He observed Mr Clark standing behind the trolley and pushing it forwards down the pontoon. The pursuer was told by Mr Clark that he should summon assistance from crew when required.

[28] Having undergone his induction and shadowing, the pursuer carried out the task of loading stock onto and unloading rubbish off the defender's vessels on a regular basis without difficulty. On occasions he had contacted the crew and obtained assistance with transporting the trolley and goods to the boat.

[29] On or about 15 July 2018, the Forth Belle was berthed at the Marina. It was to be at Hawes Pier for a first sailing at 1100 hours. The sailing time from the Marina to Hawes Pier is approximately 10 minutes.

[30] The staff rota for that day provided that another member of the bar staff, Kaya Begg, was due to commence work at the Marina. She was to load the trolley with bar stock; then take the trolley to the pontoon where the Forth Belle was berthed, utilising the ramp; and then load the stock onto the vessel.

[31] Ms Begg knew that trolleys should not be overloaded; that on ascending or descending the ramp, an employee should be above (uphill) of the trolley; and that assistance should be sought when the ramp was steep.

[32] The pursuer was due to commence work at 1045 hours attending at Hawes Pier, joining the Forth Belle when it arrived there to pick up passengers.

[33] As it turned out, Ms Begg contacted Amy Dewar, to say that she would not be coming in to work as she was ill.

[34] Ms Dewar contacted the pursuer and instructed him to attend at Port Edgar instead of Hawes Pier.

[35] The pursuer arrived at Port Edgar about 1020 hours. He required to load bar stock onto the defender's vessel, the Forth Belle, prior to her departure, using one of the trolleys provided.

[36] Prior to the pursuer's arrival at Port Edgar, some bar stock had been loaded into a trolley. The pursuer added further light items including plastic cups, biscuits and serviettes. The items the pursuer added to the load of the trolley did not add to the weight of the load to any material extent.

[37] The pursuer left the office to make his way to the pontoon. This journey would normally take about 5 minutes or so. As the pursuer made his way along the quay, he found the trolley heavy and difficult to manoeuvre.

[38] It was apparent to the pursuer when he arrived at the top of the ramp that the tide was low and the ramp was at an angle of about 30 degrees.

[39] Before starting to move the trolley down the ramp, he did not remove any of the stock from the trolley to make it lighter or seek assistance from any of his colleagues.

[40] Although he knew the trolley was heavy and the ramp was steep, the pursuer decided to take the trolley down the ramp on his own, standing downhill of it and attempting to control its descent.

[41] If the pursuer had sought assistance to move the trolley down the ramp from other staff or crew members, it would have been provided.

[42] At some stage during the descent, the pursuer lost control of the trolley. He was at risk of it running him over. He spread-eagled himself on top of the trolley and its load. The trolley continued down the ramp and rolled off the pontoon into the water.

[43] As a result of the accident, the pursuer was injured. The damages attributable to the loss, injury and damage sustained by the pursuer is properly assessed on a full liability basis at £4,000 including interest to the date of proof in this case.

[44] During her investigation carried out after the accident, Ms McGowan of the City of Edinburgh Council Health and Safety Team reviewed the risk assessment and found it to be specific and suitable for the task in question.

Grounds of decision

Preliminaries

Submissions

[45] I was provided with written submissions by both sides which were supplemented by oral submissions. I have taken account of these but not reproduced them for the sake of brevity. Relevant points arising from them are dealt with below.

Late productions

[46] At the commencement of the proof, Mr Mackay made a motion to have a Third Inventory of Productions for the pursuer received, albeit late. These had been prospectively included in the Core Bundle at pp 54-311 inclusive and were:

i. 5/5 - Copy of pursuer's written statement provided to defender (pages 55-56);

ii. 5/6 - Health and Safety Executive Research Report 228 (2004) on Review of the risks associated with pushing and pulling heavy loads (pages 57-161);

iii. 5/7 - Health and Safety Executive Approved Code of Practice and Guidance on the Provision and Use of Work Equipment Regulations 1998 (pages 162-245); and

iv. 5/8 - Health and Safety Executive Approved Code of Practice and Guidance on the Manual Handling Operations Regulations 1992 (pages 246-311).

