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

[2019] SC EDIN 48

PN905-18

JUDGMENT OF SHERIFF FIONA LENNOX REITH QC

in the cause

GHEORGHE DEHENES

Pursuer

against

T BOURNE AND SON

Defender

Pursuer: Cleland; Digby Brown LLP
Defender: McGregor; BLM LLP

Edinburgh 2 May 2019

The Sheriff, having resumed consideration of the cause, finds in fact:

1. On or about 11 June 2015 the pursuer was working in the course of his then employment with the defender as a driver and porter.

2. The pursuer and a colleague, Aaron Craig, had been instructed to travel by truck to a laboratory at the premises of Quotient, Pentlands Science Park, Bush Loan, Penicuik in order to uplift two pieces of medical equipment called analysing machines. Aaron Craig was the pursuer's team leader. The machines were to be placed in the work truck and taken to Heathrow Airport. This task was planned by the defender.

3. The pursuer and Aaron Craig were given written instructions in relation to this task in a "work ticket", number 5/7 of process. On arrival at the laboratory Aaron Craig carried out a risk assessment in relation to the task. This is also contained in the said "work ticket".

Each of the analysing machines weighed approximately 250 kg (550 lbs). This information was also on the "work ticket".

4. When Aaron Craig was carrying out the risk assessment the pursuer expressed concern to him about the weight of the machines and the narrowness of the corridor in which they were going to have to manoeuvre the machines to be placed on a pallet in the laboratory before being taken out to the truck. Aaron Craig recorded the pursuer's concern in writing below the risk assessment contained in number 5/7 of process.

5. The pursuer and Aaron Craig were told by the defender before leaving to carry out the job that workstations in the laboratory would be moved so that they would have space to manoeuvre the machines. However, when the pursuer and Aaron Craig arrived at the laboratory, this had not happened. The pursuer raised this point with Aaron Craig on arrival at the laboratory. However, the pursuer was told by Aaron Craig to get on with the job. Whilst the pursuer and Aaron Craig were at the laboratory the pursuer repeatedly expressed concerns to him about the weight of the machines and the narrowness of the working area within which the machines were to be manually handled. The pursuer was just told to get on with the job.

6. The pursuer and Aaron Craig were working along with two men from another removals company, Purdie Worldwide Removals and Storage Limited ("Purdies"). The pursuer was therefore engaged, as part of a four man team, alongside Aaron Craig and the two men from Purdie's to manually handle each analysing machine and to place it on a pallet within the laboratory. They were then going to use a small manual forklift to transport each analysing machine from the pallet to the truck outside the laboratory.

7. The task of manually handling each analysing machine to place it on the pallet involved lifting each machine in turn from the tops of two adjoining workstations in a

corridor in the laboratory and vertically lifting each machine, from a height of about one metre, onto the pallet a few metres away.

8. There were lifting handles positioned on the four corners of each analysing machine. These had been placed at each corner by a person (whose identity is unknown) who worked at the laboratory. Each of the four men would take a handle when manually handling it from the workstation to the pallet.

9. In order to carry out this manual handling task, two men had to walk forwards each holding the handle at the rear of the analysing machine and two men had to walk backwards each holding a handle at the front of the analysing machine as it was moved towards the pallet.

10. The two analysing machines were located on the tops of two workstations between about one metre and 1.20 metres above the ground.

11. These workstations were located on one side of a corridor which was bounded by workstations running the length of each side of the corridor in parallel. This left a corridor width between the parallel set of workstations of between about one metre and 1.20 metres. There were electric sockets protruding from the sides of the workstations.

12. The space in the corridor with said electric sockets was a confined space.

13. Each analysing machine was about one metre by one metre and was cube shaped.

14. The four men required to lift manually each machine off its workstation and to manoeuvre it along the said narrow corridor out to a wider area in the laboratory where the pallet was located. The pallet was located between about half a metre and one metre beyond the end of the corridor in the said wider area of the laboratory. The pallet was made of wood. The top surface of the pallet was between about 20cm and 25cm off the ground.

15. The men were only able to take small shuffling steps due to the weight of the machine holding their arms outstretched as they held onto the handles. They were unable to see their feet as they walked.

16. The manual handling exercise in relation to each machine was very strenuous due to the weight of each machine. The pursuer could not breathe properly when manoeuvring each machine due to its weight.

17. The four men were able to manoeuvre the first of the machines onto the pallet with the pursuer walking forwards at the rear end of the machine holding one of the handles at the rear.

18. The pallet was located about two or three metres away from the workstation upon which the second analysing machine to be manually handled was positioned.

19. When the second machine was being manoeuvred from the workstation to the pallet the pursuer was walking backwards taking small shuffling steps holding a handle at the front end of the machine. He was holding his breath due to its weight. Just before the machine was manoeuvred round the corner at the end of the corridor the other man at the front of the machine walking backwards holding the other handle let go of his handle and the pursuer took hold of it in addition to his own handle. It is likely that this happened because there was not enough space for the other man at the front walking backwards to pass round the corner whilst holding onto the handle.

