SHERIFFDOM OF LOTHAIN AND BORDERS

IN THE ALL-SCOTLAND SHERIFF PERSONAL INJURY COURT

[2020] SC EDIN 2

EDI-PN2392-19

JUDGMENT OF SHERIFF KENNETH J McGOWAN

in the cause

RICHARD GOODWILLIE

Pursuer

against

B&Q Plc

Defender

Pursuer: Dempsey; Digby Brown
Defender: Quinn; Keoghs

Edinburgh, 9 December 2020

Introduction

[1] This is a claim for damages for personal injuries arising from an accident at work. I heard evidence from the pursuer and his wife, Mrs Audrey Goodwillie. The defender led no evidence. Quantum was agreed at £3,900 inclusive of interest to the date of proof.

[2] Parties had helpfully agreed a core bundle ("CB") of documents. Both parties produced written submissions. The pursuer's written submissions were extensive and almost 400 pages of materials and authorities were produced. These have been taken into account but only the main points are summarised below.

[3] Having heard the evidence and submissions, I made the following findings in fact.

Findings in fact

[4] The defender is a well-known retail outlet. The pursuer has been employed by the defender as a warehouseman for 35 years. His role is primarily to deal with goods arriving at the store where he is employed. His work involves unloading vehicles, driving forklift trucks, booking in stock and housekeeping in general.

[5] Prior to the pursuer's accident in 2016, he was provided with certain equipment, including a high visibility jacket and a knife. The pursuer used the knife about two or three times per week for tasks such as opening boxes.

[6] The defender had carried out a risk assessment in relation to the use of knives, identifying who might be harmed by them and how and the steps already being taken, which included the requirement that only their safety knives be used; that gloves be used where required; and that on the job training be provided.

[7] The first knife he was provided with was about 3 or 4 inches long and had a hooked blade. At some stage prior to his accident, the pursuer was issued with a safety knife to replace the knife with the hooked blade.

[8] The pursuer kept the safety knife in the pocket of his high visibility jacket. It had a spring mechanism which meant that when not in use, the blade remained inside the plastic handle: CB 5. When to be used for cutting, the blade was exposed by pushing forward a button located on the side of the handle: CB 6. When pressure was released from the button, the blade automatically retracted back into the handle.

[9] The pursuer also had access to thick gloves which he wore in the wintertime when he was driving the forklift truck. The pursuer had not been instructed or trained to use gloves while using the safety knife to unpack stock and did not do so.

[10] The defender operates about 250 to 260 stores across the UK. Between 2012 and 2016, the number of accidents across all stores involving safety knives rose from 100 per year to 127 per year. None of these accidents resulted in injury claims.

[11] The defender provides periodic training for its employees. The pursuer has undergone various training courses since 2000, as recorded in his training record: CB 30. The defender's employees, including the pursuer, underwent Health & Safety training each year. This training included viewing a training video which contained a sequence of a man using a knife and cutting his thigh causing a serious injury. The message imparted by the sequence concerning knife use was to "take care". The knife being used in the sequence was a Stanley type with either a fixed or retractable blade.

[12] On about 7 November 2016, the pursuer was working in the course of his employment with the defender at its store in Springkerse Retail Park, Stirling. He noticed some bath panels and decided to put them onto the shelves. This was a task which he carried out occasionally.

[13] The panels were made of plastic. They were slightly bevelled rather than completely flat. They were about 1700 mm x 600 mm. Each pack contained 10 bath panels and weighed about 10 kg. The panels were held together by Sellotape wound round the bundle of panels at each end. The band of tape went round the panels three or four times, and was approximately two inches wide.

[14] The pursuer moved the bundle of panels into the bathroom area. He took his safety knife out of his pocket. He stood the bundle of panels on its short end. The band of Sellotape was about head height. He held the panels in that position with his right hand which was located 3 or 4 inches below the band of Sellotape at head height, with his thumb gripping one edge of the bundle and his index finger gripping the other edge. Using the safety knife,

he cut downwards through the band of Sellotape. As he did so, the blade of the knife came into contact with his right hand, causing a deep cut. An accident report was completed.