[47] He understood that 5/5 was not opposed. 5/7 and 5/8 were public documents and ought to be known to the defender's witnesses. 5/6 was a research report on which reliance would be placed.

[48] In response, Mr Fairweather confirmed that there was no objection to 5/5 being received. However, receipt of 5/6 – 5/8 were all opposed. To allow them to be received and now would be prejudicial to the defender. Firstly, there had been no opportunity for Mr Fairweather to discuss 5/6 with his witnesses. Second, 5/7 and 5/8 were approved codes which related to specific Health & Safety Regulations, namely PUWER and Manual Handling. There was no Record for any such case. The case was brought at common law. If there was an intention to try and establish a breach of regulations, that required to be pled. There had been no fair notice of such a case.

[49] In response, Mr Mackay accepted that it was the "usual and good practice" to plead references to regulations which were being relied upon but that was not necessary for the purposes of fair notice.

[50] In my view the grounds of objection stated by Mr Fairweather were sound.

[51] Indeed, the point made by him in relation to 5/6 could equally be applied to 5/7 and 5/8. It does not matter if documents are in the public domain or that the defender's witnesses may have had actual or constructive knowledge of them. The reason that the Ordinary Cause Rules require documents which are to be referred to or relied on to be lodged and intimated in advance of proof diets is so that the other party (or parties) have the opportunity to consider them. A party who does not know until shortly before a proof diet that particular material is to be relied on is deprived of the opportunity to properly consider

it before the proof commences and as such is prejudiced. That is particularly so where the documentation runs to some 250 pages or more.

[52] Furthermore, the pleadings in this case make no mention whatsoever of any statutory regulations being relied upon for any purpose.

[53] In order to succeed in a claim for reparation at common law, the onus is normally on a pursuer to show (a) that a legally protected interest of his has been infringed; (b) that the defender owed him a duty not to infringe that interest in the way complained of; (c) that the duty was breached by the defender's failure to achieve the standard of care required by the law in the circumstances; (d) that the infringement was not too remote from the breach complained of; and (e) that the injury suffered was caused by the breach of duty: *Stair Encyclopaedia*, Obligations, paragraph 254.

[54] Factors (a), (b) and (d) are rarely controversial in the context of personal injuries arising in the course of a pursuer's employment.

[55] Leaving aside factor (e) [causation], the main focus in contested cases is usually on factor (c).

[56] It is for the pursuer to establish a breach of duty by the defender. That is a crucial matter. As such, a pursuer must aver (at least in outline) those facts which he offers to prove and from which a finding of negligence may be made: Ordinary Cause Rules, r.36.B1(1)(a).

[57] Where a pursuer proposes to rely on Health & Safety regulations for the purpose of evidencing the safety standards incumbent on a defender[1], in the fulfilment of its common law duty to take reasonable care, notice is required of this.

[1] *Gilchrist v ASDA Stores Ltd*, [2015] CSOH 77

[58] The reliance on regulations adds another dimension to the case which is likely to require the exploration of specific lines of evidence. Appropriate notice of that is required. At least some indication must be given of the facts on which reliance is to be placed for that purpose. That includes statutory regulations being relied upon to vouch the existence of a particular, concrete element of the common law duty of care which has been said to have been breached.

[59] As Mr Mackay recognised, the inclusion of references to statutory regulations being relied on for such a purpose has become the usual and good practice.

[60] For all of these reasons, I refused leave to allow these documents to be received late.

[61] No motion was made for leave to appeal that decision nor was any motion made to amend the pleadings or adjourn the proof.

Objections and evidence admitted under reservation

[62] As the proof progressed, objections were taken at various times on behalf of each party. I deal here with the ones which were maintained in closing submissions.

Second ramp

[63] Mr Mackay renewed his objection to evidence being led about the existence of a second ramp.

[64] No evidence was elicited from the pursuer or his witness Ms Begg about the existence or use of a second ramp. The matter was first touched on in the evidence of Ms Dewar and evidence was thereafter elicited from a number of the defender's witnesses about it under reservation.

