

SHERIFFDOM OF LoTHIAN AND BORDERS AT EDINBURGH

[2022] SC EDIN 28

EDI-PD95/19

JUDGMENT OF SHERIFF K J CAMPBELL QC

in the cause

PAUL FARLEY

Pursuer

against

THE SCOTTISH MINISTERS

Defenders

Pursuer: Personally

Defenders: Thomson (Morton Fraser, Solicitors Edinburgh)

Edinburgh, 18 July 2022

Findings in fact

1. On 4 June 2016 the pursuer was employed by Marine Scotland, an agency for which the defenders are in law responsible, as an Able Seaman aboard MPV *Hirta*. His duties included watch keeping, maintenance, and working on the two rigid inflatable boats (RIBs) carried by *Hirta*.
2. On 4 June 2016, *Hirta* was carrying a Pacific RIB on the starboard side, and a Delta RIB on the port side. Two Pacific RIBs are normally carried. The Delta is used as a replacement when one of the Pacific RIBs is offloaded for maintenance. Both types of RIB are compatible with *Hirta*. When in use each RIB has a crew of two: a coxswain and a bowman.

3. On 4 June 2016, the pursuer was working as bow-man on the Delta RIB. There were four people in the RIB. The pursuer, the coxswain Neil Pederson, Paul Maclean, and Chris Ross.

4. The RIB had returned to *Hirta* having been deployed for fisheries protection tasks. It was being lifted out of the water by means of a crane on the deck of *Hirta*. The RIB came out of the water stern-heavy, and was suspended on the lifting wire at an angle with the bow above the stern.

5. Crew on *Hirta* were shouting about the attitude of the RIB as it was being raised. The pursuer got up from his seat and went forward towards the bow of the RIB in an attempt to balance the RIB and bring it closer to the horizontal. The pursuer was not instructed to do so by the Captain of *Hirta*. He was not instructed to do so by anyone else in authority on *Hirta* or on the RIB.

6. The RIB was brought over the side and lowered to the cradle on the port side of *Hirta*. The stern end touched the cradle first. The bow end came down sharply. The pursuer was seated on the floor towards the bow at that time.

7. As a result of the impact, the pursuer suffered a jarring soft tissue injury to his lower back. He also suffered an injury to his right ankle.

8. In the course of his career as a seaman, the pursuer undertook health and safety training in the course of a number of the marine skills certifications he holds. The pursuer received health and safety training when he started work aboard *Hirta*. That included safe launch and recovery of RIBs. Marine Scotland training also included instruction not to move about a RIB once it was being lifted out of the water.

9. On 5 June 2016, the pursuer had pain in his back, ankle and hip area. He was taken off *Hirta* by RIB and taken to the Western Isles Hospital in Stornoway, where X-rays were

taken. A CT scan was later carried out at the Countess of Chester Hospital, Chester. No fractures were noted. The pursuer experienced and continues to experience pain, mainly around his hips and lower spine. The pursuer has attended a consultant about his back problems. He has received three spinal steroid injections. The pursuer attended the Spire hospital in Warrington for keyhole surgery to remove 'debris' from his right ankle. The pursuer had previously injured that ankle in about 2008, and that injury had been treated successfully.

10. Prior to the accident, the pursuer went cycling and mountain biking, hill walking and swimming. He went to the gym regularly. He no longer does these activities.

11. The pursuer has not returned to work, at sea or otherwise. He receives a number of social security benefits.

12. At the time of the accident, the pursuer was employed by Marine Scotland on a fixed term appointment. The pursuer's contract reached its termination date in August 2016. Marine Scotland wrote to the pursuer confirming his employment had ceased.

13. 6/1 of process is a spreadsheet prepared by the defender, showing the pursuer's earnings during the term of his appointment with Marine Scotland.

