SHERIFF APPEAL COURT

[2025] SAC (Civ) 14
PIC-PN799-21

Sheriff Principal S F Murphy KC
Sheriff Principal N A Ross
Appeal Sheriff P Mann

OPINION OF THE COURT

delivered by SHERIFF PRINCIPAL S F MURPHY KC

in appeal in the cause

NM (AP)

Pursuer and Appellant

against

(FIRST) TO; and (SECOND) AO

Defenders and Respondents

Pursuer and Appellant: Conway, solicitor advocate: Conway Accident Law Practice
Defenders and Respondents: Cowan, advocate: Clyde & Co (Scotland) LLP

29 May 2025

Introduction

[1] The appellant, NM, held a short-assured tenancy to the respondents' property, a semi-detached residential house, between March 2017 and November 2018. She lived there with her three children who, in April 2018, were aged 6 years, 4 years and 9 months respectively.

[2] On 12 April 2018, the appellant returned home from hospital where her newly-born daughter had been receiving treatment. She left the infant sleeping downstairs and went

upstairs to run a bath. She ran the hot tap only to begin to fill the bath. After the bath was filled with scalding hot water, she heard the baby crying downstairs. She went down to attend to her, leaving the bath unsupervised, having turned off the hot tap. Ten minutes later, the appellant heard sounds of an ongoing commotion between her 6 and 4 year old sons upstairs. She then heard screaming. One of her sons appeared at the top of the stairs in soaking wet clothes. Her other son was also soaking wet. They had been fighting and both had fallen into the bath and suffered scalding injuries. The appellant raised an action for damages against the respondents, as a secondary victim, for nervous shock suffered as a result of witnessing the aftermath of her two sons being scalded by the bathwater. The appellant contended that the respondents were in breach of section 2 and 3 of the Occupiers' Liability (Scotland) Act 1960. The action proceeded to proof. Quantum was agreed at £12,500 inclusive of interest.

Legislation

[3] The relevant provisions of the 1960 Act are as follows:

> **"2. Extent of occupier's duty to show care**
> (1) The care which an occupier of premises is required, by reason of his occupation or control of the premises, to show towards a person entering thereon in respect of dangers which are due to the state of the premises or to anything done or omitted to be done on them and for which the occupier is in law responsible shall, except in so far as he is entitled to and does extend, restrict, modify or exclude by agreement his obligations towards that person, be such care as in all the circumstances of the case is reasonable to see that that person will not suffer injury or damage by reason of any such danger.
> …
> **3. Landlord's liability by virtue of responsibility for repairs**
> (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."

The sheriff's judgment

[4] The appellant required to prove that the respondents had failed to carry out their responsibilities for maintenance and repair of the property. She led evidence that between the commencement of the tenancy and March 2018 she had experienced issues with the operation of the boiler and the central heating system at the property. The respondents arranged for engineers to investigate and repair the boiler in the property when problems were identified. Her position at proof was that the bath hot water tap discharge temperature of 55°C throughout her tenancy put the property into such a state of repair that, by ordinary usage, damage might naturally be caused to a person in the position of her or her children. The sheriff disagreed. As the property had been built in 1995 (and not subsequently refurbished) it was not subject to the Building (Scotland) Regulations 2004. A discharge temperature of 55°C was standard for a property of that age. He held that the property was not in a state of disrepair. Moreover, he held that a tap discharging water at a temperature of 55°C did not, of itself, constitute a danger. What had caused the danger was the fact the appellant had left her children unsupervised.

[5] The sheriff accepted the appellant had complained about issues with the heating at the property; however, he did not accept that any complaint was made by the appellant to the respondents stating the water discharge temperature was too hot, nor was there any basis to hold that the respondents could be deemed to know that the discharge temperature for hot water was 55°C. The sheriff held that, even had there been a danger present, in the absence of notification or knowledge of that danger the respondents could not be held in breach of their duties under the 1960 Act.