[65] That evidence cannot be used to make any finding in fact which is critical to determining this case. First, it did not form a part of either party's pleadings. Second, it did not emerge in evidence until both the pursuer and Ms Begg had concluded their evidence. There was no motion to recall either of these witnesses, so we do not know what they would have said about it. Accordingly, to place any weight on it as ground supporting the pursuer's case would prejudice the defender and *vice versa*. Thus, although I have made some findings in fact about its existence and location, these are neutral as far as deciding the case is concerned.

Reprimand

[66] Some evidence about an earlier occasion when the pursuer was said to have been reprimanded was given under reservation. The ground of objection was that there was no Record for this. Mr Fairweather said that it fell within the defender's case that it had provided training and instruction. Mr Mackay renewed his objection during his submissions on the basis that that point had not been put to the pursuer and that a reprimand amounted to some kind of formal process. I have noted that the matter was put to the pursuer in cross-examination but on the second I agree with Mr Mackay and sustain the objection.

Guidance

[67] Some evidence about whether the defender had considered any guidance or publications published by the regulatory bodies (the MCA and the HSE) in relation to the risk assessment carried out was elicited in cross examination from Mr Dewar under reservation. Mr Dewar confirmed that it had not, but since these documents were not

productions or put to Mr Dewar or otherwise spoken to, I make no findings in fact about them.

Hierarchy of control mechanisms

[68] Some evidence about the hierarchy of control mechanisms was elicited under reservation during the cross examination of Ms McGowan. The objection was not maintained in final submissions and so her evidence on that issue is competently before me. However, her evidence was that it was not necessarily the case that physical or engineering control mechanisms were the first priority; and that although management or systems of work were important, that did not necessarily mean that these should be achieved through physical control mechanisms. That evidence does not advance matters in this case.

Scope of the pursuer's case

[69] There was no dispute that the pursuer had suffered an accident in the course of his employment with the defender, while using the trolley provided to take bar stock from the defender's office on the quay down to the pontoon where the vessels were berthed. The areas of dispute concerned the wider circumstances prevailing prior to his accident. In particular, the pursuer's case on Record was expressed thus:

> "The pursuer had not been provided with training and instruction as to how to perform this task. The trolley was unsuitable and ought to have been fitted with brakes. Had the trolley been fitted with brakes, in all probability the accident would have been averted".

[70] In other words, the pursuer's case is periled on proving that he had not been provided with training and/or that the trolley was unsuitable due to the absence of brakes.

[71] In response to the defender's averments, the pursuer makes some supplementary averments regarding training, thus:

> "Explained and averred that the only training received by the pursuer was crew training on maritime procedures such as 'man overboard'. No specific training was provided either in respect of manual handling training in general, nor in respect of the specific task of loading the trolley".

[72] It is specifically averred that the defender was in breach of its common law duty to take reasonable care. There is no reference to the any alternative sources, such as statutory regulations.

[73] I have already set out in some detail what happened in respect of the late productions tendered by Mr Mackay: paragraphs [49]–[64] above. One of the reasons for that decision was that there was no Record for any reliance being placed, for any purpose, on statutory regulations.

[74] Notwithstanding that ruling, the greater part of Mr Mackay's submissions were concerned with attempting to persuade me that he was entitled to rely on certain Health & Safety regulations for the purpose of "informing" the common law duty of care and that in deciding the case, it was open to the court to take account of them. He invited me to make findings as to their application to the facts of the case and their breach.

[75] Mr Fairweather submitted that there was no such case on Record and that a specific reference to any Regulations being relied on was required.

[76] I am satisfied that Mr Mackay's attempt to rely on the regulations cited must fail for the following reasons.

[77] First, the pleadings are unchanged. Second, it is a matter on which I had already ruled against him. Third, as a result of that ruling, the proof was conducted on the basis that the pursuer's case proceeded on (for want of a better phrase) "pure" common law only. If I

were to allow Mr Mackay to introduce a case based (to any extent) on statutory regulations, that would be highly prejudicial, because it is likely that the way in which the proof was conducted for the defender would have been different.

[78] Therefore, for the purpose of deciding this case, I approach it on the basis that all of the references to the regulations and case law thereon–which formed the greater part of the submissions for the pursuer–must be ignored.

Risk assessment

[79] It is convenient to take this first, since as has been observed, risk assessments logically come before and are designed to inform what an employer should do by way of training of and provision of equipment to employees.