20. As he was walking backwards, although the pursuer knew that the pallet was behind him, he could not see exactly where it was. He had already repeatedly complained that the machine was too heavy for him, but he had been told to get on with the job. The pursuer was concerned that if he refused to do the task he would probably lose his job.

21. As the pursuer was walking backwards towards the pallet he caught his right heel on the edge of the pallet. As a result, he lost his balance and the machine fell onto his right hand causing loss, injury and damage.

22. In planning the task the defender gave no thought to using any device to avoid or reduce manually lifting the machine, such as a hydraulic lift.

23. In carrying out the risk assessment in the "work ticket", number 5/7 of process, Aaron Craig gave no thought to using any device to avoid or reduce manually lifting the machine, such as a hydraulic lift.

24. A hydraulic lift, such as a scissor lift, could have been used. After initial manual handling to slide the machine directly from the top of the workstation onto the scissor lift (at the same height), this would have avoided the manual handling of the machine from the top of the workstation to the pallet. The pursuer would have been able to use such a device. He had had experience of using hydraulic lifts.

25. The defender was in control of the work that the pursuer was to do and the way in which he was to do it. It was, or ought to have been, foreseeable to the defender that manoeuvring a heavy load in such a confined space would constitute a risk of injury.

Finds in fact and law:

(1) That the accident was caused by fault and negligence on the part of the defender and on the part of Aaron Craig, acting in the course of his employment with the defender, and for whose actings in the course of his employment with them the defender is vicariously liable.

(2) That the pursuer, having sustained loss, injury and damage thereby, is entitled to reparation from the defender therefor in the agreed sum of £28,500 Sterling free and net of any recoupment in terms of the Social Security (Recovery of Benefits) Act 1997;

THEREFORE, grants decree for payment by the defender to the pursuer of the sum of TWENTY EIGHT THOUSAND FIVE HUNDRED POUNDS (£28,500) Sterling, free and net of any recoupment in terms of the Social Security (Recovery of Benefits) Act 1997, with interest thereon at the rate of 8% per annum until payment; reserves meantime all questions of expenses and appoints parties to a hearing thereon on 22nd May 2019 at 9.30am within the Sheriff Court House, 27 Chambers Street, Edinburgh.

NOTE

Introduction

[1] This is a personal injury action in which the pursuer seeks an award of damages in respect of injuries sustained by him when he was manoeuvring heavy machinery in a laboratory in Penicuik. The proof took place before me on 26 and 27 March 2019. Counsel prepared written submissions, numbers 23 and 24 of process, which are referred to for their terms and all of which I took into account, and which were supplemented by brief oral submissions.

[2] In summary, the pursuer's case on record was that, on 11 June 2015, he was working as a driver and porter for the defender along with his team leader, Aaron Craig. The task they were involved in that day involved going to pick up two pieces of medical equipment called analysing machines from a laboratory in Penicuik with a view to transporting them down to Heathrow Airport. They were being assisted by two other men from another

removals company. The pursuer averred that the two pieces of equipment were extremely heavy. Each weighed about 250kg. The task had been planned by the defender. Aaron Craig carried out a risk assessment on arrival at the laboratory that morning. The four men had to load each machine manually onto a pallet in the laboratory and then use a small manual forklift to take each machine to the truck outside the laboratory. The pursuer had to walk backwards with the second of the two machines with his arms positioned straight out in front of him at full stretch. He was not able to see where he was putting his feet. As he was walking backwards he tripped over a pallet causing him to let go of his corner of the machine which fell onto his right hand. The weight of the machine was well in excess of a load which a four man team could carry safely. The space was confined. The machine was catching on the corner of sockets. A suitable and sufficient risk assessment would have highlighted that lifting a heavy load in a confined space would create a risk of injury. Manual handling could have been avoided by the use of a hydraulic lift. The pursuer averred that his claim was based on the defender's breach of its common law duty to take reasonable care for the pursuer. It was also based on the defender's vicarious liability for the negligent actions of Aaron Craig who failed to carry out a suitable and sufficient risk assessment. Reference was made to the Manual Handling Operations Regulations 1998.

[3] The defender denied liability. It admitted that certain duties of care were incumbent on the defender but explained that these duties were fulfilled. If the defender was liable to the pursuer, the accident was caused or at least materially contributed to by fault and negligence on the part of the pursuer.