[6] The sheriff also found against the appellant on the issue of causation. Even if the respondents were in breach of their duty under the 1960 Act, in circumstances where the appellant had: (i) left a bath tub filled with hot water; (ii) failed to warn her children of the risk of the hot water in the bath; and (iii) left her children unsupervised in close proximity to the bath filled with hot water, then those actions together amounted to *novus actus interveniens*.

[7] Further, even if the appellant had established liability and causation, the sheriff would have made a finding of contributory negligence and made a reduction of 75% to her award of damages.

Submissions for the Appellant

[8] The solicitor advocate for the appellant submitted that the sheriff had been plainly wrong to hold that the discharge at outlet of domestic hot water at a temperature of 55°C did not present a danger. The sheriff had been required to have regard to the Building (Scotland) Regulations 2004 by virtue of section 13(2) of the Housing (Scotland) Act 2006 but had not done so. The house was not reasonably fit for human habitation.

[9] The sheriff had ignored a body of evidence to the effect that discharge at such a temperature was dangerous. This evidence included minutes of an evidence session to the Scottish Parliament in 2004, the Technical Guidance issued alongside the Building (Scotland) Regulations 2004, and the evidence of both parties' experts.

[10] The sheriff erred in law by seeking to distinguish the decisions in *Guy* v *Strathkelvin* 1997 SCLR 405 and *Hughes' Tutrix* v *Glasgow District Council* 1982 SLT (Sh Ct) 70) from that of *Bell* v *North Ayrshire Council* 2007 Rep LR 108. The injury in the present case had arisen

from ordinary usage by the appellant and questions of reasonable foreseeability were rarely an issue in cases involving children.

[11] The sheriff had erred in law by seeking to import the issue of reasonable care into the landlord's contractual duties. If a breach of fitness for human habitation was established, enquiry should pass to the question of whether the breach represented a danger. If so, the landlord would be subject to the duties within section 2(1) of the 1960 Act as occupier. *Separatim* the tenancy required to conform to the Repairing Standard contained within sections 13-16 of the Housing (Scotland) Act 2006. The sheriff also erred by failing to have regard to the Building (Scotland) Regulations as under section 13(2) of the 2006 Act. He erred in finding that there was no sanitary defect at the property simply because the hot water system was mechanically sound. The duties of a landlord include the requirement to conform to the Repairing Standard as contained in the Housing (Scotland) Act 2006.

[12] The sheriff erred in holding that the circumstances of the accident amounted to *novus actus interveniens.* No such argument had been pled by the respondents and questions of reasonable foreseeability rarely applied to the actions of children: *Jolley* v *Sutton* {2000] 1 WLR 1082. The source of danger had been the water discharged at 55°C; the fact that unsupervised children had come into contact with the bath water did not break the chain of causation. The sheriff erred in considering that bath-running practices were within judicial knowledge and no evidence of such practices was led. He erred in finding that the appellant had to demonstrate awareness, actual or deemed, of the danger, on the part of the respondents in order for their duty of care under sections 2 and 3 of the 1960 Act to engage. He ought to have held that the respondents did have such awareness.

[13] The sheriff erred in his approach to contributory negligence. He ought to have found contribution only for egregious negligence (*Ellis* v *Kelly* [2018] 4 WLR 124*)* and should have

applied the standard blameworthiness and causative potency test. Any contributory finding should have been no higher than 30%.

Submissions for the respondents

[14] The sheriff did not ignore any of the relevant evidence. His judgment included reference to all of the evidence listed by the appellant. In any event, in the absence of a compelling reason to the contrary, it is to be presumed that a sheriff took the whole of the evidence into their consideration: *Henderson* v *Foxworth Investments Ltd* 2014 SC (UKSC) 203 at para [48].

[15] The appellant's approach to liability was predicated on establishing that the respondents were in breach of their duties as landlords. However, the statutory duty incumbent upon a landlord as occupier under the 1960 Act is of a very different nature to his duties as a landlord: *Todd* v *Clapperton* 2009 SLT 837 at para [93].