[80] It was accepted by Mr Fairweather that a requirement to undertake a risk assessment was now part of an employer's common law duty.

[81] The defender avers that it undertook a risk assessment of the task and led evidence about how that was done, the content of it and how it was kept up to date.

[82] On behalf of the pursuer, Mr Mackay did not argue that no risk assessment had been done, but rather that the risk assessment was not adequate. (There is no Record for such an approach, the defender's averment that it had carried out a risk assessment being met with a denial. But the evidence for both parties was led without objection.)

[83] There are difficulties with the pursuer's written submissions about the risk assessment. The first is that they appeared in a section headed "Reasonable Practicability", but which jumps from one topic to another, including standard of care, various sets of regulations, training, Health and Safety Codes of Practice and various cases. This made it very difficult to follow.

[84] The second is that Mr Mackay's critique of the risk assessment was largely based on references to statutory sources (and consequently the case law on them) which do not form part of this case. The H&S Guidance (Codes of Practice) were not productions; and in any event are not self-proving: Health and Safety at Work Act 1974, section 17. No evidence was led as to their content or application.

[85] In relation to the specific points of criticism made by Mr Mackay, I make the following comments.

i. A specific definition of overloading e.g. in respect of weight was not obviously necessary. The instruction not to overload was simple and comprehensible. Both the pursuer and Ms Begg appeared to understand it. The trolley was self-limiting as to volume due to the dimensions of the basket. Employees would know if the trolley was likely to be difficult to manoeuvre because they had to make their way along the quay before descending the ramp, thereby giving them the opportunity to seek assistance if required.

ii. The existence and possible use of the west ramp was not part of the case for either party.

iii. The characteristics of the trolley were taken into account in devising the control measures. It did have a method of braking which all witnesses seemed to understand.

iv. In any event, any detailed criticisms of the trolley itself would be relevant to the case based on suitability of equipment which is dealt with separately below.

[86] Mr Fairweather accepted that the defender was under a duty to carry out a risk assessment.

[87] He submitted that the defender had identified the risk of overloading and an appropriate control measure, viz. instructing the crew not to overload the trolley.

[88] It had identified the risk associated with ascending and descending the pontoon with the trolley and an appropriate control measure, viz. crew members were instructed to stand behind the trolley and guide it to the boat. If the tide was out, making the pontoon steep, assistance was to be sought from a colleague.

[89] The risk assessment identified the risk of a back strain and the control measure was manual handling training.

[90] There was no evidence of any other accident arising in the course of an employee descending or ascending the pontoon with the trolley; and no change had been needed since the pursuer's accident.

[91] The DSM (including risk assessments) were heavily audited by the MCA, which had given the defender positive reports.

[92] The post-accident review of the by the HSE was that the assessment was specific and suitable for the task in question.

[93] The factors relied on by Mr Fairweather are compelling.

[94] There was evidence that the risk assessment had been originally created with professional assistance in 2013. It had been reviewed regularly but had remained unchanged. Although there was no evidence of industry practice (in relation to risk assessments) of other similar organisations, the control measures had apparently been effective in preventing accidents since they were introduced. The risk assessment had been reviewed by two separate regulatory authorities, the MCA and Ms McGowan of the City of Edinburgh Council and had not been found wanting. The trolley was in wide use elsewhere

and there was no evidence of any other accidents. Mr Dunbar had considered an alternative but this had been discounted as not practicable.

[95] Therefore, absent evidence that the defender had omitted to take account of some obvious risk or to identify some obvious control measure, it has not been proved that negligence has been demonstrated in the carrying out of the risk assessment. This was a straightforward work activity involving the use of simple equipment which was in widespread use. The defender carried out a risk assessment, identified the relevant risks and appropriate control measures. That was sufficient to discharge its common law duty in respect of the risk assessment.

Training and instruction

[96] This part of the pursuer's case is periled on the bald averment that he had not been provided with training and instruction as to how to perform the task. The defender's position was that he had been given specific training and in particular that he had been trained to not overload the trolley; to seek assistance from a colleague when necessary; and to push the trolley from behind when descending the ramp, so as to remain "uphill" of it.