[4] At the commencement of the proof, a joint minute agreeing certain matters was lodged. This included agreeing quantum at £28,500 inclusive of interest to 26 March 2019. The proof was, therefore, restricted to the question of liability. The evidence was led and

concluded on the first day. The pursuer was led in evidence. The pursuer also led as an expert witness in ergonomics Dr Diane Crawford, Head of Ergonomics and Human Factors at the Institute of Occupational Medicine, Riccarton, Edinburgh. The defender elected to lead no evidence. Submissions were made on the morning of the second day of the proof. I wish to record my appreciation of the care and expedition with which both counsel conducted the case. That was in relation to both the agreement of, and leading of, evidence and in relation to submissions. All that could reasonably be agreed was agreed and so the proof itself was focussed on what was truly in dispute. Much of the factual evidence was, therefore, not disputed. There was no dispute that the pursuer and Aaron Craig had to go to the laboratory in Penicuik to pick up two heavy machines, that they were working with two men from another removals company to undertake this task, that the task had been planned by the defender and that Aaron Craig had carried out a "risk assessment", that all four men were manoeuvring both machines from workstations to a pallet so that the machines could then be taken outside to the truck to be taken to Heathrow Airport, that the space in which they were manoeuvring the machines from the tops of the workstations to the end of the short corridor was a confined space, that as the pursuer was walking backwards with the second machine the pursuer caught his heel on the pallet and tripped (the defender admitted in answer 4 that he tripped), that he lost his balance and that the machine fell onto his right hand injuring it. However, there was a dispute about whether the pursuer had proved that the accident happened as set out in his averments. There was also an issue about whether, even if a scissor lift had been used, that would have avoided or reduced the risk of injury which occurred in the present case. The defender left it for the court to assess whether the risk assessment carried out by Aaron Craig had been a suitable and sufficient risk assessment of the manual handling operation.

[5] The main issues to be determined were, therefore, (1) whether the pursuer has proved that the accident happened as averred on record, (2) whether the risk assessment was suitable and sufficient, and (3) whether the use of a scissor lift would have avoided or reduced the risk of injury. These questions require to be resolved in order to determine whether the manual handling operation involved a risk of injury as a foreseeable possibility and, if so, whether the defender took adequate precautions against the risk of injury.

Statutory provisions

[6] Regulation 2 of the Manual Handling Operations Regulations 1992 ("the 1992 Regulations") provides:

> "2. – Interpretation
>
> (1) In these Regulations, unless the context otherwise requires—
>
> …"manual handling operations" means any transporting or supporting of a load (including the lifting, putting down, pushing, pulling, carrying or moving thereof) by hand or by bodily force."

[7] Regulation 4 of the 1992 Regulations provides:

> "4. - Duties of employers
>
> (1) Each employer shall—
>
> (a) so far as is reasonably practicable, avoid the need for his employees to undertake any manual handling operations at work which involve a risk of their being injured; or
> (b) where it is not reasonably practicable to avoid the need for his employees to undertake any manual handling operations at work which involve a risk of their being injured—
>
> (i) make a suitable and sufficient assessment of all such manual handling operations to be undertaken by them, having regard to the factors which are specified in column 1 of Schedule 1 to these Regulations and considering the questions which are specified in the corresponding entry in column 2 of that Schedule,

> (ii) take appropriate steps to reduce the risk of injury to those employees arising out of their undertaking any such manual handling operations to the lowest level reasonably practicable, and
> (iii) take appropriate steps to provide any of those employees who are undertaking any such manual handling operations with general indications and, where it is reasonably practicable to do so, precise information on—
>
> (aa) the weight of each load, and
>
> (bb) the heaviest side of any load whose centre of gravity is not positioned centrally…"

Submissions

Pursuer

[8] The court was invited to grant decree for payment by the defender to the pursuer in the agreed sum of £28,500. The pursuer was a credible and reliable witness. Although the accident had happened almost four years ago and the pursuer had been to the *locus* only once, his recollection had been clear enough to allow the court to reach conclusions on critical factual matters. The pursuer had made it clear that he was not at all happy about the task. Despite his complaints about the heaviness of the machine, he had just had to get on with the task. He was concerned about his job if he was to refuse to help. The evidence suggested an attitude to health and safety and risk assessment on the part of the defender which was extremely casual and out-of-date. It was true to say that the pursuer's evidence that, towards the end of the second lift, there were only three men lifting the machine was not foreshadowed in the pleadings. However, the pursuer had explained his recollection about this. It was not suggested to him that his account was untrue. No witnesses were led by the defender to contradict the pursuer's evidence about the work itself, how they went about it, who was lifting what and when, whether there was any argument between the pursuer and Aaron Craig about the pursuer's complaints and the handwriting on the "work ticket" which the pursuer said had been added by Aaron Craig when the pursuer

complained about the weight and narrowness of the working area before the accident. Although there was no suggestion that the pursuer was not following or understanding what he was being asked, he was not a native English speaker.

