SHERIFFDOM OF LOTHIAN AND BORDERS AT EDINBURGH
IN THE ALL-SCOTLAND SHERIFF PERSONAL INJURY COURT

[2025] SC EDIN 39

PIC-PN799-21

JUDGMENT OF SHERIFF CHRISTOPHER DICKSON

in the cause

NM

Pursuer

against

(FIRST) TO; and (SECOND) AO

Defenders

Pursuer: Conway (sol adv); Conway Accident Law Practice
Defenders: Fairweather (sol adv); Clyde & Co (Scotland) LLP

EDINBURGH, 7 March 2024

The sheriff, having resumed consideration of the proof, finds the following facts admitted or proved:

FINDS IN FACT

1. That the pursuer is NM. She has four children, C, Z, N and A. When A was born in July 2017 she: (i) was unwell; (ii) required to be fed via a nasogastric tube ("NG tube"); and (iii) required a number of hospital visits in the first year of her life.
2. The defenders are TO and AO. They are married and own a particular dwelling house in Coatbridge (the "property").

3. The property was built around 1995. The property is semi-detached and includes: (i) a ground floor kitchen; (ii) a ground floor living room; (iii) two first floor bedrooms; and (iv) a first floor bathroom. The bathroom contains a toilet, bath and sink. The bath was a standard size and contained separate hot and cold water taps. The bathroom did not contain a shower. An electric shower was located in a cupboard in one of the bedrooms. The defenders purchased the property and took entry in December 1997. The defenders were the first persons to live in the property.

4. The defenders lived in the property until around December 2007. The defenders then moved to a new home and rented out the property. The defenders have rented out the property from December 2007 until the present day.

5. A number of tenants rented out the property prior to the pursuer moving into the property. At least one of these tenants had young children aged about seven and four.

6. The pursuer rented the property from the defenders and moved in on 1 March 2017. The lease that the pursuer had for the property was a short assured tenancy. When the pursuer moved in to the property the hot water and heating were working correctly. The pursuer was evicted from the property in November 2018. During the pursuer's tenancy of her property she resided there with Z, N and A (after she was born in July 2017). C resided with the pursuer's mother, KM, but the pursuer saw C on a daily basis.

7. Throughout the pursuer's tenancy of the property the hot water and heating system consisted of: (i) a boiler located in the kitchen; (ii) a hot water cylinder in

the cupboard of the first floor master bedroom; (iii) a cold water storage tank in the loft; and (iv) radiators throughout the property.

8. The mains cold water supplied the cold taps and the cold water storage tank in the property. The gas fired boiler was supplied with mains cold water. The boiler supplied hot water to the radiators and the hot water cylinder. The timer had overall control of the hot water cylinder. The hot water cylinder contained a coil within it and was fitted with a thermostat. The timer could be set to once, twice or three times a day. At those set times the boiler would send hot water to the hot water cylinder, via a motorised valve, until the temperature in the hot water cylinder reached 60°C. Once the temperature of water in the hot water cylinder reached 60°C the motorised valve would stop further hot water being sent from the boiler to the hot water cylinder. When a hot water tap was turned on the cold water storage tank would then supply cold water to the bottom of the hot water cylinder. The cold water flowing into the hot water cylinder would push hot water out of the top part of the hot water cylinder, which would result in hot water being sent to the hot water tap requesting hot water. A room thermostat controlled whether hot water was sent from the boiler to the radiators. The electric shower had a cold mains supply with an inbuilt thermostat and was unrelated to the operation of the boiler.

9. A thermostatic mixing valve ("TMV") is a valve that is able to accurately control the temperature of water coming from a hot water tap or shower. A TMV can be set to a specific temperature and works by blending hot water with cold water to reach the desired temperature. Throughout the pursuer's tenancy there was not a

TMV installed at any location in the property. In particular there was not a TMV fitted to control the temperature of the bath hot water tap.

10. The Building Standards technical handbook 2017 ("the 2017 technical handbook") provides guidance on achieving the standards set in the Building (Scotland) Regulations 2004 (the "2004 regulations") and are available in two volumes, domestic and non-domestic. Compliance with the 2017 technical handbook is not mandatory and failure to adhere to the 2017 technical handbook will not result in civil liability. However, proof of compliance with the 2017 technical handbook may be relied on in any proceedings as tending to negative liability for an alleged contravention of the 2004 regulations. Paragraph 4.9 of the 2017 technical handbook provides, amongst other things:

> "**4.9 Danger from heat**
>
> **Mandatory Standard**
>
> **Standard 4.9**
>
> Every building must be designed and constructed in such a way that protection is provided for people in, and around, the building from the danger of severe burns or scalds from the discharge of steam or hot water.
>
> […]
>
> **4.9.5 Hot water discharge from sanitary fittings**
>
> Guidance to the Water Byelaws recommends that, to prevent the development of Legionella or similar pathogens, hot water within a storage vessels should be stored at a temperature of not less than 60°C and distributed at a temperature of not less than 55°C.
>
> […]
>
> To prevent scalding, the temperature of hot water, at the point of delivery to a bath or bidet, should not exceed 48°C.

A device or system limiting water temperature should not compromise the principal means of providing protection from the risk of Legionella. It should allow flexibility in setting of a delivery temperature, up to a maximum of 48°C in a form that is not easily altered by building users. This will allow reduction of temperature where, for example, facilities are used by those more at risk from injury, such as elderly people or unsupervised children."

11. The bathroom at the property had not been refurbished since the defenders became owners of it in 1997.

12. The Thermostatic Mixing Valve Manufacturers Association: Recommended Code of Practice for Safer Water Temperatures (the "TMV Manufacturer's Code") was issued in March 2000. The TMV Manufacturer's Code stated that it was primarily concerned with non-domestic installations but that the guidance given was equally appropriate in domestic situations. The TMV Manufacturer's Code provides, amongst other things:

"**2.0 THE RISKS**

There are two areas of risk covered by this document.

a. Scalding from hot water
b. Legionella infection typically from stored hot water

[…]
Effective measures can be used to minimise the risks for both scalding and legionella. However in many cases the control measures needed to reduce either one of the risks increases the potential risk from the other.
Hot water temperatures that do not cause scalding are ideal for the legionella bacteria to grow in a water system……but hot water temperatures that kill the legionella bacteria will cause scalding.

3.0 THE FACTS

3.1 Scalding

[…]

Evidence on scalding (Ref. 1,2), indicates a risk increasing rapidly from temperatures of 45°C and above. For example, partial thickness burns will occur within 30 seconds at 55°C, reducing to less than 5 seconds at 60°C and

above. These examples are taken from figures represented in the NHS Estates Health Guidance note, 'SAFE' hot water and surface temperatures' (Ref. 1) but are only guideline figures. Skin sensitivities vary greatly throughout the population, as do the risks from high temperatures for the population with specific medical conditions.
[…]

4.0 THE CONTROL OF DISCHARGE TEMPERATURES

[…] The objectives of any control system are to store water at above 60°C, distribute water at 55-60°C, yet deliver water at discharge temperatures between 35-46°C.

[…]

4.1.1 Bath fill temperatures

- Normally a set temperature between 41°C and 44°C is sufficient to suit most users.

[…]

- Fill temperature above 44°C should only be considered in exceptional circumstances (3.1.1)"

13. The BRE Information Paper, Preventing Hot Water Scalding in Bathrooms: using TMVs (the "BRE paper") was issued in 2003 and provides, amongst other things:

"[…]

The problem

[…]

Young children and older people are most at risk from bath scalds because their skin is thinner and therefore less tolerant to higher water temperatures than that of other age groups.

[…]

Over three-quarters of severe scalds are suffered by children under five years of age, and almost three-quarters of the fatalities are people aged 65 and over…

[…]

Severe scalds in seconds

The degree of scalding depends on the temperature and volume of hot water, and the length of time the body is exposed to it. However it can take only seconds for a severe scald to occur. Research (Waller et al, 1993) indicates that: *As the temperature of the water increases above 50°C, the duration of exposure needed to suffer third-degree burns decreases rapidly. Healthy adult skin requires 30 seconds of exposure to water at 54°C - 55°C before third-degree burning occurs, but only 5 seconds at 60°C and less than one second at 70°C. However, the skin of children and the elderly is even more sensitive to extreme temperatures.*

[…]

Preventing bath water scalds

Parents can minimise the risk of scalding by closely supervising bath-time, so that a child has no opportunity to turn on the hot tap while their parent is distracted. However, the most effective safety measure is the installation of a thermostatic control device to regulate the bath water outlet temperature to reduce the risk of severe scalding. For deprived families, cost is the barrier and only the social housing provider can afford to introduce this.

[…]

Control of water temperatures

[…]

For appliances within bathrooms, the discharge temperatures should be between 37°C and 46°C from the outlets.

An effective way of achieving these objectives is to store and distribute water at high temperatures and use thermostatic mixing valves (TMVs) at, or very close to, the point of use to reduce outlet temperature."

The BRE paper then notes that whilst a TMV is not: (i) *required* by legislation or authoritative guidance; or (ii) *recommended* by legislation or authoritative guidance; it is suggested best practice to use a TMV for a bath.

14. The Chartered Institute of Building Services Engineers ("CIBSE") Guide G: 2014, provides, amongst other things:

"**2.4.4.5 Safe water temperatures**

Safe water temperatures needed to be considered for hot water supplies to appliances used by elderly, infirm and young persons. The requirements of 60-65°C for stored hot water and a minimum 50-55°C for distributed hot water, in order to minimise the risk of *Legionella*, mean that temperature control will need to be provided at draw off fittings used by persons at risk of being scalded. NHS document D08 limits the temperature to taps in all NHS-type buildings (i.e. hospitals, care homes etc.) and Building Regulation G3(4) limits bath temperatures in new dwellings and dwellings created by a change of use. Note that requirements may differ in Scotland and Northern Ireland.

Thermostatic mixing valves

[…]

Design codes for health buildings require that all draw-off points that can be used by patients limit the temperature of the hot water to 43°C.
The codes also extend to care homes for elderly persons and sheltered dwellings, which are under the responsibility or licence of the local authority. Other buildings that require consideration are nurseries, schools and anywhere there is a 'duty of care' by the building owner, landlord and/or managing agent."

CIBSE Guide G also notes that the temperature recommended by NHS Estates for baths was 44°C to 46°C.

15. The Chartered Institute of Plumbing & Heating Engineers ("CIPHE") state that (i) water will be stored at not less than 60°C to prevent the development of legionella bacteria; (ii) that water will be distributed to outlets at 55°C.

16. It is normal for a domestic property: (i) built before the 2004 regulations came into force on 1 May 2005; and (ii) not having had any refurbishment work done to bring it within the 2004 regulation; to have a discharge temperature of 55°C at the hot water taps.

17. The hot water cylinder at the property required to store hot water at around 60°C to prevent the development of the legionella bacteria.

18. Throughout the pursuer's tenancy the hot water cylinder, when operating correctly, stored hot water at around 60°C and discharged hot water at the hot water taps at a temperature of 55°C. The hot water cylinder at the property had a capacity to hold around 125 litres of water.

19. Throughout the pursuer's tenancy the defenders had a home care 300 maintenance contract in place with Scottish Gas (the "Scottish Gas maintenance contract") in relation to the property which included:

    (1) Call out within 24 hours and repair of the gas central heating system, including boiler, radiators, hot water cylinder, the water pipes that connect them and controls such as thermostat and programmer;

    (2) Yearly service of the boiler to ensure it was running safely and efficiently;

    (3) Call out and repairs to hot and cold water pipes, the water supply within the boundary of the property and drains and waste pipes to restore flow;

    (4) A gas safety check and certificate;

    (5) Kitchen appliance cover;

    (6) 24/7 helpline every day of the year; and

    (7) Entitlement for tenants of the property to contact Scottish Gas directly and arrange a call out to address an issue covered by the Scottish Gas maintenance contract.

    As part of the Scottish Gas maintenance contract, Dyno Plumbing would deal with plumbing issues on behalf of Scottish Gas.

20. Between 1 March 2017 and June 2017 the pursuer had the ability, as part of the Scottish Gas maintenance contract, to contact Scottish Gas directly to arrange a call out. In June 2017 the pursuer made contact directly with Scottish Gas in order to

arrange a call out but was prevented from doing so by a call handler at Scottish Gas who wanted to know the first defender's date of birth. From around 20 June 2017 the first defender resolved the issue with Scottish Gas that resulted in the pursuer being unable to arrange a call out directly and the defenders gave the pursuer permission to contact Scottish Gas directly and instruct any repairs in relation to any issue with the heating, plumbing or hot water system. On or around 26 March 2018 the defenders informed Scottish Gas that any further repairs were to be instructed via the defenders.

21. As part of the Scottish Gas maintenance contract, the following interactions occurred in relation to the property (all interactions are by Scottish Gas, unless otherwise stated):

    (1) 1 November 2016 – Landlord's gas safety inspection and annual service visit completed. The landlord's gas safety record noted that, amongst other things, the boiler was safe, the gas installation tightness test and visual inspection of gas was a pass and that the next service check was due within 12 months;

    (2) 15 April 2017 – No heating or hot water was reported. The engineer replaced the room thermostat.

    (3) 17 June 2017 – "All off" was reported, which was interpreted by Scottish Gas that the pursuer did not have heating or hot water. The engineer:
    (i) removed air from the hot water cylinder and upstairs radiators to rectify the fault; (ii) explained that a powerflush was advised due to the poor water quality in the heating system; and (iii) provided advice that the boiler

should be replaced due to low efficiency and difficulty obtaining spare parts;

(4) 22 June 2017 – Dyno Plumbing plumber cleared an airlock on the cold water system;

(5) 20 September 2017 – Dyno Plumbing attended to rectify a fault with the toilet not flushing. They also cleared an airlock. The pursuer advised Dyno Plumbing that she had no control over the hot water and heating temperatures. Dyno Plumbing referred that issue to Scottish Gas.

(6) 21 September 2017 – An engineer attended the property but could not gain access to the property as the pursuer had gone out.

(7) 1 November 2017 – Landlord's gas safety inspection and annual service visit completed. The engineer removed air from the system. The landlord's gas safety record noted that, amongst other things, the boiler was safe, the gas installation tightness test and visual inspection of gas was a pass and that the next service check was due within 12 months;

(8) 24 February 2018 – No heating or hot water was reported. The engineer: (i) reset an overheat stat; (ii) identified a fault with a pump; (iii) quoted for a powerflush; and (iv) gave advice that the boiler should be replaced due to low efficiency and difficulty obtaining spare parts.

(9) 26 February 2018 – "All off" reported. The engineer was unable to gain entry.

(10) 28 February 2018 – Further visit regarding the "All off" reported on 26 February 2018. The Engineer identified a fault with the fan in the boiler

and gave advice that the boiler should be replaced due to low efficiency and difficulty obtaining spare parts.

(11) 17 March 2018 - Dyno Plumbing renewed the fluidmaster syphon and a ballcock at the toilet.