[97] Again, Mr Mackay's submissions on this point were largely based on the regulations and I derived little assistance from them.

[98] The first aspect of training to be considered is the DSM.

[99] I accepted the evidence of Ms Dewar, Mr Baird and Mr Dewar to the effect that the DSM comprises training records, safety procedures and risk assessments, covering the defender's onshore and offshore operations. I also accepted their evidence that the risk assessment for handling the trolley was part of, and included in, the DSM.

[100] Mr Mackay attacked Ms Dewar's evidence on the basis that the risk assessment produced was not the one which the defender said it had shown to the pursuer and there was no specific training record vouching that the pursuer had seen the risk assessment.

[101] It is clear that the DSM is a substantial document and, since it covers onshore and offshore activities, contains much material that is not relevant to the present case. Ms Dewar and Mr Baird explained that the copy of the risk assessment produced had been updated to reflect the addition of a second vessel to the defender's operations, but that otherwise it was unchanged from the previous version. Ms Dewar also said that the risk assessment was contained in the DSM. I accepted that evidence.

[102] The next issue is whether the pursuer was in fact shown the risk assessment.

[103] Ms Dewar gave clear evidence that the pursuer underwent induction training on about 15 April 2018 during which he was taken through the DSM and shown the risk assessment. This was said to be vouched by the pursuer's signature on CB 28/29. Mr Baird also gave evidence that he had taken the pursuer through the DSM.

[104] Asked about the induction training, the pursuer said that "… he did not really remember sitting in the office doing training" and that "it was 2 ½ years ago". He said it was "fair" to say that he did not remember things about training. A suggestion that he underwent training in the office at Port Edgar delivered by Ms Dewar "did not ring a bell", though he thought he would remember significant training. He was vague about the content of the DSM. He "did not remember" Ms Dewar going through the risk assessment with him.

[105] He accepted that CB30 was signed by him; that it related to the DSM and that he "supposed" that the Risk Assessment was included in the DSM, but he was adamant that he had not seen the Risk Assessment until it was sent to him by his solicitors.

[106] When it was put to him that Mr Baird had gone through the risk assessment with him as well, he could "not recall having a conversation with Mr Baird of longer than two minutes other than when he and his mother had spoken to him after the accident".

[107] This leaves the overall impression that while the pursuer did not recall the induction, he did not go so far as to say that it did not take place.

[108] Ms Begg initially said that she had not seen the risk assessment, but in cross examination said that it was fair to say that her signature on CB30 meant that she had acknowledged she had read and understood the DSM and the risk assessment.

[109] On this issue, I am satisfied that the DSM included the risk assessment and that the pursuer was taken through it by Ms Dewar during his induction training. It may be that the passage of time has meant that the pursuer's memory of training about what is a relatively mundane task has been overshadowed by his recollection of more memorable and unusual matters such as Man Overboard and Fire drills, but having gone to the trouble of preparing (and updating) a risk assessment for one of the main tasks which bar staff were going to have to undertake, it would be odd for the defender not to have apprised the relevant employees of what it said. It is possible that while going through the DSM with the pursuer, Ms Dewar did not in fact *show* him the risk assessment. In my opinion, this does not matter if he was told what it said. There is no rule that training must be delivered through the medium of the written word (though that may make it easier to prove the content of the training).

[110] I did not find Mr Baird's evidence that he too had gone through the DSM with the pursuer convincing. Mr Baird had a tendency to be dogmatic and argumentative in his responses to questions and I preferred the pursuer's evidence as to the level and nature of the interactions between them.

[111] The second aspect on the question of training was the work shadowing.

[112] Mr Baird gave evidence that he had shown the pursuer how to load the trolley and accompanied him as he took the trolley down the pontoon to the boat and had explained to the pursuer how to perform this task correctly, in accordance with the system laid out in the risk assessment. The pursuer did not agree that that had happened. Although Mr Baird's evidence was unchallenged in cross examination, I am not persuaded that even if he did accompany the pursuer down to the pontoon on one occasion this can properly be described as work shadowing or training.