14. During the period of his employment with Marine Scotland and on a date prior to 4 June 2016, the pursuer attended a selection board. The purpose of the board was to select candidates for a reserve list suitable for appointment to permanent full-time posts with Marine Scotland during the currency of the reserve list. The list was to be current for nine months. The pursuer was successful at interview. No vacancies for which he was qualified arose during the currency of the reserve list at a time when the pursuer's name was at the top of the list.

15. The pursuer had received help from his sister, Sharon Farley, with shopping twice a week, and with carrying things and other help around the house over a period of about two years from June 2016.

Findings in fact and law

1. The accident on 4 June 2016 was caused by the fault of the defenders.
2. The accident on 4 June 2016 was also caused or materially contributed to by the fault of the pursuer.
3. The pursuer's contribution to the accident was 50%.

Introductory

1. This action concerns an accident which befell the pursuer on 4 June 2016, whilst he was one of a number of people on board a rigid inflatable boat (RIB) being lifted aboard FPV *Hirta* off the Western Isles. *Hirta* is operated by Marine Scotland, an agency for which the defenders are responsible. At the time of the accident, the pursuer was employed by Marine Scotland.
2. I heard proof by webex videoconference on 5 and 6 July 2022. The pursuer gave evidence. He did not lead evidence from other witnesses. The defenders led evidence from Mark Lockwood, and Paul Macleod. I heard submissions from the pursuer and from the defender's agent, Ms Thomson, and made avizandum.
3. I should also record that on 4 July 2022, I heard the pursuer's motion to discharge the proof. The pursuer told me he had first intimated the motion a month ago, as he was having health problems which he said were a consequence of the accident giving rise to the action and also to carbon monoxide poisoning due to a defective boiler in his previous home some

months ago. He moved the court to discharge the proof fixed for 5-6 July 2022 and fix dates in August or September 2022. He produced a letter dated 10 May 2022 from Dr P Ramaswamy, a GP at the practice the pursuer attends, and page 1 of a letter dated 27 April 2022 from Dr A Farag, a cardiologist at Warrington Hospital. The former narrates a history of spinal injury following an accident on board ship, and more recently of investigations for angina. It appears to have been written in support of an application by the pursuer for alternative housing. The copy letter from Dr Farag is incomplete, but appears to be a letter to the pursuer's GP reporting on ongoing outpatient investigations for heart problems. The defenders' agents had intimated and lodged detailed written opposition, which Ms Thomson simply adopted.

4. I refused the motion to discharge the proof. This is the third motion to discharge a diet of proof in this case, each at the pursuer's instance. As it happens, all three have come before me. On 14 July 2021, I discharged a diet of proof fixed for 20-21 July 2021 in respect that on 13 July 2021 the pursuer's agents intimated they were withdrawing from acting. After sundry procedure, on 6 September 2021, a fresh diet of proof was fixed for 14-17 December 2021. On 14 December 2021, I discharged the second diet of proof because the pursuer was unwell. There was, in any event, a proof which had been identified as a priority case, which was due to run in the Personal Injury Court that week (and did in fact run). If the pursuer's latest motion was granted, resolution would be further delayed. I accepted the correspondence suggested the pursuer has a number of health problems, however the two medical letters produced do not address the pursuer's fitness to give evidence or otherwise participate in court proceedings. On the other hand, the defender had a number of witnesses cited to attend, some of whom work at sea, and for whom arrangements have had to be made. There would clearly be further delay and wasted

expenses incurred by the defenders, who have as much right to resolution of this matter as the pursuer. Further, it was a concern that the pursuer said he also required further time to prepare, given that the case had already been scheduled for proof in December last year, and the court was entitled to expect that he would be ready to proceed at that point. For all of those reasons, it seemed to me the interests of justice pointed to the proof proceeding.

5. Although there is no Joint Minute relating to evidence, parties had helpfully agreed the provenance of medical and earnings records in the Joint Minute of the Pre-trial Meeting on 23 November 2021. In the event, few documents were referred to in the course of the proof.