(12) 27 March 2018 – "All off" reported. The engineer's visit was cancelled by the pursuer.

After each of the above interactions (where access was gained to the property) the hot water and heating were working at the property.

22. On 1 September 2017 the pursuer renewed her lease of the property and the pursuer and the defenders entered into a short assured tenancy. At that time the pursuer advised that she was happy with the property and did not raise any concerns.

23. Around March 2018 the pursuer contacted the first defender to advise that the heating was not working. The pursuer said that Scottish Gas had been out to the property on lots and lots of occasion. The first defender contacted Scottish Gas to confirm how many call outs there had actually been. Dyno Plumbing replied to the first defender by email of 28 March 2018 and Scottish Gas replied to the first defender by email on 29 March 2018.

24. The Dyno Plumbing email of 28 March 2018 included the following:

> "We have had 3 call outs on the plumbing side of your homecare from March 2017:
>
> 22nd June 2017 – plumber cleared airlock on cold water system
>
> 20th September 2017 – cleared another airlock but also passed a job to British Gas for problem with hot water

> 17th March 2018 – plumber renewed the fluidmaster syphon and ballcock at the toilet"

25. The Scottish Gas email of 29 March 2018 included the following:

> "I can confirm the engineer attended the property on 1st November 2017 to carry out landlord inspection and check your central heating boiler and gas hob. All of the necessary safety and efficiency tests were completed and everything was found to be satisfactory. He also advised that upgrade work would be required to improve the efficiency of the boiler.
> […]
> The engineer attended the property on 17th June 2017 to carry out an annual service together with a repair visit of your central heating boiler. Due to the age and efficiency of the appliance it has been recommended that a replacement should be considered.
> […]
> The engineer attended the property on 15th April 2017 to carry out a repair visit of your central heating boiler. He renewed room stat. Due to the age and efficiency of the appliance it has been recommended that a replacement should be considered.
> […]
> The engineer attended the property on 28th February 2018 to carry out a repair visit on your central heating boiler. He also advised that upgrade work would be required to improve the efficiency of the boiler.
> […]
> The engineer attended the property on 24th February 2018 to carry out a repair visit of your central heating boiler. Due to the age and efficiency of the appliance it has been recommended that a replacement should be considered. He also advised that upgrade work would be required to improve the efficiency of the boiler."

26. CM is a central heating engineer who has been employed by Scottish Gas for 25 years. He was not friends with the first or second defender. In around March 2018 CM was asked by the defenders to visit the property to see whether they needed a new boiler. CM visited the property on one occasion. His visit lasted about 15 minutes. During his visit to the property the heating was working. CM formed the view that it was not necessary to change the boiler. During his visit to the property: (i) the pursuer did not advise him that: (a) the hot water was too hot, or (b) if both the hot and colds taps in the bath were run

together, the hot water would run cold ("the simultaneous tap problem"); (ii) CM did not carry out any work on the heating or hot water system; and (iii) CM did not check the discharge temperature of the hot water at the property. CM reported back to the defenders that the boiler in the property was maybe not as efficient as a new boiler but that if CM had that boiler in his own house he would be happy to keep it.

27. At no point after 21 September 2017 did the pursuer complain to Scottish Gas, Dyno Plumbing or the defenders about the hot water at the property being too hot.

28. On 11 April 2018 A was in hospital and the pursuer stayed overnight at the hospital with A. A was discharged from hospital on 12 April 2018.

29. Around 1845 hours on 12 April 2018 the pursuer returned to the property with Z, N and A. At that time Z was aged 6, N was aged 4 and A was approximately 9 months' old. At that time A was downstairs asleep in her push chair. A still had a NG tube fitted. Z and N went upstairs to the pursuer's bedroom. Z commenced playing on a PlayStation and N commenced playing on an iPad. The pursuer decided to have a bath. She ran a bath in the upstairs bathroom which was opposite the pursuer's bedroom. The pursuer ran a bath using only hot water from the bath hot water tap. The pursuer then heard A crying downstairs. The pursuer pulled the bathroom door closed a bit and went downstairs to tend to A. The pursuer did not give Z or N any warning about the hot bath water or take the boys downstairs. The pursuer picked up A and sat with A on her knee downstairs. At that point there was not an emergency situation with A. There then came a point when there was an altercation between Z and N. The pursuer

heard a commotion going on upstairs between Z and N, but remained downstairs. During the altercation Z pushed N into the bath which was about half full with the hot water from the bath hot water tap. N was partially submerged in the hot water in the bath and was unable to immediately get out of that hot water. Both Z and N suffered scald injuries. N's scald injuries were particularly severe.

30. Whilst the pursuer remained sitting downstairs with A, she heard N screaming. N then appeared at the top of the stairs with his clothes soaking wet. The pursuer put A back in her pushchair and took N downstairs to the living room. The pursuer then telephoned her father and for an ambulance. At some point Z came down stairs complaining of scald injuries. The period between the pursuer first hearing A cry and N appearing at the stop of the stairs was in the region of 10 minutes.

31. At the time of the accident on 12 April 2018 Z was normal young boy who did not need additional supervision beyond what would be expected of any 6 year old boy.

32. On the date of the accident on 12 April 2018, the temperature of the bath water that N was partially submerged in was 55°C.

33. As the property had been built in 1995 and had not had any refurbishment work done to bring it within the 2004 regulations: (i) it was not governed by the 2004 regulations or the terms of the 2017 technical handbook; and (ii) a discharge temperature at the hot water taps of 55°C was normal and to expected in a house of that age.

34. It takes around 30 seconds of exposure to water at 55°C to produce a full thickness burn in an adult.

35. It would take less than 30 seconds of exposure to water at 55°C to produce a full thickness burn in a child.

36. It would have taken between 10 to 20 seconds of exposure to water at 55°C to produce the burns that N suffered on 12 April 2018.

37. It would have taken at least 5 minutes of exposure to water at 48°C to produce the burns that N suffered on 12 April 2018.

38. If a young child came into contact with scalding water their normal reaction would be to immediately withdraw from it;

39. Following the accident N was treated in the intensive care unit for a number of weeks.

40. Following the accident Police Scotland carried out an investigation into the accident. On 22 April 2018 Detective Sergeant Lewis attended at the property and ran a bath using the bath hot water tap only until the bath was about half full. The temperature of the water was measured and found to be 55°C. The hot water was then drained. Ds Lewis then turned the hot water tap back on for 5 to 10 seconds. The water flowing out the bath hot water tap at that time was hot. Ds Lewis then turned the cold tap on so that both the hot and cold taps were on simultaneously. After 5 to 10 seconds of the cold tap being on the hot water tap began to reduce in temperature. At no time during the investigation did Police Scotland test the boiler. Following their investigation Police Scotland concluded that no criminal act took place on 12 April 2018.

41. Following the accident a referral was made to the Scottish Children's Reporter and North Lanarkshire Council. On 16 May 2018 the pursuer's children were placed onto North Lanarkshire Council's Child Protection Register under the category of

"physical neglect". At a Review Case Conference on 29 August 2018 the children were removed from the said Register.

42. Since the defenders took ownership of the property in 1997 until 12 April 2018 they have never: (i) been scalded by hot water from the property; or (ii) received a report from a tenant or anyone else about anyone suffering from scalding due to the hot water at the property.

43. During the pursuer's tenancy of the property at no point did the pursuer or KM advise the first defender that: (i) the electric shower was too hot; (ii) that the hot water was too hot; (iii) the simultaneous tap problem existed; or (iv) that the pursuer ran a bath by using hot water only and then topping up with cold. The pursuer's complaints to the first defender were always about not having hot water. The first defender was not aware at what precise temperature the hot water at the property was discharged at during the pursuer's tenancy. Prior to the accident on 12 April 2018 the first defender was not aware of: (i) the Building (Scotland) Regulations 2004 or any amendments to them; (ii) the 2017 technical handbook; (iii) the TMV Manufacturer's Code; (iv) the BRE paper; (v) CIBSE Guide G; or (vi) TMVs.

44. The half filling of the bath with only hot water would have significantly depleted the hot water available in the hot water cylinder. Given the configuration of the hot water system at the property, the turning on of the bath cold water tap, whilst the hot water tap in the bath was on, would not have caused the hot water running from the bath hot water tap to run cold. The simultaneous tap problem did not, therefore, exist. The bath hot water tap would run cold if the available hot water in the hot water cylinder had been used.

45. After a boiler reaches a certain age Scottish Gas will recommend that, due to low efficiency and difficulty obtaining spare parts, the boiler should be replaced. Such a recommendation, whilst commercially sensible from a Scottish Gas perspective, does not mean: (i) that it is necessary for a boiler to be replaced; or (ii) that a boiler is unsafe in anyway. On 12 April 2018: (i) there was no necessity to replace the boiler at the property; and (ii) the boiler was working correctly.
46. A TMV can be purchased for £50. A TMV would require to be fitted by a qualified plumber or heating engineer. The cost of fitting a TMV would depend on the layout of any particular hot water tap or shower. If the layout of a particular hot water tap was amenable to easily installing a TMV, the parts and labour cost would be in the region of a total cost £300. Those costs would increase if the layout of a particular hot water tap made it difficult to install a TMV or if more than one TMV was to be fitted in a particular property.

FINDS IN FACT AND LAW

1. That the property was occupied or used by the pursuer by virtue of a short assured tenancy between 1 March 2017 and November 2018.
2. That the defenders were landlords of the property for the purposes of section 3 of the Occupiers' Liability (Scotland) Act 1960 ("the 1960 Act").
3. That the defenders, as landlords of the property, were responsible for the maintenance and repair of the property.
4. That under section 3 of the 1960 Act the defenders, owed a duty, as landlords of the property, to the pursuer and her children, to take such care as in all the circumstances of the case was reasonable to see they would not suffer injury or

damage by reason of dangers arising from any failure on the defenders' part in carrying out their responsibilities for the maintenance and care of the property.

5. That the discharge temperature of 55°C at the bath hot water tap during the pursuer's tenancy of the property and, in particular, on 12 April 2018, did not: (i) in of itself, put the property into such a state of repair that by ordinary user damage might naturally be caused to a person in the position of the pursuer or her children; (ii) result in the property being not reasonably fit for human habitation; (iii) result in the property failing to meet the repairing standard set out in section 13(1) of the Housing (Scotland) Act 2006 (the "2006 Act"); (iii) result in the property not being in a habitable or tenantable condition; or (iv) amount to a failure of the defenders in carry out their responsibilities for maintenance and repair of the property.

6. That the discharge temperature of 55°C at the bath hot water tap during the pursuer's tenancy of the property and, in particular, on 12 April 2018 was a familiar and obvious hazard to young children and the defenders were entitled to assume that the pursuer was a reasonable parent who would provide such supervision to her children as was necessary to restrict the risk of being exposed to hot water, which had the potential to scald, to an acceptable level.

7. That the discharge temperature of 55°C at the bath hot water tap during the pursuer's tenancy of the property and, in particular, on 12 April 2018 was not: (i) a danger arising from a failure of the defenders in carrying out their responsibilities for maintenance and repair of the property; or (ii) a danger which had as its reasonable and probable consequences scalding injuries to the pursuer or her children.

8. That the defenders did not have actual or deemed knowledge, of the discharge temperature of 55°C at the bath hot water tap during the pursuer's tenancy of the property, being an alleged danger for the purposes of section 3 of the 1960 Act.
9. That the scope of defenders' duty of care, set out in finding in fact and law 4, did not extend to restricting the discharge temperature of the bath hot water to tap to 48°C or less.
10. At the time of the accident, on 12 April 2018, the defenders were not under a duty to fit a TMV to regulate the temperature of the bath hot water tap to 48°C or less.

FINDS IN LAW

1. That the defenders have not acted contrary to section 3 of the 1960 Act.
2. That the defenders are assoilzied from the craves of the initial writ.

NOTE

Introduction

[1] In this action the pursuer seeks damages, as a secondary victim, for nervous shock she suffered as a result of witnessing the immediate aftermath of her sons, Z and N, being scalded (and in N's case severely scalded) in the bath at the property. Parties were agreed that: "in the event of the pursuer establishing negligence on the part of the defenders in respect of the accident … the pursuer falls to be regarded as a secondary victim".

[2] The proof was heard over 6 days, namely 30 and 31 January, 1, 2, 7 and 8 February 2024. The parties had agreed quantum, on a full liability basis, at £12,500 (inclusive of interest to 30 January 2024) and had helpfully agreed a number of other matters in two joint

minutes of agreement. The pursuer relied on an affidavit from GS and called the following five witnesses to give evidence:

1. The pursuer;
2. Inspector John Lewis (who was a Detective Sergeant during the police investigation into the accident).
3. The pursuer's mother, KM.
4. Detective Constable Christopher Norton; and
5. Karen McNeill, who had expertise in health and safety and mechanical engineering.

[3] The defenders called the following witnesses to give evidence:

1. The first defender;
2. CM;
3. Russell Bralsford, master plumber; and
4. Dr Katherine McKay.

The evidence

The pursuer's evidence

[4] The pursuer explained about her children (see finding in fact 1). The pursuer thought that she moved into the property on 1 April 2017 and accepted that she was ultimately evicted in November 2018. The landlord of the property were the defenders. During her tenancy of the property she resided there with Z, N and A. At that time C resided with the pursuer's mother, KM, who lived close by. The pursuer saw C every day. The pursuer confirmed the layout of the property (see finding in fact 3) and accepted that the basic configuration of the hot water system was in accordance with finding in fact 7.

The pursuer slept in the master bedroom on the first floor of property with A, who had a moses basket and then a cot. Z and N shared the other first floor bedroom.

[5] Prior to the pursing moving into the property the first defender had been waiting on a part for the boiler and the boiler had had brown tape on it. When she moved in to the property the boiler was fine but on the second Saturday, after she moved in, she could not get heating. She contacted the first defender who then contacted Scottish Gas. An engineer then came out and said the thermostat was not working and fixed that problem. That was just the start of the problems with the hot water and heating. The water was always a problem. The boiler would cut out and take 5 hours to heat up. From the start of her tenancy until April 2018 Scottish Gas were called out about 15 times. The pursuer contacted the first defender a number of times about the hot water. That included a time when a noise was coming from the hot water cylinder. There was a problem with running the bath water between April 2017 and April 2018. The problem was that the hot water had to be run first, then the cold. That was due to the simultaneous tap problem. The simultaneous tap problem only occurred with the bath taps and not the other taps in the property. The pursuer told the first defender about the simultaneous tap problem. By September 2017 the hot water at the property was particularly hot. You could not put your hand in the hot water that had been run from a hot water tap. The pursuer told the first defender about this on a number of occasions. The pursuer told the first defender in November 2017 and March 2018 that the hot water was too hot. The pursuer's mother, KM, also told the first defender that the hot water was too hot. The pursuer, however, continued to use the hot water at the property.