[113] The pursuer accepted that he had shadowed a colleague, but said that this was a Paul Clark. He accepted that he had been told not to overload the trolley, although this had been "just as a passing comment". He accepted that avoiding overloading was "not putting items past the line of the trolley [i.e. the upper edge of the basket] or putting in so much that it can't move". He accepted that this was "obvious" and that if the trolley were loaded to the extent that it was difficult or dangerous to move, it would be overloaded, but said that it was acceptable to put lighter items up past the edge of the basket. He accepted that he knew that an overloaded trolley gave rise to the risk of injury.

[114] In relation to the control measure of standing behind the trolley, the pursuer accepted he had observed Mr Hart standing behind the trolley, pushing it forwards down the pontoon. He also stated that it was possibly true that Mr Hart had told him to ask for assistance with the trolley at the top of the pontoon if required.

[115] Accordingly, on this issue, the pursuer had been made aware of the risk assessment and the relevant control measures during his induction training and had seen the task demonstrated by another staff member.

[116] There is no principle that says that training cannot be delivered through a mixture of explanation and demonstration (work shadowing).

[117] Ms Begg accepted she knew what was meant by not overloading the trolley, she would always position herself above the trolley when pushing it or pulling it on the pontoon, and that she knew to ask for assistance from a colleague if required.

[118] I conclude that the pursuer had received adequate training. It follows that the pursuer has not proved a breach of duty on the part of the defender in relation to training. The pursuer was aware of the approved system of work and the reasons for the control measures. The pursuer has not demonstrated a matter of which he was ignorant but which, had he known it, the accident would not have happened: *Neil* v *East Ayrshire Council* 2005 Rep. L R.18.

Suitability of trolley

[119] This aspect of the case can be dealt with quite briefly.

[120] Again, Mr Mackay's submissions were peppered with references to regulations and associated case law which have no application in this case.

[121] As Mr Fairweather submitted, there was a substantial body of evidence that the type of trolley in use was used by the public and other business at Port Edgar marina, was widely used in marinas throughout the UK and Europe and there was no other trolley available.

[122] There was no evidence of any accident involving a trolley had ever occurred during the 14 years that the defender had operated out of the marina.

[123] There was no evidence that an alternative type of trolley, with a more elaborate braking system, was available or in use elsewhere.

[124] Mr Mackay submitted that the onus was on the defender to show that it had considered alternatives and that its failure to do so constituted a breach of the obligation to reduce the risk of injury to the lowest level reasonably practicable. In a case based on common law, I have doubts about whether the duty and onus arise in that way, but in any event, Mr Dewar when asked about this in cross-examination said that he had considered whether an alternative might be used, but that this had proved to be impracticable because of the limited width of the ramp.

[125] The trolley did have a braking system (albeit a simple one); trolleys of the same design were in widespread use across the maritime industry without giving rise to accidents. As was submitted, the defender is entitled to rely on a well-established system of work: *Baker* v *Quantum Clothing Group Ltd* [2011] UKSC 17.

[126] Mr Mackay did offer some criticisms of the trolley, but these were not supported by evidence. For example, he said that as the "foot" of the trolley (the u-shaped bend) comprised smooth metal which provided "no friction" when placed on a sloped surface. There was no evidence about the precise construction of the feet or about the co-efficient of friction; and to suggest that there was no friction seems improbable. There was likewise no evidence about what an alternative braking mechanism might be and whether, if introduced, it would have prevented the pursuer's accident.

Other issues

Overloading

[127] Mr Mackay sought to make something of the fact that the pursuer did not load the trolley. In my opinion, this would only be relevant if the pursuer was making a case that

there had been an absence of or breakdown in a system of work. No such case is foreshadowed in the pleadings.

[128] If the trolley was overloaded by volume, that would have been apparent immediately to the pursuer. If it was overloaded by weight, as was contended, that would have become apparent to the pursuer when or while he manoeuvred it along the quay. Indeed, that was his evidence. He was finding the trolley heavy and resistant to movement during the journey along the quay. In passing, I observe that the estimates as to the weight of the trolley and load from various witnesses varied so much that I am unable to make a finding of fact on it. I would say that I think that the pursuer's revised estimate of 250kg seems unlikely.

[129] Bringing these points together, the pursuer was in control of the extent to which the trolley was loaded. If he considered that it was overloaded, he could have removed items from it and made two trips or sought assistance before or on arriving at the top of the ramp. He knew that he should seek assistance as the tide was low and the ramp was steep.