The pursuer's evidence

6. Because the pursuer was not legally represented at the proof, I took a more active involvement in the pursuer's evidence than would ordinarily be the case, offering him the opportunity to address those matters he saw as relevant to the matters on record, but asking him questions about key elements of the mechanism of the accident, contributory negligence, and the injuries which he suffered. Parties did not demur to my proposing and adopting that approach. Likewise, my summary of the evidence is longer than it might otherwise be.

7. The pursuer is 55. He is rated an Able Seaman, and has had a range of jobs at sea since he was 19. At the time of the accident on 4 June 2016, he was employed by Marine Scotland as an Able Seaman aboard MPV *Hirta*, which is a fisheries protection vessel. His duties included watch keeping, maintenance, and working on the two RIBs carried by *Hirta*. Normally two Pacific RIBs were carried. Each weighed around 2.5 tonnes and normally seated up to eight people. On *Hirta*, the RIBs were used for deployment and recovery of

officers carrying out fisheries protection tasks, and were also available for rescue duties. On 4 June 2016, Hirta was carrying a Pacific RIB on the starboard side, and a Delta RIB on the port side. The pursuer believed the Delta was the wrong type of RIB for the ship.

8. There are two crew on the RIB: the coxswain, who steers and controls the boat, and a bow-man, who works the forward part of the boat and, amongst other things, secures the boat ropes. Recovery of the RIB from the water involved the bow-man securing the painter (mooring rope) and thereafter connecting the single wire cable from the lifting crane on the ship to a hard point on the RIB. The bosun, aboard the ship, then raises the RIB controlling the crane remotely. The RIB is brought over a cradle on deck and is supposed to be lowered slowly into it by the bosun. The RIB crew then step out onto the ship.

9. At the time of the accident, the pursuer was working as bow-man on the Delta RIB. The pursuer thought there were four or five people aboard, besides himself and the coxswain, Neil Pederson. The pursuer secured the lifting wire, and the RIB came out of the water. Everyone aboard was seated. The pursuer was not in a seat because these were all taken by the officers aboard, and his recollection was he was sitting on the sponson holding the grab handle on the control position. The RIB came out of the water stern-heavy, and was at an angle of 45 degrees. The pursuer had never experienced the RIB being at such an angle before.

10. With the RIB being at an angle, people were shouting for someone to go forward. The pursuer decided to go forward to try to bring the RIB to a horizontal position for a safe recovery. He did so, but the RIB did not budge. One of the officers was coming forward, and the pursuer shouted to him to go back as he believed the lifting gear would strike the officer. The pursuer sat on the metal deck of the RIB looking inboard. The RIB was still at an angle. The bosun let the RIB freefall into the cradle rather than a controlled descent and

there was a massive rebound, which hit the pursuer in the back. There was a second bounce, with the same impact. The pursuer was on the deck screaming in pain. He could not get up for a while and crawled to the sponson. After regaining his composure, the pursuer thought there was something wrong. A member of the deck crew helped him out of the RIB.

11. Later in the day, the pursuer realised something was not right. He had pain all round his body. He had spoken to the First Officer and the Captain, who gave him strong painkillers. He had not been able to sleep. The next day the pursuer had pain in his back, ankle and hip area. He was taken off the ship by RIB and taken to the Western Isles Hospital in Stornoway, where X-rays were taken. A CT scan was later carried out at the Countess of Chester Hospital, Chester. His backside was very sore at that point. No fractures were noted, but the pursuer was told he had a crush injury. The pursuer's pain got worse, and he continues to experience pain, mainly around his hips and lower spine. He also has shooting pain down his legs to his knees and toes. I pause here to note that the defenders' agent took objection to evidence about ongoing pain, as the only averments on record relate to ankle pain. As the pursuer was not legally represented, I allowed the evidence, subject to submissions about its competence and relevance. The pursuer has attended a consultant about his back problems. He has received three spinal steroid injections. The first made his pain worse, the second made it better, and the third was not effective. His waiting for a further appointment, which may result in an injection in a different area. The pursuer has been told his hip pain radiates from a crush injury to his spine. The pursuer attended the Spire hospital in Warrington for keyhole surgery to remove 'debris' from his right ankle. This helped for a while, but pain came back. The pursuer had

previously injured that ankle in about 2008, and that had been treated successfully. His ankle is weak, and he has to be careful not to go over on it.