[16] Establishing a failure on the part of a landlord to perform their maintaining or repairing responsibilities is not sufficient to give rise to liability under the 1960 Act. Not every defect which a landlord can properly be called upon to repair under their leasehold obligations will amount to a danger: *Bell* v *North Ayrshire Council*, (above) at para [41]. Liability will only be established if: (i) the failure gives rise to a danger; and (ii) the landlord is found to have failed to take reasonable care not to cause injury: *Bell* at para [43].

[17] The sheriff was correct to hold that a water discharge temperature of 55°C was not, by itself, a danger arising from the responsibilities of the respondents or a danger which had as its reasonable and probable consequences scalding injuries to the appellant or her children. Even if the sheriff had erred and ought to have held the discharge temperature of 55°C was a danger then, provided that it was a danger arising from the respondents'

failure to maintain and repair, section 3(1) of the 1960 Act would be engaged; however, the appellant would still require to prove that there had been a breach of section 2(1) of the 1960 Act. Actual or deemed knowledge of the danger by the landlord is an essential prerequisite for liability under section 2(1) of the 1960 Act: *Wallace* v *City of Glasgow District Council* 1985 SLT 23; *Kirkham* v *Link Housing Group Ltd* 2012 Hous LR 87 at para [34].

[18] There was no averment about any complaint being made about temperature. As a consequence, it was not open to the appellant to suggest there was any knowledge on the part of the respondents of the water temperature. In any event, the sheriff held that the respondents had no actual or deemed knowledge of the hot water being too hot. There was no ground of appeal formally challenging those findings. In oral submission the appellant indicated that she was now seeking to do so. Absent a ground of appeal, it was not open to the appellant to challenge the sheriff's findings as to knowledge on the part of the respondents. In the event, the appellant required to show actual knowledge of the danger. In the absence of having proving actual or deemed knowledge, the appeal was bound to fail.

[19] The sheriff was correct that the Building (Scotland) Regulations 2004 did not apply to the respondents' property: a water discharge temperature of 55°C was to be expected given the age of the respondents' property. Even had the 2004 Regulations applied to the property, the sheriff was correct to hold that it would not have altered his findings regarding the state of repair of the property. That was a conclusion which was open to the sheriff: *Fyfe* v *Scottish Homes* 1995 SCLR 209. If the 2004 Regulations applied to the respondents' property then it would mean that every property in Scotland, not just those built after 2005, would require to have thermostatic valves installed. The appellant's argument sought to overturn the intent of the Scottish Parliament when it passed the 2004 Regulations.

[20] The appellant's actions were wholly unreasonable and broke the chain of causation: *McKew* v *Holland & Hannen & Cubitts* (Scotland) Ltd 1970 SC (HL) 20 at p.25. It was the appellant's own fault, rather than any fault on the part of the respondents, which was the effective cause of the accident.

[21] The sheriff did not err in his approach to contributory negligence. In the absence of an identifiable error, an appellate court will only interfere with a finding of contributory negligence if satisfied that it was not one which was reasonably open to it: *Jackson* v *Murray* 2015 SC (UKSC) 105 at paras [27] to [38].

Decision

[22] The initial question is whether the sheriff was plainly wrong to hold that the discharge of water from the bath tap at a temperature of 55°C was not dangerous.

[23] There was almost no dispute over the mechanism of injury. The two boys had been fighting between themselves and had ended up in the scalding hot bath which had been left unattended by the appellant. The hot water had been dispensed from the bath tap at 55°C as was normal for a domestic property which had been built before 1 May 2005 and not subsequently refurbished. This had been the dispensing temperature throughout the period of the appellant's tenancy and for more than a year prior to the incident. The appellant had made no complaint about it.

[24] The sheriff founded on the Inner House decision in *Anderson* v *Imrie* 2018 SC 328 in which Lord Brodie cited with approval the following statement from Lord Phillips in *Harris* v *Perry:*

> "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."

The sheriff concluded:

> "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".

At paragraph [96] the sheriff returned to this point:

> "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 para 91 above)."