[6] The pursuer would not bath A in the bath in the property. Z and A did initially have a bath at the property but after October / November 2017 the pursuer would take them to

her parent's house for a bath. The pursuer, however, continued to use the bath. If the pursuer was having a bath at the property she would fill the bath with hot water, then let it cool and add cold water. To this day the pursuer ran a bath that way (hot water first, then tops up with cold water). The pursuer accepted that the shower in the property was electrical. She explained that the shower was roasting hot and that she never used it.

[7] The pursuer was taken through the call outs in finding in fact 21 and did not dispute that the call outs occurred for the reasons stated. The pursuer, under reference to a list of call outs attended by Dyno Plumbing (production 5/21 – see finding in fact 24)), vaguely remembered the 20 September 2017 call out and thought that the problem with the hot water, at that time, was the simultaneous tap problem. The reason Scottish Gas could not gain access to the property on 21 September 2017 was because she was in hospital. The pursuer accepted that after 21 September 2017 she made no complaint to Scottish Gas or Dyno Plumbing about the hot water at the property being too hot. In addition to the call outs set out in finding in fact 21, the defenders' friend, C [*the pursuer only knew C's first name but there was no dispute that she was referring to CM*], came out to the property in October or November 2017 and drained the radiators. When he did so black stuff went on to the curtains. The pursuer got a bucket for C. There were also call outs over Christmas and New Year and one during heavy snow, which the pursuer thought was January 2018. The pursuer explained that the first defender was present at the call out on 17 March 2018. That day the pursuer had been at a party with the children. She denied being intoxicated when she returned to property to meet the first defender and the engineer. The pursuer accepted that the taps were working that day before the engineer came out and explained that the problem was with the toilet flush not flushing. The pursuer could not the recall the call out on 27 March 2018, however, if she did cancel it, it would have been for a good reason.

[8] On 11 April 2018 A was in hospital and the pursuer stayed overnight at the hospital with A. A was discharged from hospital on 12 April 2018. Around 1845 hours on 12 April 2018 the pursuer returned to the property with Z, N and A. At that time Z was aged 6, N was aged 4 and A was approximately 9 months' old. At that time A was downstairs asleep in her push chair. A still had a NG tube fitted. Z and N went upstairs to the pursuer's bedroom. Z commenced playing on a PlayStation and N commenced playing on an iPad. The pursuer decided to have a bath. She ran a bath in the upstairs bathroom which was opposite the pursuer's bedroom. The intention was for Z and N to have a bath after the pursuer using the same water, as there would be no more hot water. The simultaneous tap problem was still occurring. The pursuer ran a bath using only hot water from the bath hot water tap. The pursuer then heard A crying downstairs. The pursuer turned the hot water tap off, pulled the bathroom door closed a bit and went downstairs to see A. At this time the pursuer had not put any cold water into the bath. The pursuer did not give Z or N any warning about the hot bath water. The pursuer picked up A and sat with A on her knee downstairs. The pursuer heard a commotion going on upstairs between Z and N. Whilst the pursuer remained sitting downstairs with A she heard N screaming. It was like a cat screaming. N then appeared at the top of the stairs with his clothes soaking wet. The pursuer put A back into her pushchair and took N downstairs to the living room. At this time the pursuer thought that Z was still playing the PlayStation. The pursuer then telephoned her father and for an ambulance. At some point Z came down stairs complaining of scald injuries. The pursuer thought the period between her first hearing A cry and N appearing at the stop of the stairs was maybe 4 minutes, however, that whole day was a terrible blur for her.

[9] The ambulance took about 40 minutes to arrive and a number of calls were made to chase up the ambulance. N's injuries were extremely serious. He was put into an induced coma and spent 3 weeks in intensive care. He required skin grafts.

[10] The pursuer accepted that there was initial concern that N's injuries were non-accidental. The children were put on the at risk register for 4 months while an investigation took place. During the investigation the pursuer lived with N at the hospital and C, Z and A lived with the pursuer's parents. About a year after the accident the head of social care apologised to pursuer for what she had been through.

[11] In cross-examination the pursuer advised that she did not think the hot water was being operated by way of a timer and did not accept that she was working the hot water system incorrectly. She accepted that the gas and electricity was paid for using a top up meter and that on occasions she ran out of credit (but she would then top it up). She accepted that the defenders had the Scottish Gas maintenance contract and that she was able, at least from June 2017, to call out engineers to deal with any issue with the heating, hot water or plumbing that arose. The pursuer accepted that each time that an engineer was called out the hot water and heating was repaired. The pursuer accepted that there had been previous issues with Z's anger and aggression and that he had previously hit N. The pursuer explained that Z was hyper and boisterous but he would not hurt anyone. She did not feel she needed to constantly supervise Z and N when they were together.

[12] At the time of the accident the pursuer knew: (i) the bath water was hot and would scald a child; and (ii) that the Z and N were only a few metres away from the bathroom. However, A had only been out of hospital for 6 hours, she had had previous seizures and could have been choking. When she heard the commotion between Z and N she did not think about the hot water in the bath. She accepted that if she said to the police that she

shouted up to the Z and N when she heard the commotion that is what she would have done. The pursuer thought what she had done by leaving the hot bath water was stupid but she also thought she did the right thing by attending to A. She accepted that she could have told Z and N to come downstairs when she heard A cry. She rejected a suggestion that the simultaneous tap problem did not exist on 12 April 2018. Under reference to a social work record (production 6/1 at page 126) she accepted that she had said at a meeting on 17 April 2018 that she left the bath running. Under reference to Z's police interview (production 6/3 at page 205) she accepted that Z had said that the pursuer asked him to turn the bath tap off, but she maintained that she thought she turned the hot water tap off before she went to tend to A after hearing her cry. The pursuer thought that it would be neglectful to have asked Z to have turn off the bath hot water tap. She accepted if she had been in the bathroom she could have intervened and quickly removed N from the hot bath water.

Inspector John Lewis' evidence

[13] Inspector Lewis was a detective sergeant at the time of the accident on 12 April 2018. He gave evidence in accordance with finding in fact 40.

KM's evidence

[14] KM is the mother of the pursuer and the grandmother of C, Z, N and A. The pursuer moved into the property with Z and N and A also lived in the property after she was born in July 2017. A was a sick child and was in and out of hospital. A was fed via a NG tube and required a lot of attention from the pursuer. When the pursuer first moved into the property there was no problems but then there were problems with the boiler and heating system. The boiler was either not working or the hot water was coming out too hot. KM saw for

herself that the hot water was too hot. The pursuer also complained to the first defender about the hot water being too hot. KM witnessed the simultaneous tap problem, although she did not really understand it. In the beginning of the tenancy the first defender would send engineers out when there was problem but then she made arrangements so that the pursuer could call out the Gas Board. KM knew that the pursuer had made plenty of complaints about the boiler but she did not know the details of those complaints. KM knew that the boiler broke down on more than a handful of times because pursuer would bring Z and N round to her house for baths when this occurred. KM thought that Z and N had come round to her house for baths more than six times and possibly more than 10 times. There were times when Dyno Plumbing were called out to the property. The first defender's friend, C [*the KM only knew C's first name but there was no dispute that she was referring to CM*], had also came to the property to fix the boiler. KM was present on one occasion that C was present at the property and the pursuer had called KM to tell her that C was coming out to the property on another occasion.

[15] The pursuer did not use a timer for the hot water at the property. She just turned the heating on as it was needed. KM was not aware that the pursuer ran a bath by running the hot water first and then topped it up with cold.

[16] KM had a conversation with the first defender about difficulties with the boiler when the first defender came to her house. This conversation took place before the accident on 12 April 2018. It was at a time when A was in hospital. The first defender was trying to get hold of the pursuer for the rent money. During this conversation KM told the first defender that she had been advised by someone from the rent office that the rent could be withheld until the boiler was fixed. The first defender said that she did not have the money to fix the boiler and KM told her to use the pursuer's deposit. KM also told the first defender, during

this conversation, about the hot water being too hot, but she was not sure if she told the first defender about the simultaneous tap problem. KM thought that she had met the first defender once before the tenancy began and twice during the tenancy (with the above conversation at her house being one of the two meetings during the tenancy). She was not sure when the above conversation took place.

[17] On 11 April 2018 the pursuer was in hospital with A. A got out of hospital on 12 April 2018. KM had Z and N and took them over to the property about tea time on 12 April 2018. KM then went to her work. KM started her work at 1900 hours and was on a tea break when her husband called to say that KM needed to come to the property. KM thought her husband must have called her about 1930 hours. KM went to the property straightaway. Both Z and N had been burned and N had suffered a dreadful accident. When she arrived the ambulance had not arrived. The ambulance service were phoned back twice after KM arrived at the property. KM made one of those calls and was screaming at the ambulance service, asking where they were.

[18] As at April 2018 Z was a typical wee boy who had a lot of energy. At one point there was a concern that Z had ADHD but the nursery had said he was a normal wee boy. As at April 2018 KM did not: (i) feel the need to constantly supervise Z and N when they were together; and (ii) consider that Z posed a risk to N. Z and N needed to be supervised but no more than any other children of their age. KM considered that it would be impossible to have eyes on children 24/7. KM was involved in the police investigation into the accident. The pursuer's children were placed on the at risk register until the investigation was completed. During the investigation the pursuer and the children lived with KM. Under reference to a social work record of a case conference held in May 2018 (production 6/1 at page 75) KM accepted that at the initial stages of the investigation there was a concern

expressed about poor parental supervision. After the investigation was concluded the children were removed from the at risk register by August 2018 and the pursuer told KM that she received an apology from the head of social work. KM rejected a suggestion that the hot water at the property was not too hot.

Detective Constable Christopher Norton's evidence

[19] On 27 April 2018 DC Norton received instructions to investigate the injuries sustained to Z and N on 12 April 2018. He acted as a liaison co-ordinator and was involved in statement taking and ultimately producing a report for the Scottish Children's Reporter Administration. The purpose of the police investigation was to see whether a crime had been committed.

[20] DC Norton attended a case conference with representatives from social work, health and family members in May 2018. Dr McKay was at the meeting and she was of the view that it was neglectful of the pursuer to leave Z and N upstairs with the bath running. Mr Watson, consultant plastic surgeon was also at the meeting and he noted that a 4 year old's first reaction would be to get out of the water quickly, however, the extent of N's burns made it look like he had possibly been held in the water and prevented from getting out. Therefore, there was a possibility that N's injuries were non- accidental. At that stage there were concerns about: (i) whether N's injuries had been inflicted deliberately; (ii) lack of parental supervision; and (iii) parenting capacity. DC Norton's personal view was that the pursuer simply needed a bit of support. The result of that meeting, which was prior to the police concluding their investigation, was that all four children were placed on the at risk register.

[21] The police, after carrying out a detailed investigation of the accident, concluded that Z and N had been fighting and Z had pushed N into the bath. The pursuer had no burn marks and the police did not consider that any adult was involved in the accident. The police's ultimate view was that no criminality had occurred and that then brought the police's involvement to an end. Following the police investigation all four children were removed from the at risk register.

Karen McNeill's evidence

[22] Ms McNeill had a BEng in Environmental Engineering and a Diploma in Occupational Safety and Health. She was a member of a number of organisations including being a Fellow of the International Institute of Risk and Safety Management. When she commenced her career she had worked as building services mechanical engineer for 10 years. This involved designing heating and ventilation systems in mainly non-domestic property. She then shifted focus to health and safety work.

[23] Ms McNeill spoke to the contents on the 2017 technical handbook, the TMV Manufacturer's Code, the BRE paper and CIBSE Guide G, which are set out in findings in fact 10, 12, 13 and 14. The key hazards connected to hot water were (i) legionella; and (ii) scalding. Since the 2004 regulations came into force the delivery temperature of hot water at a bath or a bidet, for a new home, should not exceed 48°C. That limit was detailed in the 2017 technical handbook at paragraph 4.9.5 and the limit of 48°C also applied to change of use situations and renovations. The 2017 technical handbook was like an approved code of practice for the Scottish Building Regulations. The reference at paragraph 4.9.5 of 2017 technical handbook to distribution at a temperature of not less than 55°C meant that the hot water should not be distributed along the pipe work to the tap

at less than 55°C. The NHS had always been concerned about scalding and the maximum delivery temperature of 48°C was brought in, for new builds / change of use / renovations, to bring down the cases of scalding. The 2017 technical handbook suggested that a TMV could be used to control the delivery temperature. Ms McNeill explained how a TMV worked (see finding in fact 9). A TMV was a fail-safe and simple way to control the temperature of a hot water tap.

[24] The TMV Manufacturer's Code identified the key hazards at paragraph 2.0. That Code then detailed, at paragraph 3.1, the speeds that burns will occur at certain temperatures. Those speeds were, however, not within Ms McNeill's expertise.

[25] Ms McNeill explained that she was not a plumber. She had never: (i) serviced a domestic boiler; (ii) carried out a gas safety check on a boiler; or (iii) maintained or repaired a domestic hot water system. She explained that what she had done was assess the safety of the hot water for scalding as a health and safety expert and had used her engineering experience to do that. She accepted that she was not in a position to: (i) give an opinion in relation to faults with the heating system at the property; or (ii) give an opinion as to whether there was a fault with the heating system on 12 April 2018. Ms McNeill's understanding was that the hot water system at the property was a conventional system. The boiler would heat up hot water for the radiators and supply hot water to the hot water cylinder. The hot water cylinder then supplied hot water to the bath. The test that Inspector Lewis conducted on 22 April 2018 (see finding in fact 40) was explained to Ms McNeill and she noted that it would be quite coincidental if the hot water ran out at that moment. Ms McNeill noted that the hot water could have run cold due to pressure loss. There could also have been sludge or debris in the system that could affect the functioning of valves and the water temperature. Although she had not seen the plumbing

configuration at the property there were also some circumstances where cold water could be forced along a hot water pipe. She accepted that if the half filling of the bath depleted the hot water in the hot water cylinder that could possibly be why the hot water ran cold with Inspector Lewis.

[26] Ms McNeill's opinion was that the discharge of hot water from a bath tap, in family situation, at a temperature of 55°C was unsafe and a scalding risk. Ms McNeill disagreed with Mr Bralsford assertion in his report that at delivery temperature of 55°C was to be expected. The industry publications referred to at paragraph 23 above stated the delivery temperature should be much lower than 55°C. In all environments, domestic, commercial or institutional, a risk assessment should be carried out to establish how susceptible people are to the dangers of scalding. Landlords should also assess the risk of legionella. Ms McNeill's opinion was, given that the pursuer was living with three young children, there was an increased risk due to the vulnerability of the children. Ms McNeill expected a building owner to monitor the temperatures of the hot water and considered that landlords should test the water temperature with a thermometer. A simple way of reducing the risks of burns or scalding was to install one or more TMVs. Ms McNeill's understanding was that there were no TMVs installed in the property. Ms McNeill did not expect Scottish Gas to check the temperature of the hot water if conducting a standard check but if a specific complaint was made about the hot water being too hot, she would expect Scottish Gas to check the temperature of the hot water. Ms McNeill considered that given that the average age of a heating system was 10 to 15 years and given the amount of call outs / problems reported from the outset of the tenancy, it looked like the boiler needed replaced. She accepted that she had not seen anything to suggest that Scottish Power were: (i) expressing concerns about the temperature of the hot water; or (ii) advising that TMVs should be installed.