12. Prior to the accident, the pursuer went cycling and mountain biking, hill walking and swimming. He went to the gym regularly. He no longer does these activities. He tried swimming twice, but still experienced pain. He tried cycling about a year and a half ago, and the pain was too bad for him to continue. He tries to walk every day. The pursuer has not been able to return to work, at sea or otherwise. He receives a number of social security benefits. The pursuer said he was on a rolling contract with Marine Scotland, renewed every 3-4 weeks. The pursuer was not sure if he had seen the spreadsheet 6/1 of process, but agreed the figures for his earnings set out there seemed about right. He had been on sick pay for about eight weeks after the accident, and was then dismissed. The pursuer had received help from his sister, Sharon Farley, with shopping twice a week, and with carrying things and other help around the house. That had been for a couple of years.

13. In cross-examination, the pursuer agreed that he had been on a Delta RIB before, but not on *Hirta*. He had undertaken health and safety training with Marine Scotland, and also on a number of courses which he had undertaken for certification during his career at sea. That training included launch and recovery of RIBs. The pursuer accepted it was dangerous to move around a RIB during recovery. There was a danger amongst other things of falling over. The pursuer denied there were any seats available on the RIB, because they were all taken by the officers on board. The pursuer did not accept that no one on board ship nor on board the RIB told him to move for'ard. The pursuer did not accept that Mark Lockwood had not told him to move for'ard. He did not accept that the RIB was smoothly lifted into the cradle. He did not accept that the RIB crew and others on *Hirta* were unaware he had been injured.

14. The pursuer was unaware there were no averments on record about a crush injury. He agreed he had had an ankle injury in 2008. He agreed he had had problems with his back prior to the accident, those had followed heavy lifting in another job. He was unaware there were no averments on record about ongoing back problems; so far as he understood, documents (meaning productions) had been submitted about ongoing pain in his elbows, back, hips and legs. He said he had nerve and ligament damage and an annular tear of a disc.

15. The pursuer agreed he had been on a fixed-term appointment, renewed every 2-3 weeks. He agreed he had been paid till the end of his contract term. He repeated that he had understood that after the selection board the Captain had told him he had got the full-time job for life. He had not been informed he would only get a full-time job if one was available. The pursuer understood that documents had been lodged to demonstrate he could not work as a result of the accident.

The defenders' evidence

Mark Lockwood

16. Mark Lockwood is now a Marine Superintendent with Marine Scotland. In June 2016, he was the Captain of MPV *Hirta*. Marine Scotland is a directorate of the Scottish Government. He recalled being on the port side bridge wing at the time the RIB was being recovered to the ship on 4 June 2016. He was two decks above and estimated the straight-line distance was about 15-20 metres from the RIB. He was looking at a 45 degree angle. It was his job to indicate if it was safe for the RIB to come alongside for recovery. The painter was connected and the crew of the RIB all took their seats. Mr Lockwood thought there were four people on board: the pursuer, Mr Pederson, the coxswain; Paul Macleod, the deck

officer; and one other. He could not recall Chris Ross or Gary Adamson being on the RIB.

There was a seat for each of them. The pursuer was sitting next to the coxswain's seat adjacent to the controls.