The sheriff concluded that the danger occurred when young children were unsupervised so that they came into contact with water which was being discharged at a temperature which would result in scalding if contact were to persist for a sufficient period of time. The evidence indicated that the period would have been between 10 to 20 seconds of exposure at 55°C to produce the level of scalding which the younger child suffered. He concluded that the discharge temperature itself was not a danger in the absence of a failure to supervise a child so that they would not come into contact with the hot water.

[25] There was evidence that discharge at 55° C was dangerous which included: the Building (Scotland) Regulations 2004 which said that discharge temperatures from domestic taps should not exceed 48°C; evidence that fitting a thermostatic mixing valve ("TMV") would regulate the discharge temperature at the bath tap; the requirement that discharge temperatures should not exceed 44°C within NHS facilities; the opinion evidence of the skilled witnesses on either side, and further publications which included reference to the evidence of bathtime scalding injuries to young children placed before the Scottish

Parliament in 2006. It is clear from findings-in-fact 9 to 15 that the sheriff was well aware of the details of the publications referred to by the skilled witnesses. His discussion of the evidence of the witnesses Karen McNeill, CM and Russell Bralsford show that he was aware of the issue of the role of temperature. He found that none of these factors overrode his conclusion that it was not hazardous *per se.* We do not accept the submission that the sheriff ignored this evidence, or that he applied judicial knowledge.

[26] The appellant's position identified a conflict between the fact that hot water was discharged from the taps at the property at 55°C and the secondary finding that it did not constitute a danger, under reference to *Anderson* v *Imrie*. We do not accept that this shows the sheriff to have been plainly wrong in making the finding that the temperature itself did not constitute a danger. The essence of the sheriff's decision in this respect is to be found in finding and fact and law 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. "

This conclusion by the sheriff takes account of the evidence of the effect of discharge at 55°C as reflected in the evidence referred to by the appellant by recognising that it was an "obvious hazard to young children" – but so obviously so that supervision of the children was "necessary". In our view that conclusion was factually correct. There was no evidence that either the appellant or the respondents had regarded a discharge temperature of 55°C as a danger prior to the incident. The danger arises through a combination of temperature and time of exposure, not temperature alone.

[27] The appellant's case depended upon the respondents failing in their responsibilities for the maintenance and repair of the property, for which they were responsible under the tenancy agreement, in terms of section 3 of the Occupiers' Liability (Scotland) Act 1960. The section imposes on a landlord who is responsible for the care and maintenance of the premises the same level of care towards any persons who are on the premises (such as the children in this case) in respect of dangers arising from any failure of their responsibilities as is imposed upon an occupier by section 2(1) of the Act in respect of dangers due to the state of the premises. That standard is: "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.".

[28] The property had been constructed in 1995 at which time a discharge temperature of 55°C was standard. It was not subject to the Building (Scotland) Regulations 2004 or the Building Standards Technical Handbook 2017 which provided guidance on achieving the standards set by the 2004 Regulations and which indicated that, to prevent scalding, water should not be delivered to a bath at a temperature exceeding 48° C. In *Fyfe* v *Scottish Homes* the court noted that building standards regulations were regularly amended, usually to improve minimum standards. They did not impose an obligation on a landlord to bring houses up to the latest standards each time they were amended. The court could have regard to them as one of a number of factors in assessing whether the house was tenantable and habitable. The sheriff did have regard to the 2004 Regulations in terms of the Housing (Scotland) Act 1987, as amended. The guidance contained in the 2017 Handbook was advisory: *Ellis* v *Bristol City Council* {2017] ICR 1614. The sheriff considered the appellant's expert's testimony regarding the 2004 Regulations and the 2017 Handbook. This include the contents of paragraph 4.9 of schedule 5 to the 2004 Regulations (as amended):

> "**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."