[27] A TMV could be purchased on Amazon at price of between £25 and £60 and production 5/22 showed a TMV that cost £49.99. The cost of fitting a TMV would depend on the layout of any particular hot water tap or shower. If the layout of a particular hot water tap was amenable to easily installing a TMV, the parts and labour cost would be in the region of a total cost £300. Those cost would increase if the layout of a particular hot water tap made it difficult to install a TMV or if more than one TMV was to be fitted in a particular property.

[28] Ms McNeill accepted that: (i) the 2017 technical handbook, the TMV Manufacturer's Code, the BRE paper and CIBSE Guide G were industry guidance; and (ii) she would not expect an average landlord to know about them; however, she noted that the Health and Safety Executive did provide guidance to landlords and that guidance may refer to the TMV Manufacturer's Code. Ms McNeill considered that a landlord ought to be aware of the guidance that was available, which included guidance on the temperatures of hot water that caused burns. Under reference to a Scottish Parliament Public Petition Committee paper of 24 November 2004 (the "2004 Public Petition Committee paper" – production 6/30), she accepted, at that time, the vast majority of the general public were not aware of TMVs, but noted that industry professional were and that the scalding of children was a significant problem. She accepted that the Scottish Parliament could have made TMVs compulsory in all properties but they had not done so. She also accepted that a house built in 1995, without undergoing any renovation, could have a delivery temperature of 55°C. She accepted that one way to assess the risk of scalding was to look at prior accidents, however, one also needed to factor in the ageing hot water system at the property, which increased the risk. She accepted that 10 seconds, 20 seconds, and 30 seconds were all lengthy period of times to be exposed to scalding water. Ms McNeill thought that she would not leave a 4 year old

unsupervised next to a scalding hot bath but noted that everyone was human and could face an emergency situation. It would also depend if the child had been given any instruction. Ms McNeill accepted the safest way to run a bath was with the hot and cold together and that it was not ideal to run the hot water first and then top up with cold. Ms McNeill accepted that the risk would have been reduced significantly if the pursuer had been supervising the children.

GS' evidence

[29] GS was a primary school teacher and neighbour of the pursuer during the pursuer's tenancy at the property. Her youngest daughter was aged eight at the time and was really friendly with Z and N. GS had had Z and N over to play at her house on numerous occasions. GS considered Z and N to be caring normal wee boys and had absolutely no concerns with then playing with her daughters. Any time GS saw Z and N they were always well presented and it was obvious to GS that they were well looked after. On the day of the accident on 12 April 2018 Z and N had been over a GS' house playing with her daughters. They then went back to the property about dinner time. About 7.00pm GS became aware there had been accident involving Z and N. GS went to assist and helped look after the pursuer's other children. GS considered that what had happened was a horrible tragic accident.

The first defender's evidence

[30] The first defender spoke to findings in fact 2 to 5. The hot water and heating at the property was controlled by a controller that was located in the kitchen. One of the pursuer's previous tenants had had an outside meter installed at the property which required the

tenant to pay for energy with a top up card. The pursuer rented the property from the defenders and moved in on 1 March 2017. The pursuer was evicted from the property in November 2018. Prior to the pursuer moving in to the property, the first defender prepared a welcome pack for the pursuer. That welcome pack included a copy of the tenancy agreement, the gas certificate, the electricity certificate, instructions regarding the use of appliances and a call out number in relation to the Scottish maintenance contract. When the pursuer moved into the property the first defender showed her how to work the hot water and heating, however, the pursuer struggled to grasp how to work them. When the pursuer first moved in she was delighted with the property and the first defender could not recall any brown tape being located on the boiler. The pursuer would, on occasions, contact the first defender to say the heating was not working but when the first defender asked the pursuer to check the outside meter it would sometimes have no credit.

[31] The pursuer spoke to findings in fact 19 and 20 and the landlord gas safety records associated with the landlord gas safety inspections of 1 November 2016 and 1 November 2017, noted in finding in fact 21. The pursuer chose Scottish Gas for the maintenance contract as they were biggest reputable company that she knew of.

[32] On one of the visits to the property set out in finding in fact 21 an engineer recommended a powerflush. The first defender obtained a quote of about £800 to £900 from Scottish Gas to do the powerflush. The first defender explained that she is very thorough person and she checked with Scottish Gas on numerous occasions that the powerflush was only a recommendation to improve the efficiency of the boiler and that it did not require to be done. The first defender also checked with Scottish Gas whether the boiler in fact needed replaced and was told it was only a recommendation because it would improve the efficiency of the boiler. The first defender communicated that discussion to the pursuer.

[33] The pursuer's rent payments were often late. The late rent payments commenced in May 2017 and the pursuer stopped paying rent in February 2018. The only time the first defender met KM was in July 2017. The pursuer said there was a problem with her phone and asked the first defender to meet her at KM's house in order to pay her the rent. The first defender duly attended but the pursuer was not at KM's house. KM was embarrassed that the first defender was present to collect the rent. At that time KM did not express any concerns about the boiler, heating or hot water at the property.

[34] On 1 September 2017 the pursuer renewed her lease of the property and the pursuer and the defenders entered into a formal lease. At that time the pursuer advised that she was happy with the property and raised no concerns.

[35] In the first couple of months of 2018 the first defender was in regular contact with the pursuer due to the late payments of rent. During these contacts the pursuer would say that should could not get enough hot water and the first defender would again explain how to control the hot water. The pursuer would also say that the heating was not working and the first defender would tell her: (i) to call out Scottish Gas in terms of the maintenance contract; and (ii) if there were any difficulties in calling out Scottish Gas that the pursuer should let the first defender know and she would sort out the issue.

[36] CM was a Scottish Gas engineer and a friend of the second defender's brother. The first defender did not know him personally. The first defender thought that the pursuer contacted her around March 2018 to say that the heating was not working. The pursuer said that Scottish Gas had been out to the property on lots and lots of occasion due to the hot water and heating not working. As a good will gesture the defenders arrange for CM to go round to the property in order to check that the hot water and heating were working correctly. CM went round and saw that the hot water and heating were working correctly.

He noted that the radiator in the boys' bedroom only had a slight heat and required to be bled. The pursuer told CM that she needed to go out so he never in fact bled the radiator. CM did not touch the heating or hot water system at the property as he knew the defenders had the Scottish Gas maintenance contract. He did not put dye through the system. His visit to the property was to check the system was working correctly and give the first defender peace of mind. He only visited the property on one occasion. The defenders did try to arrange for CM to go round on another occasions to bleed the radiator but they could never get hold of the pursuer.

[37] Given the number of Scottish Gas call outs the pursuer had reported to the pursuer, the first defender contacted Scottish Gas to confirm how many call outs there had actually been. Dyno Plumbing replied by email of 28 March 2018 (production 6/3 at page 165) and Scottish Gas replied by email on 29 March 2018 (production 6/17). The first defender spoke to the content of those emails (see findings in fact 24 and 25). These emails confirmed that there were a lot less calls outs than the pursuer had been making out to the first defender. The first defender did not accept that there had been a significant amount of call outs during the pursuer's tenancy and considered it was the same for every household

[38] The first defender was not aware of what the issue was with the hot water on 20 September 2017. The first defender recalled the visit by Dyno Plumbing on 17 March 2018. The pursuer reported that there was a problem with the toilet flushing and no water and said she was not paying the rent until it was fixed. The first defender arranged for Dyno Plumbing to attend. Dyno Plumbing attended but the pursuer was not in. The first defender said she could meet Dyno Plumbing at the property and the pursuer then got a taxi back to the property from a party she had been attending. The plumber, in the presence of the first defender, then checked for water and discovered that the property did in fact have

water. The toilet was, however, not flushing properly so the plumber changed the ballcock in the cistern. The first defender said in examination in chief that she could not recall any time when the pursuer said she was not paying the rent due to having no heating or hot water. However, the first defender did recall a conversation with the pursuer along the lines that she had an appointment with the Citizen's Advice Bureau and that she would not be paying her rent until she had that appointment because she was not happy with the heating system.

[39] The first defender found out about the accident that occurred on 12 April 2018 as a result of the pursuer sending her a text message on 13 April 2018. The message said that because of the first defender the pursuer's children were in intensive care and on life-support. The first defender felt sick to her stomach and did not know what to do. The first defender thought that she said to the pursuer that if there was a problem that she needed to get Scottish Gas out. The pursuer said that she was at hospital and could not make arrangements for Scottish Gas to come out. The first defender was sure she would have offered to arrange for Scottish Gas to visit the property, however, by that time the relationship between the pursuer and the first defender had broken down and the pursuer said she would deal with the issue.

[40] During the pursuer's tenancy of the property at no point did the pursuer or KM advise the first defender that: (i) the electric shower was too hot; (ii) that the hot water was too hot; (iii) the simultaneous tap problem existed; or (iv) that the pursuer ran a bath by using hot water only and then topped up with cold. The pursuer's complaints to the first defender were always about not having hot water. The first defender was not aware at what precise temperature the hot water at the property was discharged at during the pursuer's tenancy. Prior to the accident that first defender was not aware of: (i) the Building

(Scotland) Regulations 2004 or any amendments to them; (ii) technical handbooks relating to the said regulations; (iii) the TMV Manufacturer's Code; (iv) the BRE paper; (v) CIBSE Guide G; (vi) TMVs; or (vii) the temperature of water that caused scalding after exposure for a certain amount of time.

[41] Since purchasing the property in December 1997 the defenders had: (i) not had the bathroom refurbished; (ii) never been scalded by hot water from the property; and (iii) never had a report from any tenant or anyone else about anyone being scalded due to the hot water at the property. A new boiler was installed in the property around March 2019. The defenders continue to rent out the property and also rent out another property.

[42] In cross-examination the first defender accepted that the pursuer did contact her about the hot water and hearing not working on occasions. When she did this the first defender referred her to the Scottish Gas maintenance contract and also said that she could arrange for Scottish Gas to attend the property if the pursuer wished. The first defender accepted that during the pursuer's tenancy no TMVs were installed in the property. She accepted that she did not know the safe temperature for bath water and explained that she relied on Scottish Gas to ensure the hot water was working correctly. She was unsure if the property was occupied between November 2016 and March 2017. She rejected a suggestion that when she lived at the property that the water was discharged at a temperature that was scalding. The first defender explained that: (i) she had done nothing wrong during the pursuer's tenancy of the property; and (ii) all she had done was try and help the pursuer throughout her tenancy of the property. The first defender advised she would not have left and a 4 and 6 year old child unattended when running a bath with hot water. The first

defender thought that if the bath water had been a mixture of hot and cold water that it would not have been scalding.

CM's evidence

[43] CM was a central heating engineer who had been employed by Scottish Gas for 25 years. CM knew the second defender's brother. He was not friends with the first or second defender. CM's understanding was that the defenders had been made aware that British Gas engineers visiting the property had made mention of the age of the boiler. In around March 2018 CM was asked by the defenders to visit the property to see whether they needed a new boiler. The defenders had asked CM to do this because they knew he would give an honest opinion. CM visited the property on one occasion. His visit lasted about 15 minutes. During his visit to the property the heating was working. He looked at the boiler and knew the rough age of it. He formed the view that it was not necessary to change the boiler. During his visit to the property: (i) the pursuer did not advise him that: (a) the hot water was too hot, or (b) the simultaneous tap problem existed; (ii) CM did not carry out any work on the heating or hot water system; and (iii) CM did not check the discharge temperature of the hot water at the property. CM had not encountered a simultaneous tap problem in his 25 years' experience. CM reported back to the defenders that the boiler in the property was maybe not as efficient as a new boiler but that if CM had that boiler in his own house he would be happy to keep it.

[44] CM advised that when a boiler reaches a certain age, Scottish Gas will automatically say that it is advisable to look to change the boiler. That did not mean that it was necessary to change the boiler, rather, it was just advice. CM advised that: (i) when he was restoring someone's hot water and heating after a breakdown he would not test the water

temperature with a thermometer, unless the water temperature was a specific concern; and (ii) he had not been trained when attending a property: (a) to check for TMVs; or (b) offer to install TMVs to a property that does not have them. If CM found water being discharged at 55°C at a property it would not cause him any concern because water had to be stored at 55°C to 60°C to prevent legionnaires' disease. If he found a property had hot water being discharged at 55°C he would be happy to leave that temperature as it was and did not think it was unsafe. Up until recently hot water had always been discharged at about 55°C. If CM was running a bath for a young child he would run the cold first and then top up with hot water because that method gave you more control over the temperature. He would also keep an eye on the child when running a bath. CM had never met KM and would now not recognise the pursuer. CM did not know that it would have taken between 10 to 20 seconds of exposure to water at 55°C to cause a full thickness burn to a child.

Russell Bralsford's evidence

[45] Mr Bralsford started his apprenticeship in plumbing in 1968 and had worked in the plumbing and heating industry ever since. He had spent most of his life working on domestic premises. In 2011 he was given: (i) the Master Plumber Certificate Award from the CIPHE; and (ii) the Licentiateship Award from the City and Guilds of London Institute. In 2017 he was made a fellow of the CIPHE. He held numerous accreditations in relation to heating and plumbing. He had been acting as a skilled witness for the last 12 or 13 years and was instructed as a skilled witness in about 50 to 70 cases a year. Very few of those instructions came from insurance companies. Mr Bralsford adopted his written report (production 6/18).

[46] Mr Bralsford confirmed his understanding of what the hot water and heating system consisted of at the property (see finding in fact 7) and explained how the system operated (see finding in fact 8). Mr Bralsford was very familiar with the type of system that was in place at the property. The boiler in the property was Ideal Classic FF240, which Mr Bralsford had previously fitted, stripped and over seen the fitting of.

[47] Under reference to a photograph of the hot water cylinder at the property (production 6/27) Mr Bralsford advised that it was a standard hot water cylinder that would hold about 125 litres of water. The hot water cylinder thermostat would be set to 60°C to prevent legionella. Mr Bralsford advised that in his experience, as the property was built in 1995, he would expect the hot water to be stored at 60°C in the hot water cylinder and for it to lose about 5°C when flowing along the pipes. He therefore expected that the discharge temperature at the hot water taps at the property would be 55°C.