17. When the RIB leaves the water, the majority of the weight is at the rear. With a Delta RIB, it is not unusual for the RIB to come up at an angle. It was hard to estimate the angle; 45 degrees might be possible, but seemed to Mr Lockwood excessive. During recovery of the RIB, no-one aboard should move once the RIB is out the water, because if one is not seated in a seat or on the sponson holding the grab rope, there is a danger of falling out because of sea and wind conditions. Mr Lockwood saw the pursuer get up and move to the for'ard end of the RIB as it was being lifted. The pursuer appeared to be trying to balance the weight so the RIB would come closer to the horizontal. Mr Lockwood did not tell the pursuer to do that; nor did he gesture to him to do so. He was not aware of anyone else doing so; there was audible noise of messages being passed but he could not hear what was said. The stern of the RIB touched the cradle first. The front came down sharply, at an angle rather than horizontally. He did not agree with the description freefall, because the aft end had already touched the cradle. The RIB did not bounce twice. In his view it was not possible for it to bounce when being lowered by remote control. Mr Lockwood did not recall the pursuer rolling around after the RIB was fully aboard. He recalled asking the pursuer if he was okay. The pursuer had been on another RIB launch later in the day. The pursuer came to see Mr Lockwood with the duty officer around 23.00 asking for painkillers.

18. It was a regular part of the pursuer's duties aboard *Hirta* to launch and recover RIBs. That was done daily. The Delta RIB was carried when one of the Pacific RIBs was away for repair or maintenance. Mr Lockwood believed the pursuer had worked the Delta before. The Delta had been picked up in Aberdeen at the start of the trip. It was standard practice

to run a RIB once it was taken on board as a replacement to ensure there were no issues.

The pursuer and Mr Pederson were responsible for making daily checks on both RIBs. They were the only people operating the RIBs. All Able Seamen have the efficient deckhand qualification which includes significant health and safety training. That includes the operation of RIBs and the davit or crane used for launch and recovery.

19. The pursuer was on a fixed-term appointment. He undertook several trips on *Hirta* during that appointment. When Marine Scotland requires agency cover for sickness or vacancies, someone appropriately qualified is identified for a fixed-term appointment. Such appointments might be extended for a further fixed period to give continuity of cover.

Mr Lockwood thought the pursuer had been engaged to cover long-term sick leave.

Mr Lockwood confirmed he had been on a panel interviewing the pursuer during his service. That was not for appointment to a full time permanent role; rather it was to form a reserve list for a period of nine months, and any vacancies in that period would be filled from the reserve list. The pursuer was successful in getting on to the reserve list. No vacancy arose while the pursuer was number 1 on the list. After the nine month period, a further recruitment process would start, and anyone on the reserve list would be welcome to apply. The pursuer had spoken to Mr Lockwood a number of times after the selection board about progression, and he had explained to the pursuer that if a vacancy came up in the nine month period he would be considered. Further, a letter communicating that would be sent to the pursuer by the Scottish Government.

Paul Macleod

20. Paul Macleod is currently a First Officer (Executive) with Marine Scotland, and in June 2016 was a Second Officer aboard FPV *Hirta*. He was on board the RIB at the time of

the accident. He was seated at the back of the RIB, behind the area where the steering controls were located. There were four or five people on board. Mr Macleod could not recall the identity of person driving the RIB. He recalled the pursuer and Chris Ross being on board.

21. When the RIB was alongside *Hirta*, and being raised out of the water, the bow was unbalanced. The pursuer moved to the front of the RIB to counteract the weight. Because of where he was sitting, Mr Macleod could not see exactly where the pursuer went.

Mr Macleod could not recall if anyone told the pursuer to move for'ard. He had not been able to see the pursuer's reaction when the RIB came to rest in the cradle. He did not recall hearing the pursuer screaming at that point. Marine Scotland required health and safety training on board *Hirta*, specifically on the risk assessment for RIB operations on first trip aboard. That training included instruction not to move about the RIB once it was being lifted out the water.

Submissions

Pursuer's submissions

22. The pursuer agreed he had seen the Record and had received a copy of it. I explained to him that the record set out the parameters of the case, particularly in relation to the components of the losses claimed. The pursuer sought an award of damages and summarised the account he had already given of the events on 4 June 2016, and the medical treatment he had received.