This paragraph relates to the design and construction of a building. The discharge of hot water within the premises was controlled by the operation of the taps in the bathroom and elsewhere. The sheriff's discussion of the evidence makes it plain that he did have regard to the 2004 Regulations and also to the 2017 Handbook. He did not accept the appellant's expert's position that the discharge of water from the bath tap at 55° C was in itself unsafe or dangerous. He noted that the premises were not governed by the 2004 Regulations or the 2017 Handbook and that a discharge temperature of 55° C was normal and expected in a house of the age of the premises. He noted that there had been no prior scalding incidents since the respondents purchased the house in 1997, a period of approximately 21 years, or any prior indication to the respondents of any issue with the temperature of the hot water at the premises. These considerations led to the conclusions which he set out at the end of paragraph [96]:

> "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 para 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."

These conclusions flowed directly from the sheriff's factual findings. He did not regard the discharge of water at the tap at 55° C to be dangerous by itself. He did not consider that filling the bath with scalding hot water only was ordinary usage. He did not consider that leaving young children unsupervised for a period of the order of ten minutes close to such an obvious hazard was ordinary usage of the premises. We consider that the sheriff was

justified in reaching each of those conclusions from the findings in fact and each has significance in terms of the key authorities relied upon.

[29] The appellant criticised the sheriff's approach whereby he distinguished the decisions in *Guy* v *Strathkelvin* and *Hughes' Tutrix* v *Glasgow City Council* on the one hand and *Bell* v *North Ayrshire Council* on the other. In *Guy* v *Strathkelvin* a parent sued a local authority housing association on behalf of her asthmatic child who had been adversely affected by the level of condensation and dampness in her premises. In *Hughes' Tutrix* v *Glasgow City Council* a child had been injured by falling on to a broken toilet bowl. Each of these cases followed the guidance given in *Summers* v *Salford Corporation* 1943 AC 283 in which Lord Atkin stated:

> "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 on all respects reasonably fit for human habitation. "

In *Guy* v *Strathkelvin* and *Hughes' Tutrix* v *Glasgow City Council* damages were sought in respect of injury which had been sustained in the course of normal use of the property in each case. By contrast, in *Bell* v *North Ayrshire Council* the pursuer injured her hand while trying to open a stiff window in a flat leased to her friend. The court considered the terms of sections 3(1) and 2(1) of the 1960 Act:

> "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 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."

[30] The sheriff applied those principles. From *Bell*, it is the landlord's statutory responsibility to maintain and repair a property and that any failure to do so which results in a danger to occupiers and others which results in their injury is something for which the landlord is liable. There must be a danger; and that danger must be a consequence of the landlord's failure to maintain and repair the property to the necessary standard. Further, not every defect which a landlord can properly be called upon to repair under his leasehold obligations will amount to a danger. Whether or not it does will be a question of fact.

[31] The sheriff applied these principles in reaching his conclusion that the emission of hot water from the bathtap in the property at 55°C was not dangerous *per se* and that accordingly no liability attached to the respondents. We do not consider that the sheriff erred in his interpretation of *Bell* nor in his distinguishing it from *Guy* and *Hughes' Tutrix*. Had the court in *Bell* been required to do so, it would not have found that the window had been a danger.

[32] Furthermore, the dampness problem in *Guy* and the broken toilet bowl in *Hughes' Tutrix* presented as dangers in ordinary use of the premises. The sheriff saw the facts differently in the present case in that he clearly considered that running a bath with water from the hot tap only was not ordinary use while leaving young children unsupervised nearby. The critical part of his decision is to be found within paragraph [97] of the judgment:

> "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 findings in fact 29 and 30) that resulted in the risk that damage might be caused to the pursuer's children."

We detect no error of law in that conclusion.

[33] The premises were required to meet the repairing standard within section 13(1) of the Housing (Scotland) Act 2006, the relevant parts of which state:

> "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, electricity (including residual current devices) and any other type of fuel and for sanitation, space heating by a fixed heating system and heating water are in a reasonable state of repair and in proper working order."