[48] If the hot water and heating stopped working it would either be a fault with the boiler or a fault with the time clock that operates the boiler. The servicing of a boiler included cleaning residue, checking everything was working as it should, making sure that the gas pressure was okay, checking the gas pressure combustion process was correct, checking the flue emission and making sure it complied with the gas regulations and manufacturer's instructions. Mr Bralsford considered that the landlord gas safety records relating to gas safety inspections of 1 November 2016 and 1 November 2017 were correctly completed. These certificates each lasted for 12 months and indicated that the appliances listed on the certificates, which included the boiler, had passed a gas safety check and were safe to use. Mr Bralsford noted that the Scottish Gas maintenance contract was in place throughout the pursuer's tenancy of the property and included central heating cover, plumbing and drains cover, kitchen appliance cover, a gas safety check and CP12

certification. He considered that the Scottish Gas maintenance contract provided suitable cover which ensured regular servicing and maintenance, gas safety checks and a priority call out service throughout the pursuer's tenancy. The documentation showed that the appropriate gas safety certificates were in place throughout the pursuer's tenancy.

[49] Mr Bralsford was, under reference to the Scottish Gas records (production 6/5, commencing at page 319), taken through the various visits to the property by Scottish Gas / Dyno Plumbing set out in finding in fact 21. When the pursuer took entry to the property in March 2017 the gas safety certificate of 1 November 2016 still covered the property. On 15 April 2017 there was no hot water and heating at the property. The engineer replaced the room thermostat and recorded that the system was then working correctly. This was therefore not an issue with the boiler. The documentation therefore suggested that the hot water and heating were working correctly between 1 November 2016 and 1 April 2017, however, Mr Bralsford accepted that he did not know whether the property was occupied between 1 November 2016 and 1 March 2017. Mr Bralsford confirmed the reasons for the visits as set out in finding in fact 21.

[50] Mr Bralsford noted that on several occasions Scottish Gas had recommended that a new boiler be considered. Mr Bralsford explained that, in his opinion, this was a usual and familiar recommendation to be made by a company holding responsibility for maintaining an older boiler. As technology advanced boilers become superseded by more efficient boilers. Components within the older boiler become superseded and many manufacturers stop manufacturing certain components. That resulted in the system costing the maintenance contractor more money to maintain. Therefore, to ensure there was still a profit, the maintenance contractor would prefer to maintain a newer system or refuse to

agree a maintenance contract for a boiler above a certain age. This, however, did not mean that the older boiler was unsafe or not operating as expected.

[51] Mr Bralsford had reviewed the Scottish Gas records and had not identified anything to suggest that the boiler at the property was in any way unsafe. Indeed a Scottish Gas engineer would not leave a boiler that was unsafe, they would, instead, switch it off. The Scottish Gas records did not contain any report of, or repair related to, the simultaneous tap problem. Mr Bralsford was referred to the Dyno Plumbing email to the first defender of 28 March 2018 (see finding in fact 24), he considered that: (i) the email identified there was a problem with the hot water on 20 September 2017 that was passed to British Gas; (ii) given the problem with the hot water was passed to British Gas, that the email would not cause a landlord to be concerned about the safety of the system; and (iii) the email did not suggest that there was the simultaneous tap problem. Mr Bralsford was also referred to the Scottish Gas email to the first defender of 29 March 2018 (see finding in fact 25), he considered that there was nothing in this email to suggest that: (i) there was the simultaneous tap problem; or (ii) that there any defect in the system as at 29 March 2018.

[52] Mr Bralsford considered that the Scottish Gas maintenance contract enabled the pursuer to directly call out an engineer and therefore was able to achieve the quickest possible response to an issue arising that was covered by the Scottish Gas maintenance contract. Whilst there was no record of Scottish Gas receiving a report about a gurgling noise from the hot water cylinder any such noise could be explained by air being in the system and air was required to be removed from the system during the pursuer's tenancy. Mr Bralsford considered that the discharge temperature of 55°C from the hot water tap as measured by the police after the accident was to be expected for a property built in 1995 and not having a TMV. The CIPHE and the 2017 technical handbook both stated that hot water

should be stored at not less than 60°C to prevent the development of legionella bacteria and stated that water will be distributed to outlets at 55°C. However, new builds in both Scotland and England now required to be fitted with devices, such as TMVs, in order to limit the water temperature to 48°C at the outlets.

[53] Mr Bralsford advised that the simultaneous tap problem could not occur in the system at the property. He thought it would be impossible. The cold and the hot water were separate circuits and the cold tap was fed from the mains supply. The hot and the cold water did not mix. The only way the hot water would run cold would be if the hot water ran out in the hot water cylinder. If there was still hot water in the hot water cylinder and the cold bath tap was switched on, the hot water tap would remain running with hot water. Inspectors Lewis' experience of running the bath at the property was put to Mr Bralsford (see finding in fact 40). Mr Bralsford explained, under reference to a photograph of the bath at the property (production 6/23 at page 37), that: (i) the bath appeared to be of standard size; (ii) a standard bath which was full would hold between 250 to 300 litres of water; (iii) the hot cylinder at the property would hold about 100 litres of hot water, with the remaining 25 litres at the bottom of the hot water cylinder being cool or cold; (iv) that 100 litres of hot water would fill a standard bath about half full; and (v) once the hot water in the hot water cylinder had been used the hot water tap would run cold.

[54] Mr Bralsford thought that if on the day of accident the discharge temperature from the bath hot water tap was 55°C, the water would have been stored in the hot water cylinder at around 60°C. Mr Bralsford considered, in that scenario, the hot water cylinder would have been working correctly because otherwise the discharge temperature of the hot water would be higher or lower. Mr Bralsford did not that there was any fault with the boiler,

heating or hot water system on the day of the accident. He did not consider that it was necessary for the defenders to replace the boiler.

[55] Mr Bralsford explained how a TMV worked (see finding in fact 9). He had fitted hundreds of them after they became law in England in about 2010. That law did not require TMVs to be fitted in homes built in England before 2010 but did require them to be fitted in premises such as care homes, schools and hospitals. In Scotland the law in relation to TMVs came in a bit earlier but only applied to new builds. Mr Bralsford had done some research and estimated that about 80% of homes in the UK did not have any TMVs fitted. As the property was built in 1995 he did not expect it to have TMVs fitted unless a new bathroom had been installed. A TMV would be required to be fitted by a plumber.

[56] Mr Bralsford opinion was that: (i) the hot water and heating system at the property appeared to be installed and maintained in line with industry and manufacturer's regulation; (ii) the defenders took every possible precaution to ensure that the pursuer had an adequate response to any issues with the system; and (iii) the accident was not attributable to faulty components or workmanship.

[57] Under reference to paragraph 5.9 of his report Mr Bralsford apologised for offering an opinion on whether the accident was attributable to the defenders. He accepted that: (i) there had been quite a lot of calls out and that, from the pursuer point of view, something kept going wrong with the hot water and heating; and (ii) he did not refer to scalding in his report but that scalding was at the front and centre of the building regulations. He noted that scalding had been a huge concern for the plumbing industry. Mr Bralsford accepted the CIBSE Guide G: (i) stated what was set out in finding in fact 14; and (ii) did not state that discharge at 55°C was acceptable. Mr Bralsford would not have expected an average landlord to have read CIBSE Guide G. He accepted that there was no mischief young

children could not get up to. Mr Bralsford was asked whether he thought in April 2018 the bath at the property was safe for a house with young children and he said it was not. He explained that his reference to it being unsafe was due to the bath being filled with water at temperature of 55°C, which could cause scalding. However, if the hot and cold water had been run together in the bath that would have reduced the water temperature considerably. What made the bath in the present case unsafe was the fact that only hot water had been used to fill the bath up. However, the pursuer would, on the day of the accident, have been able to run the cold water at the same time as the hot water.

Dr Katherine McKay's evidence

[58] Dr McKay had been retired for 2 years. Prior to retirement she was a consultant paediatrician and lead for child protection. Her role involved coming to an opinion in relation to whether a child had suffered abuse or neglect. Over her career she had seen children with scalds and burns but it was relatively rare in a child protection context because often the first examining doctor would be satisfied that the scald or burn was caused accidentally.

[59] Dr McKay was involved in the cases of both Z and N following the accident on 12 April 2018. Dr McKay had prepared a report in respect of both Z and N. As part of her enquiries, prior to producing her reports, Dr McKay spoke directly to the pursuer. Dr McKay summarised her discussion with the pursuer in her report in respect of Z, dated 24 April 2018 (production 6/3 at page 94), which included the following:

> "… About 4 pm the two younger boys went upstairs in the house to play with a friend, [*M*], and later in the afternoon they decided to go to KFC in [*location*] which they walked to at 4.45pm. On the way back the boys were bickering and [*N*] wanted to go out to play. Mum said no and sent the boys upstairs to play in mum's bedroom with the PlayStation at about 6pm.

> Mum went into the bathroom to run the bath and left the boys in her bedroom at 6.30pm. She had turned on a PlayStation to entertain them [*sic*] She had turned the hot water on and ran the bath, filling the bath halfway. She did not say whether the tap had been turned on or off when she left the bathroom. She usually waits to run cold water as the boiler is faulty. She ran the bath and then heard [*A*] downstairs in her pram crying and shouting. She went downstairs to tend to [*A*] and was probably downstairs for about ten minutes, heard a shout upstairs and thought initially that the boys were fighting. She did not hear any further noise, until she heard [*N*} let out a scream, a high pitched moaning sound. She put [*A*] in the pram and ran to the stairs. She did not go up the stairs as she saw [*N*] at the top of the stairs fully dressed, but soaking wet. She noticed immediately that the skin on his fingers was white and blistered, the clothes were hot and he was screaming in pain. She immediately brought him downstairs. …
>
> Mum indicated that she had asked [*Z*] what he had done after he was playing the PlayStation and he said that he had gone for a pee. [*Z*} said that [*N*] came into the bathroom and [*N*] pushed him, he pushed [*N*] and they both fell into the bath. [*N*] had said to mum '[*Z*] pushed me' and grandmother remember then both bickering all day …"

Dr McKay formed the impression that the pursuer was not concerned about the sounds of the boys fighting and ignored that. Rather, it was N's scream that prompted her to react.

[60] A case discussion meeting was held on 26 April 2018. Dr McKay attended along with a number of other professionals including Mr Stuart Watson, consultant plastic surgeon, who had a special interest in burns / scalds. The injuries that N had suffered were "glove and stalking" distribution which meant there was a clear line below the wrist and a clear demarcation on the legs. That distribution was suggestive of N being held in the water or being unable to get out of the water and that gave rise to a concern that the injuries could be non-accidental. Dr McKay was also concerned that Z and N had not been supervised appropriately. Dr McKay considered that the length of time of 10 minutes that the two boys had been left increased the risk of a variety of injuries they could sustain. Dr McKay thought, as a matter of general knowledge, that it was reasonable for the pursuer to attend to A to check there was nothing serious wrong but once she had done so she could, given the age and developmental stage of the two boys, have then taken A upstairs or brought the

boys downstairs. It was common for parents to have deal with a fractious baby when there were other young siblings in the house. Dr McKay explained that at the conclusion of the meeting on 26 April 2018 one of the high level concerns was a lack of supervision in the home.

[61] Under reference to a letter written by Mr Watson, consultant plastic surgeon, dated 2 May 2018 (production 6/3 at page 80) Dr McKay explained that Mr Watson thought that N would have to have been exposed to bath water at 55°C for 12 to 20 seconds to have sustained the injuries that he did. Dr McKay explained that the foregoing was not within her expertise. She was not a burns specialist. Her role was to consider the patterns and determine whether the injuries were accidental or non-accidental. Dr McKay noted that 12 to 20 seconds was a long exposure to the water in circumstances where: (i) it would cause severe pain within 1 to 2 seconds; and (ii) a 4 year old boy would make every effort to get away from the source of burning. Dr McKay did not know whether the fact that N was clothed would result in it taking slightly longer for the severe pain to occur on exposure to the water, however, she accepted that that may be correct.

[62] Dr McKay confirmed that in her report dated 14 May 2018, in relation N (production 6/3 at page 70), she was of the opinion that N's injury was non-accidental and that there was evidence of a lack of supervision and neglect. She confirmed that at a case conference meeting on 16 May 2018 she noted that she believed that N's injuries were non-accidental and could have been caused by an adult or a child. She did, however, go on to note, at that case conference, that N's injuries could be non-accidental but she wanted to explore if there was something that froze N as he did not get out the bath as quickly as he could.

[63] Dr McKay considered, as a matter of generality, that most parents would run a bath by putting cold in first and then hot. She would not expect a four and 6 year old child to be left unsupervised when there was a bath filled with only hot water. Dr McKay noted that Z and N's case was very unusual and she had presented it to a forum of paediatricians.

[64] Dr McKay confirmed that she was aware that the police concluded that no crime had been committed. She accepted that the mechanics of how N entered that bath were not known. She accepted that N could have frozen in the bath but noted that it would not be particularly normal for children to do that. She was not able to comment on the figures in the 2004 Public Petition Committee paper regarding the number of children attending hospital with scald injuries. Dr McKay had not heard of a TMV. She was not aware that as a result of the Building (Scotland) Regulations 2004 that the temperature of hot water, at the point of delivery, to a bath in new builds should not exceed 48°C. She did not consider it was her role to make any recommendation about the bath water being at a temperature of 55°C. She did not know if it was momentary thoughtlessness on the part of the pursuer in not draining the bath before she went to tend to A.

Submissions

[65] The solicitor advocate for the pursuer lodged a 19 page written submission and the solicitor advocate for defenders lodged a 34 page written submission. Both also made additional oral submissions and lodged further short supplementary written submissions.

Submissions for the pursuer

[66] The pursuer was not contending that there was a fault with boiler. The pursuer was only insisting on her case in respect of a breach of section 3 of the 1960 Act. That case was

based on the discharge temperature of 55°C at the bath hot water tap throughout the currency of the tenancy. Under reference to section 2 and 3 of the 1960 Act and the cases of *Guy* v *Strathkelvin Council* 1997 SCLR 405, and *Hughes Tutrix* v *Glasgow District Council* 1982 SLT (Sh Ct) 70 it was contended that if it could be shown that the landlord (the defenders) had breached or failed to perform their responsibilities in respect of repair and maintenance then they would have also breached section 3 of the 1960 Act. In such circumstances there was no need to consider reasonable care. The tenancy was a short assured tenancy and required at common law to be put into a habitable and tenantable condition. The tenancy was also subject to the repairing standard as contained in section 13(1) of the 2006 Act. Section 13(1)(a) of the 2006 Act provided that a house would meet the repairing standard if it was "wind and water tight and in all other respects reasonably fit for human habitation,". Section 13(2) of the 2006 Act made clear that in determining whether a house meets the standard of repair set out in section 13(1)(a) regard was to be had "to the extent (if any) to which the house, by reason of disrepair or sanitary defects, falls short of the provisions of any building regulations". The building regulations referred to were the current regulations (*Guy* and *Fyfe* v *Scottish Homes* 1995 SCLR 209). The current building regulations were the Building (Scotland) Regulations 2004 as read with the 2017 technical handbook. The landlord's duty was set out in section 14 of the 2006 Act. In *Todd* v *Clapperton* 2009 SLT 837 the appropriate test for considering whether a house was not in all other respect reasonably fit for human habitation was identified as that set out by Lord Atkin in *Summers* v *Salford Corporation* [1943] AC 283 (on which see paragraph 94 below).