[9] The pursuer submitted that Dr Crawford gave her evidence in a careful and measured way. She had many years of relevant experience as an ergonomist pertaining to the risks of injury, particularly musculoskeletal injury, as a result of inappropriate lifting at work and has, over the years, provided advice to a number of organisations about reduction measures. The particular task in this case clearly fell entirely within her remit of experience and expertise. It was obvious that her view was that the task in this case was not properly planned, with no thought whatsoever given to considering the risks of four men transporting such a heavy and unwieldy load, particularly given the narrow confined space. It was equally obvious that a relatively simply alternative solution was available by way of a hydraulic lift, her recommendation being a scissor lift. Such a lift is readily available for hire, easy to operate and would have been capable of being used in this case albeit with some care given that the machine was not a balanced load and consisted of sensitive medical equipment. She considered that this is what a reasonable employer would have been thinking of and that this would have avoided the manual lifting of the load, including it being moved from the workstation top to the pallet at ground level, and would have reduced the extent of manual handling otherwise to the lowest level reasonably practicable. Dr Crawford was not challenged as regards either her expertise or the recommended alternative solution. She accepted that using a scissor lift would still have involved some element of effort as it would have to have been pushed and/or pulled, but that was clearly something four men, if not fewer, could do and would still have avoided the significant

manual handling lifting which was undertaken. The defender led no evidence to justify either its planning of the task or the system of work, or the actions of Aaron Craig.

[10] In relation to the effect of section 69 of the Enterprise and Regulatory Reform Act 2013 ("the 2013 Act") the pursuer accepted that it was not possible for him to rely on a direct breach of the 1992 Regulations as they no longer confer civil liability. Accordingly, the pursuer's claim proceeds under the common law. However, in considering the scope and standard of duty of care owed, and whether that duty is breached, it is relevant to consider, in the exercise of assessing the defender's duty to take reasonable care towards the pursuer as their employee, the defender's obligations under the regulations which they still require to comply with as a matter of law. A breach could result in criminal proceedings. The duties set out in statutory instruments made prior to the 2013 Act inform and may define the scope of duties at common law. The existence of a regulation demonstrates that harm is foreseeable. An employer could hardly be in breach of a duty imposed under a regulation and still argue that he had taken reasonable care for the safety of his employees. Employers are bound to know their statutory duty and to take all reasonable steps to prevent their employees from committing breaches. Existence of a statutory duty may be regarded as evidence of the state of knowledge of a reasonable (i.e. non-negligent) employer as regards a particular risk. It would seem difficult for an employer to argue that it had acted reasonably whilst at the same time being guilty of a crime for having fallen below the standards set by Parliament for the protection of the health and safety of employees. If regulations are applicable to the factual situation of the case, they may very well be useful in assessing the nature and scope of a defender's duties at common law. The pursuer submitted that the analysis set out in the authorities to which reference was made in his submissions, including the text books referred to, is correct and that, in considering what the duty of care consists

of, considerable weight must be attached to the defender's ongoing duties under the statutory regulations (in this case the 1992 Regulations). The state of knowledge which has built up amongst employers over the last few decades as regards health and safety is also important to consider. This includes the concept of carrying out a suitable and sufficient risk assessment.

[11] In relation to the 1992 Regulations, the defender wholly failed to comply with its obligations. This was not a highly technical breach as in some other cases. The defender in planning the task and Aaron Craig in his risk assessment gave no thought to the risk of manual handling. Rather, it was simply a case of "let's get on with it" to get the job done. The regulations applicable in this case are regulations 2 and 4, and schedule 1 to the 1992 Regulations. The defender failed to comply with its statutory duties either to avoid manual handling altogether or to reduce the risk to the lowest level reasonably practicable as required in terms of regulation 4. The defender had made no averments at all about its obligations under the regulations. There was no suitable and sufficient risk assessment. The "risk assessment", part of number 5/7 of process, is barely worth being recognised as such. Although the weight of the machines and the narrow space at the locus was identified and highlighted, none of the factors specified in schedule 1 to the regulations were taken account of even although many of them clearly applied to the task in hand. The questions which applied were, in relation to "The tasks", whether they involved "holding or manipulating loads at distance from trunk", "unsatisfactory bodily movement or posture…especially stooping", "excessive lifting or lowering distances", "risk of sudden movement of loads" and "frequent or prolonged physical effort". In relation to the factor "The loads", the questions which applied were: are they "heavy", "bulky or unwieldy" or "difficult to grasp" and "unstable, or with contents likely to shift". In relation to the factor "Individual

capability", the question which applied was: "does the job require unusual strength, height etc". In relation to this last question, the machine weighed about 40 stone, far in excess of the recommended weight as confirmed by Dr Crawford. The lifting of the machine was clearly a "load" within the definition of the regulations. In considering the question of whether a risk of injury exists in the manual handling operation, it is clear that the risk of injury need not be more than a foreseeable possibility. That is manifestly the case with the manoeuvre in this case. It was entirely foreseeable that the accident would happen in this case given the weight of the machine and the manoeuvre involved. It is plain that the defender was in breach of its duties under the regulations and that its failures define the scope of the duties incumbent on it. The only conclusion that can be drawn is that the defender was not acting reasonably as a reasonable employer. That was the effect of the evidence of Dr Crawford. The defender was, therefore, negligent in failing to take any action to avoid or at least reduce the risk of manual handling. It may not have been possible to avoid completely manual handling. An element would still have been required in order to pull and push the scissor lift. It may well be that, as Dr Crawford accepted in her evidence, that would have been sufficient to reduce the risk of injury occurring as a result of the manual handling operation to the lowest level reasonably practicable as required by regulation 4, but that was not done either. Pushing or pulling the machine on the scissor lift would perhaps have been unwieldy requiring some effort, but it clearly would have avoided what actually happened.