[34] The sheriff noted that hot water had to be stored at about 60°C to prevent the development of legionella bacteria and that the passage of water from the hot water cylinder to the bath tap would result in a discharge temperature of 55°C. He concluded that Lord Atkins's test in *Summers* v *Salford Corporation* (above) had not been met nor had the respondents failed to meet their responsibilities for the maintenance and repair of the property. Accordingly it could not be said that the property was not fit for human habitation so that the repairing standard in section 13(1)(a) of the 2006 Act had not been breached. His reasoning that the discharge temperature was not dangerous by itself, and only became so in the circumstances which occurred on the date of the accident, is, in our view, justified on the evidence.

[35] With regard to section 13(1)(c) of the 2006 Act the sheriff stated:

> "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 water at the bath hot water tap at a temperature of 55°C."

As has already been noted, hot water required to be stored at 60°C to prevent the development of legionella bacteria and the consequential bath tap discharge temperature of 55°C was standard in a property of the age of the premises. In these circumstances we

consider that it cannot be said that the water and sanitation installations were not in proper working order simply because of that discharge temperature, which is the appellant's case in terms of section 13(1)(c).

[36] The aim of the 1960 Act was to define the degree of care required of an occupier by restoring a broad test of reasonableness; and the concept of reasonable foreseeability clearly underlay fault: *Dawson* v *Page* [2012] CSOH 33, per Lord McGhie at paragraph 14. The sheriff was correct to consider that the test of reasonable foreseeability applied to the situation in the present case. The appellant submitted that the law regarding natural and probable consequences had developed since *Muir* v *Glasgow Corporation* 1943 SC (HL) 3 which had been considered by the sheriff. Reference was made to the speech of Lord Hope in *Mitchell* v *Glasgow District Council* 2009 SC (HL) 21:

> "[18] There are other indications in the authorities that a high degree of likelihood of harm may be an appropriate limiting factor (see *Dorset Yacht Co Ltd* v *Home Office*, per Lord Reid, p. 1030). In *Attorney-General of the British Virgin Islands* v *Hartwell* (para 21) Lord Nicholls of Birkenhead said that the concept of reasonable foreseeability embraced a wide range of degrees of possibility, from the highly probable to the possible but highly improbable. As the possible adverse consequences of carelessness increase in seriousness, so will a lesser degree of likelihood of occurrence suffice to satisfy the test of reasonable foreseeability."

In *Bolton* v *Stone* [1951] AC 850 a person on a side road was injured by a cricket ball which had been struck in an "altogether exceptional" manner from a nearby cricket ground, although a ball had been struck out of the ground on very rare occasions in the past. While the possibility of the ball being struck on to the highway might reasonably have been foreseen, the court held that it was not sufficient to establish negligence since the risk of injury to anyone in such a place was so remote that a reasonable person would not have anticipated it. The sheriff considered the likelihood of the injury in the present case to be low in part because there had been no scalding injury on the premises since the respondents

had first occupied it in 1997 and because it was not reasonably foreseeable that children would be left unattended in the vicinity of a bath filled with hot water. In our view his reasoning was sound.

[37] The appellant sought to rely on the statement in *Todd* v *Clapperton* 2009 SLT 837 that warrandice on the landlord's part is implied regarding the fitness of premises for habitation at the commencement of the lease (per Lord Bannatyne at paragraph [109] *et seq.*). In our view the evidence showed that the premises were fit for habitation and the appellant failed to show otherwise. Furthermore, *Todd* v *Clapperton* is of limited assistance to the appellant because the court held that the injury had not occurred as a consequence of normal use of the property. So it is in the present case.

[38] In *Kirkham* v *Link Housing Group* 2012 Hous LR 87 a tenant tripped on a raised paving slab which was part of the footpath leading to her front door. She brought an action of damages under the terms of her tenancy agreement and also in terms of section 2(1) of the 1960 Act. The court stated, at paragraph [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."

In the present case the sheriff found that the respondents did not have knowledge that the hot water in the premises was too hot for safety, or of the actual discharge temperature. In the absence of any previous scalding incident between December 1997 and 12 April 2018, and of any prior indication that there was any issue with the delivery temperature of the hot water, he decided that the respondents did not have actual or deemed knowledge that the discharge temperature of 55°C was a danger. He noted that there had been complaints about the operation of the water and heating systems within the premises which had been attended to under a maintenance contract which the respondents held with Scottish Gas.