[67] Under reference to *Hughes* v *Lord Advocate* 1963 SC (HL) 31 and *Jolley* v *Sutton* [2000] PIQR P136 it was contended that the precise mechanism of how a child accessed a source of danger was irrelevant as long as the kind of injury could be foreseen. In the present case it

was agreed that the discharge temperature of the bath hot water tap since that start of the pursuer's tenancy was 55°C. It was that temperature that was the source of danger, even if the precise chain of events could not have been reasonably foreseen. Mr Bralsford agreed that a temperature of 55°C was not safe. Under reference to *Lamb* v *Glasgow District Council* 1978 SLT (Notes) 64, *Kerr* v *East Ayrshire Council* 2005 SLT (Sh Ct) 67 and *Hughes Tutrix* it was contended that the source of danger was the scalding water in the bath and that risk materialised when it was being used as bath. In such circumstances this constituted ordinary user in a *Summers* sense. At both common law and in terms of the 2006 Act discharge temperature of the hot water tap at 55°C resulted in the property not being in a habitable and tenantable condition and not being reasonably fit for human habitation. Any landlord would be in breach section 3 of the 1960 Act if the hot water in their property was discharged at 55°C. What landlords required to do was to fit TMVs, which could be done at a relatively low cost.

[68] The case of *Ryan* v *Camden London Borough of Camden* [1983] 8 HLR 75 could be distinguished from the present case, because in that case: (i) there was a nationwide non-accident history relating to the heating system; and (ii) the heating system conformed to a code of practice and British standard. However, in the present case: (i) there was an acknowledged risk of bathwater causing scalding; and (ii) no-one was suggesting anywhere that 55°C was safe, quite apart from the Building (Scotland) Regulations 2004.

[69] Under reference to *Anderson* v *Imrie* [2016] CSOH 171, *Surtees* v *The Royal Borough of Kingston Upon Thames*; *Surtees* v *Hughes and Hughes* [1992] PIQR P101 and *Ellis* v *Kelly* [2018] 4 WLR 124 it was contended that if the court found the defenders to be in breach of section 3 of the 1960 Act there should not be a finding of contributory negligence as it was only momentary careless on the part of the pursuer who was going to tend to A who was a sickly

child who had just got out of hospital. What the pursuer did not do was drain the bath when she went downstairs to tend to A. This was an incident in the course of family life and ordinary parenting and the court should be slow to make a finding of contributory negligence in such cases, save for cases of egregious negligence. If the court was minded to make a finding of contributory negligence it ought to be in the range of 10% to 20%.

Submissions for the defenders

[70] The defenders made detailed submissions as regard there not being any fault with the hot water and heating system, however, given the pursuer's ultimate acceptance that there was not any fault it was not necessary to consider these submissions further.

[71] The pursuer was unreliable in a number of respects. Her number of reported repairs was contradicted by the Scottish Gas records. The alleged simultaneous tap problem was flatly contradicted by Mr Bralsford. Her evidence regarding CM's involvement was incredible. She did, however, make some appropriate concessions, including that her actions on the day of the accident were reckless. KM was not trying to assist the court. Rather she was doing her best to defend her daughter and mount blame on the pursuer. Ms McNeill was not a heating and plumbing expert and she could not diagnose any fault with the hot water and heating system. She appeared to be making every effort to avoid criticising the pursuer and was promoting a counsel of perfection. Her evidence ought to be treated with caution. All the other witnesses were credible and reliable.

[72] The defenders accepted that they owed a duty of care to the pursuer and her children to take reasonable care and owed the statutory duty in section 13(1)(a) of the 2006 Act. The defenders discharged all such duties upon them. Under reference to *Bell* v *North Ayrshire Council* 2007 Rep LR 108 and *Kirkham* v *Link Housing Group Limited* [2010] CSOH 31 it was

contended that section 3(1) of the 1960 Act provided that a landlord should demonstrate the same level of care as is demanded of an occupier in terms of section 2(1). The occupier's statutory obligation was only to take reasonable care in all the circumstances to prevent injury or damage from dangers which are due to the state of the premises. In determining whether an occupier has taken reasonable care, the calculus of risk was relevant. The court should consider such factors as the nature of the danger, the occupier's knowledge of the danger, the probability of the injury or harm arising, the extent of the injury or harm, the age of the person injured and the practicality of eliminating the danger (*Thomson's Delictual Liability*, 6th Ed at paragraph 10.13). The 1960 Act did not impose a duty of insurance on the defenders. The defenders must have had knowledge, actual or deemed of any danger before they could be found liable in terms of the 1960 Act (*Kirkham* v *Link Housing Group Ltd* [2012] CSIH 58 per Lady Payton at paragraph 34). The pursuer had now conceded that there was no fault with the hot water and heating system and therefore the only live issue remaining was whether the hot water was too hot.

[73] The concept of reasonable foreseeability applied to cases under the 1960 Act (*Dawson* v *Page* [2013] CSIH 24). Under reference to *Muir* v *Glasgow Corporation* 1943 SC (HL) 3, *Wheat* v *E Lacon & Co Ltd* [1966] 1QB 335, and *Dawson* v *Page* [2012] CSOH 33 it was contended that the question was whether injury to the children was a natural and probable consequence of a failure of the defenders to fit a TMV on the bath hot water tap. The answer to that question was no. The injury was not foreseeable because: (i) there had been no scalding incidents at the property for two decades; (ii) the scalding only occurred due to a series of deliberate unforeseeable and unreasonable acts by the pursuer and her children; and (iii) there was only a risk of scalding if there was prolonged exposure to the hot water. Even a minor scald was not foreseeable given the strong presumption of parental

supervision. A breach of the repairing standard in section 13(1)(a) of the 2006 Act did not amount to foreseeability of harm. In any event the repairing standard in section 13(1)(a) of the 2006 Act had not been breached and it was not permissible to have regard to the 2004 regulations because section 13(2) of the 2006 Act required that there be disrepair or sanitary defects, but the pursuer had not identified any. The temperature of the water was not a defect and it was not a danger *per se*. The running of the bath with only hot water was not ordinary use. The present case could be distinguished from the case of *Hughes* because unlike in that case, the hot water in the present case was not a "known source of danger". It only became a source of danger due to the pursuer's unforeseeable actions.

[74] Under reference to the parental supervision cases of *Hastie* v *Magistrates of Edinburgh* 1907 SC, *Phipps* v *Rochester Corporation* [1955] 1 QB 450, *Stevenson* v *Glasgow Corporation* 1908 SC 1034, *Taylor* v *Glasgow Corporation* 1922 SC (HL) 1 at page 11, *Ryan* v *Camden London Borough of Camden, Anderson* v *Imrie* and *Harry* v *Perry* [2008] EWCA Civ 907 at paragraph 34, it was contended that the duty of landlord could not extend to foreseeing, and taking precautions to obviate, the risks caused by the pursuer's failure to take reasonable care for her young children. Nor could they have foreseen that N would be unable to leave the hot water for up to 20 seconds.

[75] Further, under reference to *Morton* v *Dixon* 1909 SC 807, per the Lord President at page 809 and *McKevitt* v *National Trust for Scotland* 2018 Rep LR 76 at paragraphs 96 to 97, it was contended that the pursuer's contention was essentially one of a negligent omission on the part of the defenders. However, there was no evidence of what was typically done by other landlords in control of a property built before the 2004 regulations came into force. It was apparent that the existence of TMVs was not a matter of common public knowledge and the fitting of TMVs was not be something that was suggested or recommended by

Scottish Gas. TMVs were only known about by industry professionals. Both Mr Bralsford and CM said that a temperature of 55°C was normal. A reasonable landlord would not be expected know what the temperature of the hot water at their property would be and did not require to check the temperature of the water with a thermometer in the absence of any prior scalding incidents. In the circumstances it could not be said that installation of a TMV was a thing commonly done by other persons in like circumstances or that it was so obviously wanted that it was folly for the defenders to neglect to provide it. The defenders could not have been reasonably expected to have taken a precaution that they did not know existed and could not reasonably have known existed. The cost of fitting TMVs throughout the property was also disproportionate to the probability of the negligible risk materialising.

[76] If the pursuer was correct that defenders ought to have fitted a TMV that would mean that the legislative duty brought in under the 2004 regulations in respect of properties built after 2005 was the same as the common law duty incumbent on landlords in respect of houses built before 2005. That could not be correct and would be contrary to the express intentions of parliament. The 2004 regulations did not apply to the property because it had been built in 1995 and had not been subsequently renovated. In all the circumstances the defenders had exercised reasonable care to the pursuer and her children.

[77] Even if there was a breach of section 3 of the 1960 Act, the pursuer's actions amounted to a *novus actus interveniens*. The pursuer had filled the bath with hot water only, when she could have run the hot and cold together. When she went down stairs she failed to empty the bath or give the boys a warning. She failed to bring the boys downstairs and remained downstairs for 10 minutes in circumstances where: (i) she knew the boys were only a few metres from a hot bath; (ii) she knew that Z had anger issues and had previously hit N; (iii) she knew that she was not facing an emergency situation with A; and (iv) she

had heard the boys fighting. The court should accept that it was 10 minutes rather than the 4 minutes suggested by the pursuer given that the pursuer had told Dr McKay, shortly after the accident, that it was 10 minutes. In the circumstances the pursuer's actions amounted to a *novus actus interveniens*. However, if there was a breach of section 3 of the 1960 Act and the pursuer's actions did not break the chain of causation there was nevertheless a high degree of contributory negligence on her part, which should not be assessed at any lower than 80%.

Analysis and decision

Conclusions on the evidence

[78] A significant amount of evidence was led in respect of the Scottish Gas maintenance contract, the various faults that had required Scottish Gas / Dyno Plumbing to be called out to the property and the simultaneous tap problem. However, during closing submissions the pursuer: (i) accepted that there was no fault with the hot water system on the day of the accident; and (ii) made clear that her case was simply based on the bath hot water tap discharging hot water at temperature of 55°C throughout the tenancy. In such circumstances there was only a limited amount of factual evidence that was in dispute.

[79] I considered that Scottish Gas maintenance contract provided comprehensive cover for the property (the details of that cover are set out a findings in fact 19 and 20) from a reputable company. That cover included: (i) the pursuer being able to call out Scottish Gas / Dyno Plumbing; (ii) a yearly service; and (iii) a yearly gas safety check of the boiler. A service and gas safety check on the boiler had been conducted on 1 November 2017 and the boiler had been certified, in the landlord gas safety record, as being safe. The next service and gas safety check were not due until 1 November 2018 and therefore the landlord gas safety record of 1 November 2017 continued to apply to the boiler on 12 April 2018.

A Scottish Gas engineer last visited the property, prior to the accident, on 28 February 2018, and made a repair to the fan in the boiler. I considered, in line with Mr Bralsford's evidence, that the Scottish Gas engineer would not have allowed the boiler to continue to operate unless it was safe to do so.

[80] I also accepted the evidence of Mr Bralsford and CM regarding the reasons why Scottish Gas recommend that a boiler should be replaced. I considered that the recommendations made by Scottish Gas in the present case (see finding in fact 21), whilst commercially sensible from a Scottish Gas perspective, did not mean: (i) that it was necessary for the boiler at the property to be replaced; or (ii) that the boiler was unsafe in anyway.

[81] In any case I am entitled to accept bits of what a witness has had to say and reject other bits. I did not accept the pursuer's evidence regarding the existence of the simultaneous tap problem. Mr Bralsford, who was a highly experienced master plumber, gave a very clear explanation as regards why such a problem could not have occurred (see paragraph 53 above). I considered that his explanation was entirely logical and CM, who himself had 25 years' experience as heating engineer, had never encountered such a problem. Ms McNeill, whilst having a mechanical engineering background, did not have the wealth of experience that Mr Bralsford had in relation to domestic hot water and heating systems. Whilst I considered both Ms McNeill and Mr Bralsford to be credible witnesses, I preferred Mr Bralsford's evidence where it differed from Ms McNeill's in relation to anything to do with the operation of the hot water and heating system at the property, including the simultaneous tap problem. I did not accept Ms McNeill's evidence that, on the basis of the number of call outs, the boiler needed to be replaced and I considered, again in line with Mr Bralsford's evidence (which was supported by CM), that on 12 April 2018:

(i) there was no necessity to replace the boiler at the property; and (ii) the boiler was working correctly. I also preferred Mr Bralsford's evidence to that of Ms McNeill in relation to the reasons why the bath hot tap would run cold, namely that it would do so when all the hot water in the hot water cylinder had been used. In the circumstances I considered that the simultaneous tap problem did not exist and that it therefore would have been possible for the pursuer to run the bath on 12 April 2018 using the hot and cold tap simultaneously or by running the cold tap first and then topping up with hot water.

[82] I considered that the Scottish Gas records (production 6/5) were comprehensive and would have detailed all the call outs that were made to the property. In such circumstances I did not accept the evidence of the pursuer in relation further call outs to the property which were not recorded in the Scottish Gas records. Nor did I accept her evidence in relation to CM. CM gave evidence in a calm and simple way. He was clear that he only attended the property once for 15 minutes, that he only attended to give a view about whether the boiler needed to be replaced and that he did not conduct any work at the property. His evidence was supported by the first defender, although her memory was that he was checking that the hot water and heating system was working correctly. I considered that CM's evidence was internally consistent and that he was a credible and reliable witness. I preferred his factual evidence to the evidence of other witnesses where there was a difference between their respective evidence.

[83] I considered that the first defender gave evidence in a thoughtful and careful manner. I considered that she was an honest witness who recognised the importance of what she was doing. She came across as an organised person who wanted ensure that the tenancy of the property ran smoothly. She was clearly concerned with the number of call outs made by the pursuer under the Scottish Gas maintenance contract and therefore made

the enquiries that resulted in emails from Dyno Plumbing and Scottish Gas on 28 and 29 March 2018 (see findings in fact 23 to 25). I considered that her evidence was generally internally consistent and generally consistent with the other evidence I accepted, including the documentary evidence. I accepted her evidence as being generally credible and reliable and preferred her evidence to that of the pursuer and KM where there was difference in their evidence. In particular I accepted the first defender's evidence in relation to having a single meeting with KM in July 2017. I considered her account of that meeting to be straightforward and plausible.