[12] In relation to the defender's averments of contributory negligence, the pursuer was trying his best to fulfil a task under the most strenuous of circumstances, and it was a task which he had already made clear he was not happy to perform. He felt that he was in no position to disobey the instructions given. His team leader, Aaron Craig, was present at the

job. The pursuer was inferior to the team leader. For contributory negligence to apply in relation to an employee, momentary lapses or acts of inattention or inadvertence do not equate with negligence. This is especially so when the employee is involved in a task which placed him under pressure or stress. It should only apply when the employee embarks on a risky course of action, fails to follow training and experience, or does not comply with specific instructions or training given to him beforehand. None of these applies in this case. If the court was minded to make any finding of contributory negligence, it should be minimal at no more than 20%.

[13] Authorities in support of the pursuer's submissions were: *Gilchrist* v *Asda Stores Limited* 2015 Rep LR 95; *Kennedy* v *Cordia Services LLP* 2016 SC (UKSC) 59; *Kennedy* v *Chivas Brothers* 2015 SLT 981; *Boyle* v *Kodak Limited* [1969] 1WLR 661; *Wright* v *National Galleries of Scotland*, Sheriff McGowan (unreported), All Scotland Sheriff Personal Injury Court, 28 February 2019; *Cockerill* v *CXK Limited* [2018] EWHC 1155 (QB); *Cullen* v *North Lanarkshire Council* 1998 SC 451; *McGowan* v *W and JR Watson Limited* 2007 SLT 169; *Charlesworth & Percy on Negligence* (14th Edition) paragraphs 13-66 to 13-77; *Clerk & Lindsell on Torts* (22nd Edition) at paragraph 13.02.

Defender

[14] I was invited to assoilzie the defender from the craves of the initial writ. The defender's *esto* position was that the agreed damages should be reduced by 75% with a finding of contributory negligence to that extent. I was told that the defender took no issue with the pursuer's submissions in relation to, and analysis of, the legal position since the coming into force of section 69 of the 2013 Act. There was also no dispute in relation to the findings-in-fact proposed by the pursuer, with two exceptions. The pursuer had failed to

prove that the accident happened as set out in the pleadings. The clear implication of the pursuer's pleadings was that the accident occurred as a result of losing his footing while he was one of four men carrying the second machine. However, his position in evidence was that only three men were carrying the second machine at the material time. It was clear that the pursuer had stepped into the pallet while he was effectively left carrying one end of the second machine. The pursuer had in effect taken up the slack when one of the men let go of his handle. It was inconceivable that the pursuer could have forgotten this material factor. His explanation for remembering it in evidence was less than convincing. The pursuer was neither a credible nor a reliable witness in this connection. On the pursuer's evidence he had not proved his case as pled on record. The issue of fair notice to the defender was also raised. The pursuer should be precluded from succeeding on a basis that has not been foreshadowed in the pleadings. There may otherwise be a significant prejudice to the defender. There may have been a right of relief against Purdies. There may also have been an issue as to whether the pursuer's injury would have occurred if Purdies' employee had not failed to hold onto his handle. Even ignoring the fundamental factual difficulty that the pursuer has, it is clear from the evidence, in particular from that of Dr Crawford, that this was not a task in which manual handling could have been avoided. Even on the hypothesis that a scissor lift could have been used, there would inevitably be manual handling of the machine onto the scissor lift from the top of the workstation and then removing the machine from the scissor lift to place it on the pallet once it had been moved there. The movement of the scissor lift between the workstation and the pallet would also still have required manual handling in the form of pushing and pulling. Dr Crawford was unable to say how much force would be required to move the scissor lift carrying the machine. Dr Crawford appeared to accept that there would be a risk of one of the men catching his foot or heel on