However, the evidence indicated that none of these complaints had concerned the water being too hot. These were factual matters for the sheriff to determine and we detect no error in his conclusion that the respondents had no actual or deemed knowledge of the presence of dangerously hot water.

[39] The appellant submitted that the sheriff had erred in holding that the respondents had no actual or deemed knowledge of the discharge temperature of 55°C being an alleged danger. Counsel for the respondents submitted that the issue of deemed knowledge was not contained within the grounds of appeal and that no averment of constructive or deemed knowledge was contained in the pleadings. We agree that the issue of deemed knowledge is nowhere to be found within the grounds of appeal. We can find no averment of constructive or deemed knowledge within the appellant's pleadings in the statements of claim in the initial writ. This court has recently held that reliance cannot be placed upon a case in law which has not been pled: *Miller* v *Miller* 2025 SCLR 120, at paragraphs [14] and [15]. Accordingly the question of deemed knowledge on the part of the respondents is not competently before the court in this appeal.

[40] The sheriff held that if he were to have erred on the issue of danger arising from the temperature of the bath water, the appellant's case would still fail on the basis that the level of supervision which she had exercised over the children constituted *novus actus interveniens.* We consider that the defence was capable of being established, and was established in this case, but we differ from the sheriff's analysis. Any fault on the part of the respondents could relate only to a dangerously high discharge temperature of water from the bath tap. The circumstances as found by the sheriff were that the appellant filled the bath with water from the hot tap only, then left the bathroom for a period of around ten minutes to attend to her youngest child, knowing that two young children would be left unsupervised in the vicinity

of the scalding hot bath. In our view the whole circumstances, not simply the absence of supervision, were capable of constituting *novus actus interveniens.* The filling of the bath with scalding hot water was a critical factor in creating the danger, as was leaving two young children unsupervised for an extended period. Accordingly in our view these two factors in combination broke the chain of causation between any fault on the part of the respondents and the resulting injury.

[41] Had we found otherwise, the issue of contributory negligence would arise. The appellant challenged the sheriff's finding as to contributory negligence on her part of 75%. The appellant submitted that the apportionment ought to have been 70% to the respondents and 30% to the appellant. Various authorities in which children were injured were cited by way of example but are too fact-specific to be of assistance. Both parties referred to the speech of Lord Reed in *Jackson* v *Murray* 2015 SC (UKSC) 105 at paragraph [27]:

> "It is not possible for the court to arrive at an apportionment which is demonstrably correct. The problem is not merely that the factors which the court is required to consider are incapable of precise measurement. More fundamentally, the blameworthiness of the pursuer and the defender are incommensurable … The court is not comparing like with like.
> [28] It follows that the apportionment of responsibility is inevitably a somewhat rough and ready exercise …"

His Lordship went on to say:

> "[31] Given the broad nature of the judgment which has to be made, and the consequent impossibility of determining a right answer to the question of apportionment, one can say in this context, as Lord Fraser of Tullybelton said in relation to an exercise of judgment of a different kind in *G* v *G (Minors:Custody Appeal) (*p 651*):*
>
> 'It is comparatively seldom that the Court of Appeal, even if it would itself have preferred a different answer, can say that the judge's decision was wrong, and unless it can say so, it will leave his decision undisturbed.'"

[42] The sheriff set out the factors which pointed to the appellant's blameworthiness in the context of his consideration of the issue of *novus actus interveniens,* immediately before

stating his position on contributory negligence. In the light of his consideration of those factors we are unable to say that he was wrong. We would not have interfered with his decision in relation to contributory negligence.

Disposal

[43] Accordingly we refuse the appeal and adhere to the sheriff's interlocutors of 7 March 2024 and 22 March 2024. Standing the terms of section 8(2)(b) of the Civil Litigation (Expenses and Group Proceedings) (Scotland) Act 2018, we make a finding of no expenses due to or by either party.