Assistance

[130] I did not find the pursuer's explanation for not seeking assistance convincing.

[131] The pursuer offered to prove that he did not seek assistance as there was no colleague available to ask for assistance. But in my view he has not proved that this was the case. He said he did not know which crew members were on the boat, but he made no enquiries about this as he could have done by asking Lauren (a lady whom I understood to work in the office) before he left the office or telephoning her when he reached the top of the ramp. Instead, because of a Lauren's report of a conversation which she had had that morning with Mr Carty (to the effect that moving the trolley down to the boat was not his

(Mr Carty's) job), he assumed that Mr Carty was not likely to offer assistance. While that may have been valid in relation to Mr Carty, it is probable that the pursuer knew that other crew were likely to be on board the Forth Belle by that time. There were also other personnel in the office.

[132] The pursuer accepted that he had previously asked for and received help.

[133] He could have left the trolley at the top of the ramp and gone down to the vessel and asked for assistance. He did seek to justify not doing this on the basis that the security gate at the top of the ramp was sometimes left unlocked, but he said that he did not know whether it was locked that day or not. In any event, there was evidence that it operated by a key pad and since its purpose was to prevent unauthorised persons getting access to the pontoon and the vessels berthed at it, it is not clear to me why he could not have closed it behind him, to allow the trolley to be left secure while he made his way down to the vessel which was berthed close by.

[134] Although there was some evidence from Ms Begg that crew were sometimes reluctant to assist with the trolley, she accepted that if asked, they did so.

[135] Accordingly, if the pursuer had sought assistance, I am satisfied that that would have been provided and there would have been no need for the pursuer to embark on the method of descent which led to the accident.

Time of arrival

[136] The pursuer and Ms Dewar gave conflicting evidence about this, though neither seemed very clear in their recollections. Mr Baird said that the pursuer had told him that he had arrived at 1020 hours and I accepted that evidence.

Novus actus interveniens

[137] In view of my decision on liability, this point does not need to be determined but I will state my views on it.

[138] The principle has been described thus:

> "There are certain propositions that I think are well established and beyond question in connection with this class of case. One is that human action does not *per se* sever the connected sequence of acts … The question is not whether there was new negligence but whether there was a new cause … It must always be shown that there is something which I will call ultroneous, something unwarrantable, a new cause coming in disturbing the sequence of events, something that can be described as either unreasonable or extraneous or extrinsic. I doubt very much whether the law can be stated more precisely than that." *The Oropesa*, [1943] 1 All E.R.211.

[139] The defence arises where breach of duty has been established, but since the application or otherwise of it depends on the precise ground of fault established, I cannot give a concluded view on it in this case.

[140] Nevertheless, in the present case, it might arise if, for example, I had held that the pursuer had not been instructed to remain uphill of the trolley. On that hypothesis, the argument would be that by allowing the pursuer to adopt a risky method of work (by not instructing him to remain uphill of the trolley) the defender had negligently allowed a dangerous situation to come about, thereby causing the pursuer's accident. In that hypothetical situation, an argument that a pursuer resorting to an unusual or even unexpected means of escape could not properly be called *novus actus interveniens.* It did not disturb "… the sequence of events …". An attempt to rescue himself was foreseeable even if the precise means were not. Such a scenario is distinguishable from that in *Clay* v *TUI Ltd* [2018] EWCA Civ 1177, where it was the actions of the plaintiff which turned an awkward situation (being trapped on a balcony because of a defective sliding door) into a dangerous one which caused the subsequent accident (attempting to step cross to a neighbouring

balcony). In the present case, on the hypothesis described, the danger would have been caused by the defender's fault and the pursuer's response to a dangerous situation would not have broken the chain of causation.

[141] Accordingly, if liability on the ground mentioned above had been established, I would not have upheld this plea.

Contributory negligence

[142] If liability had been established, I think that the pursuer would still have to bear a material share of the blame. He knew that the trolley was heavy and the risk created by being below such a load if control of it were lost must have been apparent to him. I would have assessed contributory negligence at 50%.