the scissor lift. Dr Crawford agreed that, even with the scissor lift, the four men may well have ended up moving in a similar direction to that on the date of the accident, with two walking forwards and two walking backwards. That being so, and without knowledge of the force required to push or pull the scissor lift, the very risk on which the pursuer relies, namely tripping on the pallet, would have remained. It would have been for Dr Crawford to have said that use of the scissor lift would have lowered the risk of injury transporting the machine from the top of the workstation to the pallet. It was submitted that she had not done so. It had been due to a number of factors. She had not really applied her mind to the number of people involved and to the force involved in pushing and pulling. The real problem that Dr Crawford was seeking to address was the vertical lifting and lowering of the machine. Her report had been pretty much silent on the moving of the scissor lift from the worktop station to the pallet. Under reference to regulation 4 of the 1992 Regulations, it was clear from the evidence that it was not reasonably practicable for the defender to avoid the need for their employees, such as the pursuer, to undertake manual handling and which involved the risk of being injured. The defender had to make a suitable and sufficient assessment of the manual handling operation. It is for the court to assess whether the risk assessment performed by Aaron Craig and recorded on the "work ticket" achieved that. If it did not, it was clear from Dr Crawford's evidence that, even with the use of the scissor lift, it does not reduce the risk of injury that occurred in the present case. The pursuer would still have been walking backwards. Even if the court determines that there is a breach of the common law as a consequence of any failure to comply with the 1992 Regulations, the pursuer had failed to establish in terms of causation that this accident would have been avoided. This is because the mechanics or movement of the four men would have been the same with or without the scissor lift.

[15] In the event that the defender is liable to the pursuer, there should nevertheless be a finding of contributory negligence. The pursuer knew where the pallet was. He had completed the transportation of the first machine to the pallet. The pallet was a short distance from the workstation. In these circumstances, this is not an instance of a brief aberration or inadvertent or momentary loss of attention. Any award should be reduced by approximately 75%.

[16] Authorities cited in support of the defender's submission were: *McCallion* v *Warburtons Limited* [2019] SC Edin 8 and *McGowan* v *W and JR Watson, supra*.

Response for pursuer

[17] In this case it was known what had happened. The pursuer had been carrying a heavy load and he tripped. There was one man down, but that did not take away from the fact that it was the carrying of the heavy load which had caused the accident. It was that that caused the pursuer to trip. The defender would still have a right of relief against Purdies if appropriate, but it could not be said that the accident would not have happened even if there had still been four men at that point. The machine was incredibly heavy and the pursuer could not see where he was going. He was having to take small shuffling steps backwards. It was the weight that caused him not to see where he was going and to trip. He has proved the case on record. There was in any event no prejudice to the defender. The pursuer accepted that some form of manual handling would still have been required with the scissor lift. However, the defender was saying that, if the alternative (a scissor lift) was used, there would still be the same outcome and that this meant that the pursuer had not proved that any negligence had caused his injuries. This could not be right. In the first place, there was no evidence as to what would actually have happened if a scissor lift had

been used. In the second place, even on Dr Crawford's account (which was unchallenged by the defender), if the scissor lift had been used, it would have been possible to take the machine on the scissor lift straight out to the truck without the need to place it on the pallet at all. In addition, it could not be said that, if the scissor lift had been used, this would have resulted in the same outcome. There would have been no manual handling of the heavy machine taking small shuffling steps backwards and not being able to see where his feet were. In so far as the defender asserted that, even with a scissor lift, the pursuer would still have been walking backwards, that cannot be known. He could just as well have been pushing it. Whilst it is known that the pursuer was walking backwards, Dr Crawford said that the load would have to have been secured anyway for it to be moved. So, whilst there was potentially a risk that an unwieldy scissor lift could have resulted in something happening (such as tripping or a back strain), there was no evidence that it would have resulted in what actually did happen.

Analysis

Assessment of witnesses

[18] I took into account the defender's submissions in relation to the credibility and reliability of the pursuer, but I came to the view that he was both credible and reliable. Albeit that the pursuer had a pretty good understanding of English, English is not his first language and he sometimes used unfamiliar words and phrases which required clarification. I took particular account of the defender's submissions about the pursuer's description of his having taken hold of a second handle at his end of the machine just before the four men were taking the machine round the corner from the narrow corridor to the wider area where the pallet had been left. The way that the pursuer mentioned this was

quite natural as part of his narrative of the way that the machine was carried to the pallet. I am satisfied that this was not the reason why he tripped on the pallet, as I go into in more detail below. He explained that the space at the corner was too narrow for the other man at his end of the machine to get through. In relation to averments in statement 4 which were read out to him, he said that he could not remember if he had, before giving evidence in court, mentioned about four men becoming three men just before the corner. He explained that, as he had been giving his evidence, he had been thinking about how the accident had happened and had remembered this part. Considering his evidence as a whole, I did not think that the pursuer was fabricating his evidence about this or indeed any other part of his evidence. In my assessment, the pursuer gave his evidence in a careful, straightforward and measured way without any element of exaggeration. I, therefore, accept the pursuer as being a credible and reliable witness.

[19] Dr Crawford was an appropriately qualified expert witness with relevant qualifications and experience in relation to the issues which arose in the present case. She was appropriately careful in her evidence, making clear the nature and extent of the enquiries she had made. She was a wholly credible and reliable witness. The defender did not suggest otherwise.

The principal factual issues in dispute

Whether the pursuer has proved that the accident happened as averred on record

[20] In statement of fact 4 the pursuer avers:

> "The pursuer was required to walk backwards, with his arms positioned straight out in front of him at full stretch. He was unable to see where he was putting his feet. As he was walking backwards, the pursuer tripped over a pallet, causing him to let go of his corner of the machine, which fell onto his right hand".