23. The pursuer did not accept the accident was his fault to any extent. He referred to the RIB being at an angle, and to being asked to go for'ard. He also spoke of having decided for himself to going forward to try to balance out the RIB. He said Mark Lockwood was

mistaken about the Delta RIB having been used during the voyage prior to the occasion in question. He said Mr Lockwood was also incorrect in his evidence about the RIB being lowered into the cradle. He disagreed with Mr Lockwood's recollection of who had been present on the RIB, and pointed to what Paul Macleod had said about Chris the safety officer being aboard the RIB.

24. The pursuer reprised all of the injuries he attributes to the accident, not all of which are the subject of averments on record. He said he has pain in his elbows (not on record) hip pain (not on record) in his spine (there is no record for continuing pain) and his right ankle. He was not able to go to the gym, to swim, cycle or go mountain walking. On the matter of loss of earnings, the pursuer reprised his view about the selection board he attended in the period prior to the accident, and in particular that he had been given a permanent full-time post. However, he accepted it was possible Mr Lockwood's account of the purpose of the selection board was correct.

Defenders' submissions

25. Ms Thomson submitted that I should prefer the evidence of the defenders' witnesses. Their evidence was clear and broadly consistent. The witnesses accepted the limitations on what they could see, but both had seen the pursuer move forward as the RIB was being lifted. Ms Thomson challenged the pursuer's qualifications to give evidence about any medical matters or about loss of earnings.

26. Ms Thomson invited me to make a substantial finding of contributory negligence, for a number of reasons. First, the pursuer already had experience working aboard *Hirta*, including working the RIBs. Secondly, the pursuer had relevant health and safety training. The defenders' witnesses spoke to that too. Thirdly, the pursuer moved forward while the

RIB was being lifted on board *Hirta*. Fourthly, the health and safety training was that one should remain seated. The pursuer himself accepted it was dangerous to move during recovery. Fifthly, there was a clear risk in moving once the RIB was being lifted. Sixthly, the pursuer was aware of that risk, and took it on himself to move forward. In summary, in her submission, the pursuer had failed to take reasonable care for his safety.

27. On damages, Ms Thomson submitted the pursuer had failed to establish causation. There were limits to what the pursuer averred. He had made averments about medical treatment, but there was no averment to link treatment to injuries caused by the events on 4 June 2016. The pursuer said he had understood papers had been submitted about his medical condition, but that was not fair notice of his case. Even allowing for the pursuer not being legally represented, the rules about pleading and fair notice were fundamental. The only evidence the court had heard was from the pursuer. The medical records had been agreed as documents, but had not been agreed to be equivalent to the evidence of the clinicians and others who made the records. There were no pleadings and no evidence to connect the events and the pursuer's claimed injuries; further he had pre-existing medical problems with his knee, ankle and back.

28. In any event, and as a fall-back, Ms Thomson submitted that the pursuer had suffered a soft-tissue injury from which full recovery within 6 months would be anticipated; any other symptoms were related to pre-existing conditions. On quantification, she referred me to the Judicial College Guidelines on Damages for Personal Injuries. She submitted section 7(B)(c)(iii) was the appropriate bracket for the pursuer's back injuries, and could be valued at £3000 at its highest. Section 7(L)(d) was the appropriate bracket for his ankle injuries, £2000 at the highest. There was a 20% overlap, so £4000 was an appropriate total

valuation. Interest at 8% was £2000. That made for £6000 on a full liability basis for solatium.

29. On loss of earnings, Ms Thomson submitted that the pursuer had failed to establish a causal connection and this should be valued at £nil. Even if there was a causal connection, the pursuer was on a fixed term contract, so there was still a nil loss. Mr Lockwood's evidence should be preferred about the nature of the selection board. 6/1 showed the pursuer had been paid in full to the end of his contract. On services, Ms Thomson submitted the pursuer had failed to prove there were *necessary* services. But if that was not accepted, the assistance came only from the pursuer's sister and for a very limited amount. She submitted this should be assessed at £500 including interest. Ms Thomson submitted that a full liability valuation was therefore £6500. From that there should be a significant deduction for contributory negligence.