[84] The email from Dyno Plumbing of 28 March 2018, as read with the Scottish Gas records, did indicate that the pursuer had no control over the hot water and heating temperatures on 20 September 2017. Scottish Gas did then visit the property on 21 September 2017 but they were unable to gain access. It did not appear from the Scottish Gas / Dyno Plumbing records that the pursuer raised the issue with further with either of them and the pursuer accepted that after 21 September 2017 she made no complaint to Scottish Gas or Dyno Plumbing about the hot water at the property being too hot (see paragraph 7 above). The issue identified on 20 September 2017 appeared to be the only time an issue was possibly raised about the temperature of the hot water, but I accepted the first defender's evidence that the defenders were not aware of what the issue with the hot water was on 20 September 2017. Further, when CM visited the property in March 2018 the pursuer did not advise him that: (i) the hot water was too hot, or (ii) the simultaneous tap problem existed. I considered that the foregoing was consistent with the first defender's evidence that, during the pursuer's tenancy of the property, at no point did the pursuer or KM advise the first defender that: (i) the hot water was too hot; or (ii) the simultaneous tap problem existed; and I accepted the first defender's evidence in that regard. I also accepted

the first defender's evidence that: (i) the pursuer's complaints to the first defender were always about not having hot water; (ii) the first defender was not aware at what precise temperature the hot water at the property was discharged at during the pursuer's tenancy; (iii) prior to the accident that first defender was not aware of the Building (Scotland) Regulations 2004, the 2017 technical handbook or other industry guidance referred to during the evidence; and (iv) that the defenders had not received any prior reports of scalding at the property.

[85] Whilst I did not accept the evidence of the pursuer and KM in relation to the above matters I did generally accept their respective accounts of the day of the accident and the behaviour of Z. The only aspect of the pursuer's account of the accident that was really in dispute was the length of time she was downstairs for. In evidence the pursuer explained, understandably, that the day was a terrible blur but that she thought she was downstairs for 4 minutes. Dr McKay had spoken to the pursuer shortly after the accident and the pursuer had told her she had been downstairs for about 10 minutes. I considered that the day of the accident must have been absolutely awful for the pursuer and that it was very difficult for her to estimate the length of time she was downstairs. I considered, on balance, that her account given to Dr McKay, shortly after the accident, was more likely to be an accurate estimate and that, on the balance of probabilities, the length of time the pursuer was downstairs for was in the region of 10 minutes. The pursuer and KM's evidence about Z's behaviour was supported by the evidence in the affidavit of GS who was a primary school teacher. I accepted that Z was normal young boy who did not need additional supervision beyond what would be expected of any 6 year old boy.

[86] I accepted the evidence of Ms McNeill regarding the contents of the 2017 technical handbook and the industry publications. She also referred to guidance from the Health and

Safety Executive, however, that guidance was not produced or relied on by the pursuer and the contents of that guidance were not before the court. I accepted Ms McNeill's evidence in relation to the approximate costs of fitting TMVs. I did not, however, for the reasons explained below, accept her evidence that the discharge temperature of the bath hot water tap of 55°C was, in of itself, unsafe or a danger. Ms McNeill was unable provide detailed information about the 2004 regulations but helpfully parties were agreed that, for the purposes of the present case, the following correctly represented the position as regards the 2004 regulations:

(1) The 2004 regulations came into force on 1 May 2005. They applied to all applications for building warrants from 1 May 2005.

(2) The Building (Scotland) Amendment Regulations 2006 ("the 2006 amendment regulations") came into force on 1 May 2007.

(3) The 2006 amendment regulations applied to all applications for building warrants from 1 May 2007. Paragraph 4.9 of schedule 5 to the 2004 regulations (as amended by the 2006 amendment regulations) provides:

> **"4.9 Danger from heat**
> Every building must be designed and constructed in such a way that protection is provided for people in, and around, the building from the danger of severe burns or scalds from the discharge of steam or hot water."

(4) The 2006 amendment regulations did not amend paragraph 4.9 of schedule 5 to the 2004 regulations;

(5) The 2004 regulations are mandatory for properties that they apply to, but compliance with the 2017 technical handbook is not and failure to adhere to the 2017 technical handbook will not result in civil liability (paragraph 0.1.4 of the 2017 technical handbook).

[87] There was no real challenge to the evidence of DC Norton and Inspector Lewis and I accepted that they were credible and reliable witnesses. I considered Dr McKay to be a generally credible and reliable witness. However, I did not consider that Dr McKay was giving any expert evidence as regards the supervision of Z and N and considered that was a common sense matter for the court to consider - indeed a number of witnesses commented on the level of supervision of the boys and the manner in which to fill a bath, but I considered these were all common sense matters for the court to consider. I also did not consider, on the basis of the evidence before me, that I could make a finding that N's injuries were non-accidental. I considered that what the available evidence showed was that: (i) Z pushed N into the bath; and (ii) N was, for unknown reasons, partially submerged in the hot water in the bath and was unable to immediately get out of the hot water.

[88] Findings in fact 1, 28 and 39 are based on the evidence of the pursuer. Findings in fact 2, 4, 5, 11, 23, 42 and 43 are based on the evidence of the first defender. Finding in fact 3 is based on a combination of the evidence of the pursuer, the first defender, Mr Bralsford and the first joint minute of admissions. Finding in fact 6 is based on a combination of the evidence of the pursuer, KM, the first defender and the first joint minute of admissions. Findings in fact 7 and 41 are based on the first joint minute of admissions. Findings in fact 8, 15, 17 and 44 are based on the evidence of Mr Bralsford. Finding in fact 9 is based on a combination of the evidence of Ms McNeill, Mr Bralsford and the first joint minute of admissions. Findings in fact 10, 12, 13 and 14 are based on the evidence of Ms McNeill. Finding in fact 16 is based on a combination of the evidence of CM and Mr Bralsford. Finding in fact 18 is based on a combination of the evidence of Mr Bralsford and the first joint minute of admissions. Finding in fact 19 is based on a combination of the evidence of the first defender and Mr Bralsford.

[89] Findings in fact 20 and 22 are based on a combination of the evidence of the first defender and the first joint minute of admissions. Finding in fact 21 is based on a combination of the evidence of the pursuer, Ms McNeill, the first defender and Mr Bralsford. Findings in fact 24, 25, and 27 are based on a combination of the evidence of Ms McNeill, the first defender and Mr Bralsford. Finding in fact 26 is based on a combination of the evidence of the first defender and CM. Finding in fact 29 is based on a combination of the evidence of the pursuer, Dr McKay and the first joint minute of admissions. Finding in fact 30 is based on a combination of the evidence of the pursuer and Dr McKay. Finding in fact 31 is based on a combination of the evidence of the pursuer, KM and GS. Finding in fact 32 is based on a combination of the evidence of Inspector Lewis and the second joint minute of admissions. Finding in fact 33 is based on a combination of the evidence of Ms McNeill, CM and Mr Bralsford. Findings in fact 34 to 37 are based on the second joint minute of admissions. Finding in fact 38 is based on the evidence of Dr McKay. Finding in fact 40 is based on a combination of the evidence of Inspector Lewis and DC Norton. Finding in fact 45 is based on a combination of the evidence of CM, Mr Bralsford and the second joint minute of admissions. Finding in fact 46 is based on a combination of the evidence of Ms McNeill and Mr Bralsford.

The case in terms of section 3 of the 1960 Act

[90] The pursuer only insisted on her case in respect of a breach of section 3 of the 1960 Act. In order to consider that case it is first convenient to identify what the law requires in relation to the supervision of children. In the House of Lords case of *Taylor* v *Glasgow Corporation* Lord Shaw observed at page 11:

> "When the danger is familiar and obvious, no special responsibility attaches to the municipality or owner in respect of an accident having occurred to children of tender years. The reason of that appears to me to be this, that the municipality or owner is entitled to take into account that reasonable parents will not permit their children to be sent into the midst of familiar and obvious dangers except under protection or guardianship. The parent or guardian of the child must act reasonably; the municipality or guardian of the park must act reasonably. This duty rests upon both and each; but each is entitled to assume it of the other."

[91] In the Inner House case of *Anderson* v *Imrie* 2018 SC 328 Lord Brodie, at paragraph 31, approved the following passage in the English Court of Appeal case of *Harris* v *Perry* (per Lord Phillips at paragraph 34):

> "It is quite impractical for parents to keep children under constant surveillance or even supervision and it would not be in the public interest for the law to impose a duty upon them to do so. Some circumstances or activities may, however, involve an unacceptable risk to children unless they are subject to supervision, or even constant surveillance. Adults who expose children to such circumstances or activities are likely to be held responsible for ensuring that they are subject to such supervision or surveillance as they know, or ought to know, is necessary to restrict the risk to an acceptable level."

In the present case I considered that the defenders were entitled to assume that the pursuer was a reasonable parent who would provide such supervision to her children as was necessary to restrict the risk of being exposed to hot water, which had the potential to scald, to an acceptable level.

[92] There was no dispute that the defenders were the landlords of the property and that the tenancy that the pursuer had at the time of the accident was a short assured tenancy. In the circumstances there was no dispute that the defenders owed the pursuer the duty set out in section 14 of the 2006 Act. Section 13 to 14 of the 2006 Act provides:

> "**13 The repairing standard**
>
> (1) A house meets the repairing standard if—
>
> (a) the house is wind and water tight and in all other respects reasonably fit for human habitation,
>
> […]

(c) the installations in the house for the supply of water, gas and electricity and for sanitation, space heating and heating water are in a reasonable state of repair and in proper working order,

[…]

(2) In determining whether a house meets the standard of repair mentioned in subsection (1)(a), regard is to be had to the extent (if any) to which the house, by reason of disrepair or sanitary defects, falls short of the provisions of any building regulations.

[…]

14 Landlord's duty to repair and maintain

(1) The landlord in a tenancy must ensure that the house meets the repairing standard—
  (a) at the start of the tenancy, and
  (b) at all times during the tenancy.

(2) The duty imposed by subsection (1) includes a duty to make good any damage caused by carrying out any work for the purposes of complying with the duty in that subsection.

(3) The duty imposed by subsection (1)(b) applies only where—
  (a) the tenant notifies the landlord, or
  (b) the landlord otherwise becomes aware,
  that work requires to be carried out for the purposes of complying with it.

(4) The landlord complies with the duty imposed by subsection (1)(b) only if any work which requires to be carried out for the purposes of complying with that duty is completed within a reasonable time of the landlord being notified by the tenant, or otherwise becoming aware, that the work is required."

Section 70 of the 2006 Act provides that:

"'*sanitary defects*' includes lack of air space or of ventilation, lack of lighting, dampness, absence of adequate and readily accessible water supply or of sanitary arrangements or of other conveniences, and inadequate paving or drainage of courts, yards or passages,"

[93] The pursuer also made brief mention of the rule of the common law that a landlord should put a property into a habitable or tenantable condition on entry and maintain them in a like condition for the duration of the lease. I considered there was a clear overlap between the rule of the common law and section 13(1)(a) of the 2006 Act and that, for the purposes of the present case, consideration of section 13(1)(a) of the 2006 Act would also

provide the answer to whether the defenders had complied with the rule of the common law.

[94] The pursuer placed considerable reliance on the case of *Guy* v *Strathkelvin Council*, however, in *Bell* v *North Ayrshire Council* Lady Smith stated at paragraph 42 to 44:

> "[41] It was a matter of agreement that the defenders, as landlords, had a duty to repair and maintain the house at 11 Montgomerieston Place and that that duty included an implied term that they were obliged to keep the premises reasonably fit for human habitation: *Rankine, Leases* (3rd ed) p 241; Housing (Scotland) Act 1987 Sch 10 para 1(2), Housing (Scotland) Act 2001 Sch 4 para 1. The duty to repair and maintain may, of course, involve carrying out repairs in respect of defects which do not render a house unfit for human habitation but are nonetheless matters which the landlord can properly be called on to attend to. For example, a house with a roof leak may, depending on the nature of the leak, still be reasonably fit for human habitation, as may one with a malfunctioning central heating system yet these are matters which a landlord such as the defenders would be obliged to repair as part of their repair and maintenance obligations. That, of course, highlights that not every defect which a landlord can properly be called on to repair under his leasehold obligations will amount to a danger. Whether or not it does will be a question of fact.
>
> [42] The pursuer's claim is a statutory one, based on s 3(1) of the 1960 Act, the provisions of which refer back to s 2(1). Those subsections provide:
>
> > '2.—(1) The care which an occupier of premises is required, by reason of his occupation or control of the premises to show towards a person entering thereon in respect of dangers which are due to the state of the premises or to anything done or omitted to be done on them and for which the occupier is in law responsible shall, except in so far as he is entitled and does extend, restrict, modify or exclude by agreement his obligations towards that person, be such care as in all the circumstances of the case is reasonable to see that that person will not suffer injury or damage by reason of any such danger. …
> > '3.—(1) Where premises are occupied or used by virtue of a tenancy under which the landlord is responsible for the maintenance or repair of the premises, it shall be the duty of the landlord to show towards any persons who or whose property may from time to time be on the premises the same care in respect of dangers arising from any failure on his part in carrying out his responsibility aforesaid as is required by virtue of the foregoing provisions of this Act to be shown by an occupier of premises towards persons entering on them.'
>
> [43] Thus, if a landlord is obliged under a lease to maintain and repair a tenanted property and he fails to fulfil his obligation to do so in some respect and that failure gives rise to the presence of a danger in the property then but only then he becomes subject to an obligation to persons other than the tenant who are present in the premises such as, for instance, visitors. The nature of that obligation is that he is

> bound to take such care as is in the circumstances reasonable to see to it that such person will not suffer injury by reason of that danger. The duty arises only in respect of dangers that arise from the failure to repair and maintain and to that extent I would take issue with what is said by Lord Johnston in *Guy v Strathkelvin District Council* at 1997 SCLR, p 408; it is not the case that third parties can sue on *any* failure to repair and maintain, as seems to be suggested by him. The failure would require, given the terms of ss 3(1) and 2(1) of the 1960 Act, to have given rise to a danger and the landlord would have to have failed to take reasonable care to see that those third parties would not suffer injury by reason of the danger for it to be actionable at the instance of such parties."

I respectfully agree with Lady Smith's analysis.

[95] The first issue is therefore whether it has been proved that the defenders failed to carry out their responsibilities for maintenance and repair of the property. The defenders' responsibilities for maintenance and repair of the property required them to meet the repairing standard in section 13(1) of the 2006 Act and in particular section 13(1)(a) of the 2006 Act. The pursuer contended that the property was not in all other respects reasonably fit for human habitation and it is therefore necessary to consider whether or not the property was in all other respects reasonably fit for human habitation. The test to be applied in considering that question is the following test set out by Lord Atkin in the English House of Lords case of *Summers* v *Salford Corporation* at p 289 (which was adopted in Scottish case of *Haggarty* v *Glasgow Corporation (No 2)* 1964 SLT (Notes) 95):

> "if the state of repair of a house is such that by ordinary user damage may naturally be caused to the occupier, either in respect of personal injury to life or limb or injury to health, then the house is not in all respects reasonably fit for human habitation."

Therefore the question that arises is in the present case is:

> "did the bath hot water tap discharge temperature of 55°C throughout the pursuer's tenancy put the property into such a state of repair that by ordinary user damage might naturally be caused to a person in the position of the pursuer or her children?"