[21] I am satisfied that the pursuer tripped over the pallet because he could not see it behind him and could not see where he was placing his feet. The reason why he could not see behind him and where he was placing his feet was because he was finding it "way too heavy" for him to lift the machine by hand with both arms at full stretch, and it was so heavy that, when he was manoeuvring it, he was having to hold his breath so that he could not even speak. He was also having to take small shuffling steps backwards in the confined space which then opened out to the area where the pallet had been placed. As to that, the pursuer told the court that he knew that the pallet was there, but that he could not see exactly where it was. It was put to him in cross-examination that he had slipped on the pallet because he had been carrying the weight which had previously been carried by two men, but he firmly denied this adding: "I just didn't see the pallet". It was put to him that he had been chatting and talking to the other men. He again firmly denied this, adding that he could not speak because he was holding his breath. It was put to him that he was not paying enough attention. He responded that he was concentrating on what he was doing but that he did not have eyes in the back of his head. He could not see the pallet because he was walking backwards. He caught his heel on the edge of the pallet. I noted that Dr Crawford gave evidence to the effect that, if the pursuer had been using shuffling steps in manoeuvring the machine, a consequence of this is that you cannot use your leg muscles to help you, and she confirmed that "shuffling backwards" would have affected the pursuer's ability to see where he was going. I am, therefore, satisfied that the pursuer tripped on the pallet because he was having to walk backwards, using small shuffling steps, whilst holding onto the heavy machine with both arms at full stretch and he was not able to see where he was putting his feet. This was the simple mechanism averred and this was the simple – and in my opinion readily foreseeable – mechanism proved. I am, accordingly, satisfied that the

pursuer has proved that the accident occurred as averred on record. I am, in any event, not satisfied that there is "significant prejudice" to the defender as contended. In this respect, I accept and prefer the submissions made on behalf of the pursuer. I also note that, although a number of propositions were put to the pursuer in cross-examination (including it being put to him that he had slipped on the pallet because he had been carrying the weight which had previously been carried by two men – which he denied), and although the defender had originally indicated an intention to lead Aaron Craig in evidence, the defender ultimately elected not to lead any evidence to contradict the pursuer's account.

Whether the risk assessment was suitable and sufficient

[22] Perhaps wisely, counsel for the defender did not attempt to suggest that the risk assessment was suitable and sufficient. He instead left it to the court to decide whether it was. The pursuer submitted that the "risk assessment" produced (part of number 5/7 of process) was "barely worth being recognised as such". The defender did not advance a contrary submission. In my opinion, the "risk assessment" was, at best, superficial and I am not satisfied that it represented a "suitable and sufficient" risk assessment as required by regulation 4(1) of the 1992 Regulations. As correctly submitted for the pursuer, none of the factors specified in schedule 1 to the 1992 Regulations were taken account of even although many of them clearly applied to the task at hand. Dr Crawford gave evidence to the effect that she would have expected a reasonable employer, having been told about the weight of the machines, to have asked how the load was going to be moved. In relation to the defender's "risk assessment", she noted that no risk reduction measures had been suggested even although the issues of the weight of the machine and the confined space had been recorded there. Her view was that four men would not be an adequate number of men to

lift a machine weighing 250kg. In her opinion, four men could safely handle a maximum of 85kg at waist height.

Whether the accident would have occurred if a hydraulic lift, such as a scissor lift, had been used

[23] The defender submitted that, in terms of causation, the pursuer had failed to establish that the accident would have been avoided if a scissor lift had been used. This was based on the proposition that the mechanics or movement of the men would have been the same with or without the scissor lift; the pursuer would still have been walking backwards. I do not accept these propositions. I prefer the pursuer's submissions in this regard. Dr Crawford confirmed that, if the scissor lift had been used, it would have been possible to take the machine on the scissor lift straight out to the truck avoiding the need to take it to and transfer it onto the pallet at all. Dr Crawford said at paragraph 5.8 of her report: "The scissor lift could have been lowered to manoeuvre the machine from the space available to the transport outside". She expanded on this in evidence-in-chief saying that the scissor lift could have been used to take the machine straight out to the back of the truck at waist height so that taking it to the ground where the pallet was would have been avoided completely. She also confirmed in evidence-in-chief that using the scissor lift would have removed the need for the men to walk holding the machine with outstretched arms and moving with small shuffling steps backwards to put it on the pallet. She also commented that the scissor lift would have reduced the use by the men of the handles on the machine. She explained that these were designed to protect the machine and not the humans carrying them. Even if the machine had been taken on the scissor lift from the workstation to the pallet, there was no evidence that this would have involved manual handling of the machine with the men

having to hold the machine by the handles with outstretched arms and taking small shuffling steps backwards. Indeed, from the description given by Dr Crawford about how the scissor lift would work, it seems most unlikely that these elements would have been involved. There would only have been initial manual handling to slide the machine using its handles directly from the top of the workstation onto the scissor lift which would have been raised to the same height. There is also, in my opinion, no basis for assuming that the pursuer would, if a scissor lift had been used, still have been walking backwards with the scissor lift. In short, there was no evidence that the "mechanics or movement" of the men would in fact have been the same with or without the scissor lift. I also noted that this proposition was not put to Dr Crawford. Dr Crawford confirmed under reference to the 1992 Regulations that, even although use of the scissor lift would not have completely eliminated manual handling, it would have at least reduced manual handling to the lowest level reasonably practicable.