Analysis and decision

Assessment of witnesses

30. I was satisfied the pursuer believed in the truth of what he told me in evidence. However I formed the impression that his account of events is informed in part by the constellation of symptoms which he attributes to his injuries on the day, not all of which are subject of averments on record, and none of which was the subject of evidence from a medical practitioner. I did not find some elements of the pursuer's evidence about events on 4 June 2016 to be reliable, because it was at variance with the evidence of other witnesses, which, by contrast, was consistent on many key points about these events. In general, I found Mark Lockwood to be a credible and reliable witness. He indicated those matters which he could not clearly recall. I found Paul Macleod to be credible and reliable on the

limited number of matters he was asked about. Again he was clear about what he could and could not recall, and also about what he could and could not see of the events of 4 June 2016.

Liability and contributory negligence

31. On record, the pursuer's case is one of common law fault on the part of the defenders' employees. The defenders admit liability on record, but plead contributory negligence on the part of the pursuer. That means that the live liability issue for the court is contributory negligence, which is to say whether, and, if so, to what extent, the pursuer contributed to the accident by his own negligence. On his own account, the pursuer decided for himself to go for'ard to try to "balance out" the RIB, and get it into a horizontal position for recovery. He said there were a lot of people shouting to go for'ard. Mr Lockwood was clear the he did not tell the pursuer to do that, nor did he gesture to him to do so. Mr Lockwood was aware of shouting from the deck when the RIB was being recovered, but could not make out what was being said. Mr Macleod had no recollection of anyone telling the pursuer to move.

32. I am accept that there was shouting from crew members as the RIB was being brought on board. Because of the concerns I have about the reliability of some of his evidence, I do not accept the pursuer's evidence that people were shouting at him to move for'ard on the RIB. Rather, I consider that his account that he decided for himself to do that is what happened. I consider that he acted out of a desire to help as he saw it, but he did so contrary to what was the safe practice recognised by the pursuer himself, Mr Lockwood, and Mr Macleod that once a RIB was lifted out of the water, those on board should stay in their seats or remain on the sponson holding the grab rope. It was common ground that being out of one's seat as a RIB was recovered on board the *Hirta* carried with it a material

risk of injury. The pursuer is an experienced seaman, and holds a number of certificates in order to gain which I was told involved safety training. I accept the evidence of all witnesses that on-board health and safety training was mandatory and that included RIB training on a person's first trip. Accordingly, I conclude that the pursuer was or ought to have been aware of the risks in acting as he did. I therefore find he was contributorily negligent. Taking a broad view of the evidence in the round and having regard to the factors set out above, I assess that contributory negligence at 50%.

Causation

33. I do not accept the pursuer's evidence that the RIB was in freefall to the cradle. I prefer Mark Lockwood's evidence that the stern was in the cradle and the bow end descended sharply, and the pursuer was sitting on the floor of the boat at that end. The pursuer reported pain sufficient to seek out senior officers on the evening of 4 June and request strong painkillers. He was taken to hospital the following day. No fracture was found, but he was thought to have a soft tissue injury. On the balance of probabilities, I hold that was caused by the manner in which the bow end of the RIB was lowered to the cradle.

Assessment of damages

34. Turning to the assessment of damages. On record, five heads of loss are pled: solatium, loss of earnings, services, inconvenience and out of pocket expenses. In my view, inconvenience is not a self-standing head of claim in a case like this, and properly forms part of solatium. I heard no evidence about out of pocket expenses.