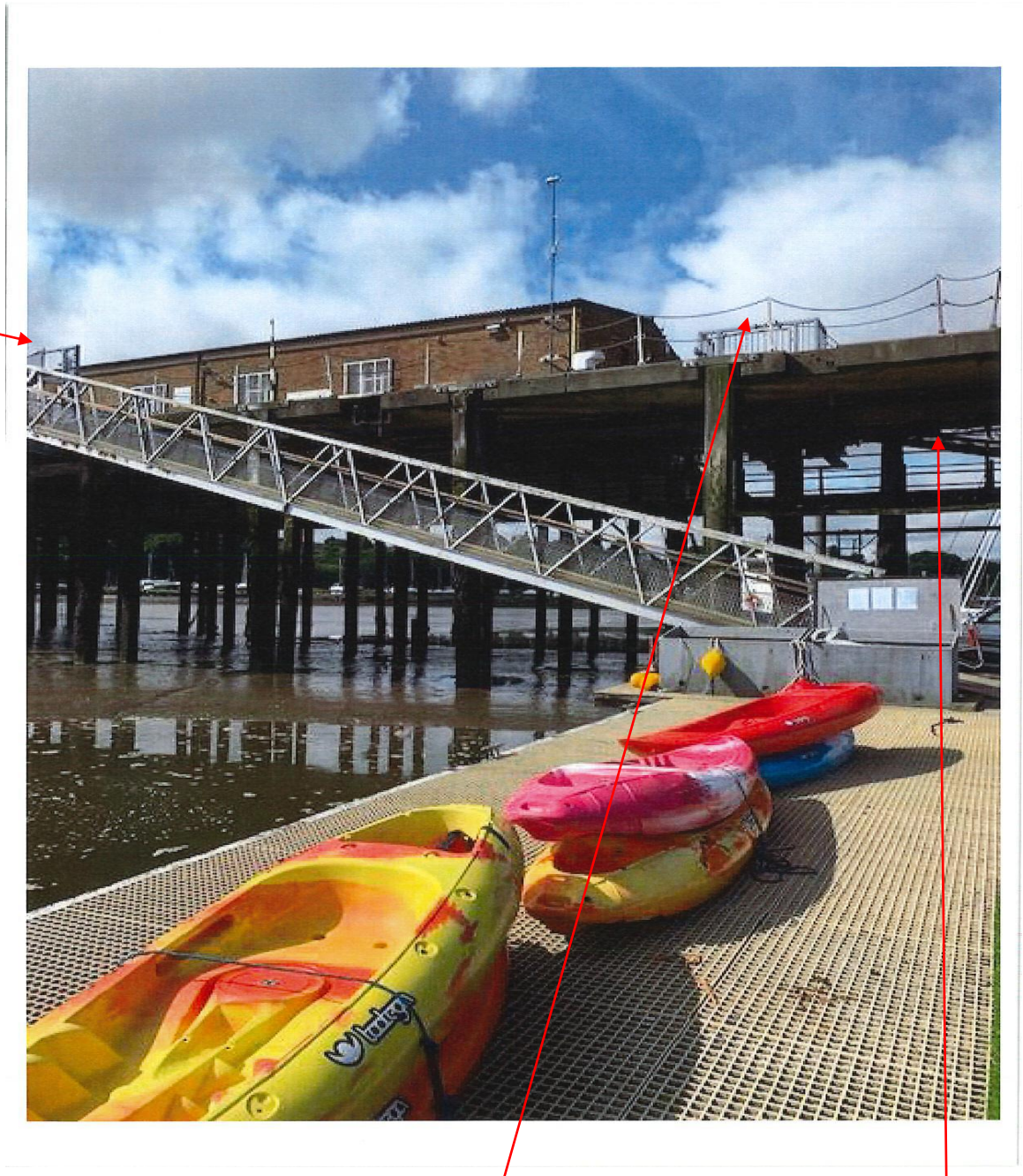
Disposal

[143] I shall grant decree of absolvitor in favour of the defender. Parties were agreed that expenses should follow success, so I shall find the pursuer liable to the defender in the expenses of process as taxed.

_____

Sheriff

Appendix 1: View of East ramp



Appendix 2: trolley (beside security gate at top of East ramp)