The law and its application in the present case

The effect of section 69 of the 2013 Act

[24] I agree with and accept the pursuer's analysis of the legal position (summarised at paragraph [10] above) since the coming into force of section 69 of the 2013 Act, the defender having confirmed that no issue was taken with it.

The 1992 Regulations and the common law

[25] I am satisfied that regulation 4 of the 1992 Regulations applied to the factual situation in this case. The manual handling operation involved plainly involved a risk of injury which was foreseeably possible. The defender did not suggest otherwise. I am satisfied that

the defender did not comply with regulation 4 of the 1992 Regulations. Dr Crawford's view was that four men could safety handle a maximum of 85kg at waist height. By contrast, the weight of the machine involved in the present case was about 250kg, coupled with it having to be manoeuvred in the awkward manner described by the pursuer such that he could not see where he was placing his feet. The pursuer's position was that the defender in planning the task, and Aaron Craig in his risk assessment, gave no thought to the risk of manual handling, the approach apparently being "let's get on with it". I am satisfied that the "risk assessment" carried out by Aaron Craig on behalf of the defender was not suitable and sufficient as required by regulation 4 of the 1992 Regulations. The defender did not lead evidence to a contrary effect. Neither did the defender dispute the findings-in-fact proposed by the pursuer in relation to the lack of thought having been given the risk of manual lifting both by the defender in planning the task and by Aaron Craig in his risk assessment. In the light of all the evidence before me, I am satisfied that findings-in-fact 22 and 23 are appropriate.

[26] The defender's position was that it was clear from the evidence presented that it was not reasonably practicable for the defender to avoid the need for its employees, such as the pursuer, to undertake manual handling and which involved the risk of being injured. I pause to observe that the defender did not aver this, but no issue was taken with that. Be that as it may, the pursuer accepted that some manual handling would still have been required if a scissor lift had been used. However, the pursuer's position was to the effect that it would have reduced the manual handling to the lowest level reasonably practicable. Despite the fact that the defender's position in submissions was that it was not reasonably practicable for the defender to avoid the need for manual handling, I noted that the defender did not argue (and there were no averments to this effect either) that they had taken steps to

reduce the risk of injury arising out of any such manual handling operation to the lowest level reasonably practicable as would be required by regulation 4(1)(b) of the 1992 Regulations. The defender's position was to the effect that, even if the scissor lift had been used, the risk of injury would not have been reduced. For the reasons given in paragraph [23] above, I do not accept that. Under reference to the 1992 Regulations, Dr Crawford's evidence was clear that use of the scissor lift would have at least reduced manual handling to the lowest level reasonably practicable. I accepted her evidence, no contrary evidence having been led. In all the circumstances, it follows that I am satisfied that neither the defender, nor Aaron Craig, took adequate precautions against the risk of injury in this case. In short, the defender did not take reasonable care for the safety of the pursuer.

Decision

[27] I am, therefore, satisfied that, in all the circumstances, the pursuer has proved that the accident was caused by fault and negligence on the part of the defender, and that it was vicariously liable for Aaron Craig's failure to carry out a suitable and sufficient risk assessment.

[28] The defender averred that the accident was caused or at least materially contributed to by the pursuer's failure to pay adequate attention to his surroundings and take reasonable care for his own safety. The pursuer explained in evidence that, although he was aware that the pallet was behind him, he could not see exactly where it was. As he put it in cross-examination, he did not have eyes in the back of his head. In all the circumstances, and having regard to the evidence from both the pursuer and Dr Crawford to which I have referred above, I am satisfied that, at worst for the pursuer, this might have amounted to a very minor act of inadvertence on his part. However, the reality is that he had been placed

in a very difficult position. Although he had been repeatedly complaining about how heavy the machine was, he was told by his team leader, Aaron Craig, to get on with the job. He was concerned that he would lose his job if he refused to continue with the job. In what I am satisfied were pressured and stressful circumstances, I do not consider that the pursuer can fairly be said to have been at fault amounting to negligence at all. I, therefore, make no finding of contributory negligence against him.

[29] The pursuer, therefore, succeeds in his claim against the defender. Parties were agreed that, in the event of the defender being found liable to the pursuer to any extent, the amount of damages payable to him be in the sum of £28,500 with interest on that sum from the date of decree. I, therefore, find the defender liable to the pursuer in that amount. A hearing on expenses will be assigned as requested by both parties.