Solatium

35. The pursuer summarised his injuries, but, perhaps understandably, did not address me with reference to case-law or other authority. Ms Thomson submitted that as the pursuer is not medically qualified, he was not in a position to give evidence about medical matters nor about causation. I think that goes too far. Pursuers in actions of this kind routinely give evidence about their symptoms and medical history, as did the pursuer here, without objection. That is evidence of fact about those matters. What is correct, though, is that beyond this, the pursuer is not in a position to do more than report diagnoses given to him by treating clinicians, and he is certainly not in a position to give evidence about medical causation and prognosis.

36. From that it follows there is less information about the medical aspects of this case than the court would ordinarily anticipate. Nevertheless, in my view, on the facts I have held established, I am able to conclude the pursuer suffered soft tissue injury to his lower back and injury to his right ankle as a result of the accident. The pursuer accepted he has had problems with his back and his ankle previously, which when taken with the absence of evidence from a medical practitioner, makes it impossible for me to reach a definitive view about ongoing effects, if any, of the injury from the accident. Nonetheless, it is reasonable to infer a period of symptomatic pain. This is the type of injury where it is possible to anticipate gradual improvement over a period months, though in his evidence, the pursuer asserted otherwise, but that was not vouched by the evidence of a medical practitioner. That is as far as I consider the evidence which I have accepted allows the court to go.

37. Turning to valuation, I agree with Ms Thomson that the Judicial College Guidelines on Damages for Personal Injuries provide a helpful range. I consider that the pursuer's back injury is at the top end of the bracket in section 7(B)(c)(iii), and I would award £4350. I

consider that the ankle injury falls within section 7(L)(d), and that a figure of £2000 is reasonable. I agree with Ms Thomson's submission that there is an overlap of 20%. That brings a value of £5080 for solatium. Interest to date at 8% is £2473.

Wage loss

38. The pursuer was on a fixed term contract at the time of the accident. I accept his evidence that he attended and passed a board to be considered for a full-time permanent appointment. I prefer Mr Lockwood's evidence about the purpose and outcome of that board, namely that the pursuer was put on a list of appointable candidates to fill any vacancies which became available within a nine month period of the board. Passing the board was not, of itself, appointment to a permanent post. I accept Mr Lockwood's evidence about that because he was the vessel's captain and a member of the board, and therefore familiar with the terms of appointment. I also accept his evidence that he explained this to the pursuer a number of times subsequently. The pursuer accepted it was possible Mr Lockwood was correct about that. From that it follows that the pursuer was not on a permanent contract at the time of the accident. Mr Lockwood's evidence that no vacancy arose at a time when the pursuer was at the top of the list of appointable candidates was not challenged.

39. It is common ground the pursuer's employment ceased in August 2016, and that he was paid up to the end of his employment. That is vouched by 6/1 of process, which the pursuer agreed looked about right as a statement of his earnings in that period. The pursuer in effect invited me to infer his employment was terminated because he was unfit through injury. I cannot do that, because there is no evidence which points in that direction. In light of my conclusion that the pursuer was on a fixed-term contract, not a permanent post, that

fixed-term contract simply reached its natural term. As I have already concluded the pursuer was not on a full-time permanent contract, and no opportunity for one arose whilst the list was live. Further, no evidence was led to demonstrate the extent to which the pursuer might be unfit for work, nor was evidence led to confirm whether any ongoing difficulties are attributable to the accident rather than other causes, for example pre-existing conditions. I accordingly conclude there was no loss under this head of claim.

Services

40. The pursuer gave evidence that his sister, Sharon, had helped him with shopping twice a week and some, unspecified, tasks around the house. That had lasted for a couple of years. Taking a very broad axe, I consider that £1000 inclusive of interest to date reasonably accounts for that.

Overall assessment of damages

41. Drawing those together:

Solatium	£5080
Interest	£2473
Loss of earnings	£nil
Services (inclusive of interest)	£1000
Total	£8553

As I have assessed contributory negligence at 50%, that amount falls to be reduced to £4273.

Conclusion

42. I will therefore pronounce decree in the pursuer's favour in the sum of £4273. I was not addressed on expenses, and a hearing will therefore be fixed.