The evidence in the case made very clear that hot water had to be stored at about 60°C in order to prevent legionella bacteria developing. There was no real dispute that there would

likely be a 5°C drop off in temperature as the hot water flowed along the pipes, from, in the present case, the hot water cylinder, and result in a discharge temperature at the hot water taps of 55°C. Both Mr Bralsford and CM considered that a discharge temperature of 55°C was normal and to be expected in houses that were built before the new regulations came into force (the 2004 regulations) and I considered that to be a matter of common sense given the need to store hot water at about 60°C. On the day of the accident on 12 April 2018 there was, in the end, no dispute that the hot water system was operating as it should and discharging hot water at the bath hot water tap at a temperature of 55°C. Given the property had been built in 1995 and had not had any refurbishment work done to bring it within the 2004 regulations: (i) it was not governed by the 2004 regulations or the terms of the 2017 technical handbook; and (ii) a discharge temperature at the hot water taps of 55°C was normal and to expected in a house of that age.

[96] The pursuer had not notified the defenders that: (i) the hot water in the property was too hot; or (ii) that the simultaneous tap problem existed (I have found that it did not in fact exist). Nor was there any acceptable evidence to suggest that the defenders otherwise became aware of those two issues. The defenders were also not aware of: (i) the actual discharge temperature of the bath hot water tap; (ii) the contents of the 2004 building regulations and the associated 2017 technical handbook; (iii) the industry guidance referred to during the evidence; or (iv) the existence of TMVs; and I would not have expected a reasonable person in the position of the defenders to have such awareness (or any awareness of the 2004 Public Petition Committee paper). What the defenders were aware of was, amongst other things, that they had the Scottish Gas maintenance contract in place, which was with a reputable company, and provided for the matters set out in finding in fact 19. Whilst Ms McNeill suggested that the defenders ought to have tested the hot water with a

thermometer, there was no averments regarding any such testing or inspection and no evidence that this was done by any other reasonable domestic landlord. In any event, when I considered the absence of any prior scalding incidents between December 1997 and 12 April 2018 or any prior indication that there was an issue with the temperature of the hot water, together with the existence of the Scottish Gas maintenance contract and checks that that contract provided, I came to the view that defenders did not require to measure the discharge temperature of the hot water at the property at the start of the tenancy.

I considered that the bath hot water tap discharge temperature was, like many things in a family home, a familiar and obvious hazard to young children and that ordinary use of hot water at the property (at a temperature of 55°C) would involve appropriate parental supervision of young children (see paragraph 91 above). I did not consider that it would be ordinary use to fill a bath with only hot water (in circumstances where the simultaneous tap problem did not exist) and leave children aged 4 and 6 unsupervised, for a period of in the region of 10 minutes, a very short distance away from the bath.

[97] The cases of *Guy* v *Strathkelvin Council* and *Fyfe* v *Scottish Homes* considered a near identical provision in the Housing (Scotland) Act 1987 to section 13(2) of the 2006 Act and I accepted that the building regulations identified in section 13(2) of the 2006 Act were not limited to the building regulations in force when the property was built. I therefore considered that I could have regard to the 2004 regulations if disrepair or sanitary defects had been proved. However, I did not consider that the hot water system was in a state of disrepair or amounted to a sanitary defect. Rather, the boiler had been certified as safe, by way of the landlord gas safety records, on 1 November 2016 and 1 November 2017 and the hot water system was working as it should on 12 April 2018. In the circumstances I considered that the discharge temperature of 55°C at the bath hot water tap during the

pursuer's tenancy of the property (which includes the start of the pursuer's tenancy of the property) and, in particular, on 12 April 2018, did not, in of itself, put the property into such a state of repair that by ordinary user damage might naturally be caused to a person in the position of the pursuer or her children. Rather, it was the circumstances that transpired on 12 April 2018 (see finding in fact 29 and 30) that resulted in the risk that damage might be caused to the pursuer's children. In all the circumstances I did not consider that the discharge temperature of 55°C at the bath hot water tap during the pursuer's tenancy of the property and, in particular, on 12 April 2018: (i) resulted in the property being not reasonably fit for human habitation; (ii) resulted in the property failing to meet the repairing standard set out in section 13(1) of the 2006 Act; (iii) resulted in the property not being in a habitable or tenantable condition; or (iv) amounted to a failure of the defenders in carry out their responsibilities for maintenance and repair of the property.

[98] However, if the discharge temperature of 55°C at the bath hot water tap did amount to disrepair or a sanitary defect, I would accept that the discharge temperature fell short of paragraph 4.9.5 of the 2017 technical handbook by exceeding a discharge temperature at the bath hot water tap of 48°C. In the event that the discharge temperature of 55°C did amount to disrepair or a sanitary defect, I considered, when I had regard to the extent to which the property fell short of paragraph 4.9 of schedule 5 to the 2004 regulations (as read with paragraph 4.9.5 of 2017 technical handbook – which draws attention to unsupervised children being at more risk of injury), and regard to the factors set out in paragraphs 95 to 97 above, that my conclusions set out in the last three sentences of paragraph 97 above remained unaltered.

[99] In all the circumstances I concluded that the defenders had not failed in carrying out their responsibilities identified in section 3 of the 1960 Act and therefore the pursuer's claim fails at the first issue.

[100] However, in the event I am wrong about that I will now comment on the remainder of the requirements to establish a breach of section 3 of the 1960 Act.

[101] In the case of *Dawson* an Extra Division considered the proper approach to section 2 of the 1960 Act. At paragraph 14 Lord McGhie stated:

> "[14] However, it is well understood that the aim of the 1960 Act was to define the degree of care required of an occupier in place of the complex situation by then arrived at under common law. The established need to identify categories of persons entering upon premises had led to fine distinctions which made little practical sense. The fundamental aim was to restore a broad test of reasonableness. The purpose of sec 2(1), as is stated by sec 1(1), is to establish the degree of care to be shown by an occupier. We do not consider that the descriptive provisions of sec 2(1) fall to be read as intended to effect a radical change to the concept of fault in so far as affecting occupiers. The familiar concept of reasonable foreseeability clearly underlies fault in this context."

[102] In the House of Lords case of *Muir* v *Glasgow Corporation* Lord Macmillan said at p 10:

> "The duty to take care,' as I essayed to formulate it in *Bourhill v. Young*, 'is the duty to avoid doing or omitting to do anything the doing or omitting to do which may have as its reasonable and probable consequence injury to others, and the duty is owed to those to whom injury may reasonably and probably be anticipated if the duty is not observed.' This, in my opinion, expresses the law of Scotland, and I apprehend that it is also the law of England. The standard of foresight of the reasonable man is, in one sense, an impersonal test. It eliminates the personal equation and is independent of the idiosyncrasies of the particular person whose conduct is in question. …The reasonable man is presumed to be free both from over-apprehension and from over-confidence, but there is a sense in which the standard of care of the reasonable man involves in its application a subjective element. It is still left to the judge to decide what, in the circumstances of the particular case, the reasonable man would have had in contemplation, and what, accordingly, the party sought to be made liable ought to have foreseen. Here there is room for diversity of view, as, indeed, is well illustrated in the present case. What to one judge may seem far-fetched may seem to another both natural and probable."

The scope of the duty is therefore to avoid doing, or omitting to do, anything which has, as its reasonable and probable consequence, injury to others.

[103] In the Inner House case of *Kirkham* v *Link Housing Group* Lady Paton made clear at paragraph 34:

> "[34] … The Occupiers' Liability (Scotland) Act 1960 does not impose a duty of insurance upon the defenders. The defenders must have knowledge, actual or deemed, of any danger before they can be found liable in terms of the Act. There may be many ways in which the necessary knowledge is communicated or attributed to a landlord, not necessarily involving a report by the tenant."

[104] The second issue is therefore whether the discharge temperature of 55°C was a danger which had as its reasonable and probable consequences injury to the pursuer and her children (it is also convenient when dealing with this issue to very briefly consider what actual or deemed the knowledge the defenders had of that alleged danger). I approached this issue by bearing in mind the passages, set out a paragraph 90 to 91 above, as regards parental supervision. In my opinion, for the reason already given, at paragraph 95 to 97 above, the discharge temperature of 55°C was not, in of itself, a danger. It only became a danger in the circumstances that transpired on 12 April 2018 (see finding in fact 29 and 30).

[105] I have already identified, at paragraph 96, what the defenders were and were not aware of. For the reasons given in that paragraph I considered that the defenders did not have knowledge, actual or deemed, of the discharge temperature of 55°C being an alleged danger.

[106] In the case of *Muir* v *Glasgow Corporation* the tea room manager was entitled to assume the urn would be carried with reasonable care and would therefore cause no harm to the children. A reasonable person in the manager's position, would not, therefore have foreseen as a possibility, let alone a probability, that the urn would be dropped and the children scalded. As such, the injury of the children could not have been foreseen as a

reasonable and probable consequence of the manager allowing the urn to be carried through the tea room, and therefore that event was outwith the scope of the duty of care she owed to the children.

[107] In the present case the circumstances included that: (i) there had been no reports of anyone being scalded by the hot water at the property since the defender purchased the property in 1997 (during that period there was at least one tenant who occupied the property who had young children); (ii) the Scottish Gas maintenance contract was in place; (iii) the boiler had been passed as safe on 1 November 2016 and 1 November 2017; (iv) defenders were not aware of the matters set out in the paragraph 96 (or aware that the pursuer filled a bath by running hot water first and then topped up with cold water); (v) the bath hot water tap discharge temperature was, like many things in a family home, a familiar and obvious hazard to young children; (vi) the defenders were entitled to assume that the pursuer was a reasonable parent who would provide such supervision to her children as was necessary to restrict the risk of being exposed to hot water, which had the potential to scald, to an acceptable level; (vii) if a young child came into contact with scalding water their normal reaction would be to immediately withdraw from it; and (viii) on the day of the accident the hot water system was operating as it should and discharging hot water at the bath hot water tap at a temperature of 55°C, which was normal and expected for a property built in 1995 that had not had any refurbishment done to bring it within the 2004 regulations. In the circumstances I did not consider that a reasonable person in the positon of the defenders would consider that a reasonable and probable consequence of the discharge temperature of 55°C at the bath hot water tap was injury to the pursuer or her children. Whilst I considered that a domestic property could be fitted with TMVs at a relatively modest cost, I did not consider that the scope of the defenders' duty to the pursuer

and her children to take such care as was reasonable in all the circumstances of the case extended to restricting the discharge temperature of the bath hot water tap to 48°C or less. As such, I considered that the defenders were not under a duty to fit a TMV to regulate the temperature of the bath hot water tap to 48°C or less.

[108] The pursuer relied on the House of Lords case of *Hughes* v *Lord Advocate*. I accepted that that case made clear that it was not necessary reasonably to foresee the extent of the pursuer's injuries, rather, it was enough that the injuries sustained were the kind which would be foreseeable as a reasonable and probable consequences of the defender's careless conduct. In the present case the injuries to N were particularly severe. However, I did not consider, for the reasons already given, that the discharge temperature of 55°C was a danger in of itself or that a reasonable person in the positon of the defenders would consider its reasonable and probable consequence was any kind of scalding injury to the pursuer or her children. In all the circumstances the pursuer's claim also therefore fails at the second issue.

[109] If, however, I am wrong about the second issue and that some kind of scalding injury was foreseeable, the third issue is then whether the defenders had fallen below the standard of care required of them in section 3 of the 1960 Act (on which see finding in fact and law 4). I considered, given the factors set out in paragraph 107 above (including, in particular, that the defenders were entitled to assume that there would be appropriate supervision of the children), that if some kind of scalding injury was foreseeable that: (i) the seriousness of the injury in contemplation would be minor; and (ii) such an injury would be improbable. There was also no evidence to show that a reasonable person in the position of the defenders would restrict the discharge temperature from 55°C to 48°C or less and I did not consider that a TMV was so obviously wanted that it would have been folly not to provide it (see *Morton* v *Wm Dixon Ltd* per the Lord President (Dunedin) at page 809). Whilst I considered

that a domestic property could be fitted with TMVs at a relatively modest cost, I did not consider, after balancing all the foregoing factors, in all the circumstances, that a reasonable person in the position of the defenders would have taken any precautions to restrict the discharge temperature of the bath hot water tap from 55°C to 48°C or less. I therefore did not, in any event, consider that the defenders had fallen below the standard of care required of them in section 3 of the 1960 Act. As such the pursuer's claim also fails at the third issue.

[110] In the event I am wrong so far and the defenders ought to be found in breach of section 3 of the 1960 Act, the fourth issue is whether pursuer has proved that the breach of duty was the cause of the harm sustained by the pursuer. Whilst I accepted that the pursuer genuinely thought that the simultaneous tap problem existed, it, in fact, did not and the pursuer would have been able to have filled the bath with hot and cold simultaneously or filled the bath with cold water and then topped up with hot water. However, on the day of the accident the pursuer made the decision to fill the bath with hot and then top up with cold (although the topping up with cold never occurred). A had only been released from hospital that day and I could completely understand why the pursuer would wish to go downstairs and tend to her when she heard her crying. It was unclear whether or not the pursuer left the bath hot water tap running when she went downstairs, but there was no dispute that the water that had been left in the bath had been solely run from the bath hot water tap. The pursuer then pulled the bathroom door closed a bit and went downstairs. When the pursuer went down the stairs Z and N were in the pursuer's bedroom adjacent to the bathroom. The pursuer did not give the boys any warning about the hot bath water or take boys down the stairs. There was no suggestion that there was any type of ongoing emergency situation with A but the pursuer remained downstairs for a period in the region of ten minutes, leaving Z and N unsupervised a very short distance from the bath filled with

hot water. At no point during that period did the pursuer take A up the stairs so that she could supervise the boys. There then came a point during that period when there was an altercation between Z and N. The pursuer heard a commotion going on between Z and N, but remained downstairs. During the altercation Z pushed N in the bath, which was about half full of water with a temperature of 55°C. N was, for unknown reasons, unable to get out the bath immediately despite the temperature of the water.

[111] I considered that the pursuer left Z and N unsupervised for what was, in the particular circumstances, a significant period of time and in doing so unfortunately did not reduce the risk to the boys to an acceptable level. In all the circumstances I considered, even if the defenders had breached section 3 of the 1960 Act, that the pursuer's level of supervision of the boys constituted a *novus actus interveniens* due to the pursuer's actions not being reasonable and not being reasonably foreseeable to a reasonable person in the position of the defenders. As such the pursuer's claim also fails at the fourth issue.

[112] Finally, in the event I am again wrong about that I would, in all the circumstances, have made a finding of contributory negligence and made a 75% reduction to the award of damages.

Disposal

[113] For the reasons given above, I find that the defenders did not act contrary to section 3 of the 1960 Act and I therefore grant decree of absolvitor. A hearing will now be fixed to determine the question of expenses and certification of skilled persons.