[15] The pursuer was off work due to his accident. On his return, one of the managers at the store spoke to him and said that there had been a change of policy and that it was now mandatory to wear gloves when using safety knives. The pursuer was asked to confirm his understanding of the change of policy and to sign a health and safety induction record sheet: CB 31 – 32. He was not given any further training on the use of knives but told of the change in policy.

[16] Following a review in 2018 of the frequency of accidents involving safety knives, the defender replaced the black and red knife used by most employees with a Penguin knife, which had a concealed blade: CB 47 and 48.

[17] The compensation due to the pursuer for the injuries and losses sustained by him in the event of liability being established is £3,900.00 on a full liability basis including interest to 23 September 2019, net of recoverable benefits.

Submissions for pursuer

Introduction

[18] The key questions were whether the knife provided by the defender was suitable work equipment; whether the pursuer was adequately trained in the use of that knife; and, if the defenders are liable, whether and to what extent contributory negligence should apply.

[19] The defender was in breach of its common law duty of care owed to the pursuer as their employee. The common law standard of care is informed by the Provision and Use of Work Equipment Regulations 1998 ("the 1998 Regulations").

[20] The defender failed to provide adequate training as required by Regulation 9 of the 1998 regulations. Part of the defender's defence relates to the provision of training to minimise the risk of injury, and more specifically the training on the task of unpacking stock. The pursuer required to lead evidence on what training had actually been provided to allow the court to assess the adequacy thereof.

Agreed matters

[21] It was agreed that no. 6/1 of process is an accident report prepared by the defender and is what it bears to be and no. 6/2 are photographs of the self-retracting safety knife in use at the time of the accident.

Proposed findings

[22] The court was invited to make the following findings:

a. that the knife is work equipment in terms of the Provision and Use of Work Equipment Regulations 1998;
b. that the defender ought to have ensured, so far as reasonably practicable, that they provided the pursuer with suitable work equipment as required by Regulation 4 of the Provision and Use of Work Equipment 1998 Regulations;
c. that the defender also failed to provide adequate training in the use of the knife as required by Regulation 9 of the Provision and Use of Work Equipment Regulations 1998;
d. that a reasonable, prudent employer would have provided employees with an appropriate knife which featured sufficient safety measures.

Evidence for the pursuer

[23] The evidence of the pursuer and Mrs Goodwillie should be accepted as credible and reliable and the court should find that the pursuer was not issued with gloves prior to the accident; had a discussion with his manager after the accident about a change of policy and that wearing gloves was now mandatory when using knives; and that the pursuer had received no training on the use of the knife and the need to wear gloves.

[24] The pursuer's recollection of the message of the video as being "Do not use these knives" suggests that the knife in the video was not the retractable safety knife provided to him by the defender. Any training on the use of knives contained within this module was therefore inadequate.

The regulations inform the common law

[25] The relevant standard of care must be considered. The pursuer avers the 1998 Regulations were breached.

[26] All cases must now be brought in negligence: s. 69, Enterprise and Regulatory Reform Act 2013 ("the 2013 Act"). In order to succeed in a case based upon the common law, a pursuer must show (i) that the injury was a foreseeable consequence of the work; and (ii) that the common law standard of care was breached.

[27] During the Parliamentary debates on the Enterprise and Regulatory Reform Bill, Viscount Younger said that that:

> "the existing regulatory framework, including both the statutory duties and the approved codes of practice and established guidance, would inform the court as to what risks a reasonable employer should be aware of and the steps they would be expected to take to manage those risks."

[28] The common law duty is often informed by government publications such as the guidelines issued by the Health and Safety Executive.

[29] In considering the scope and standard of duty of care owed and whether that duty is breached, it is relevant to consider the defender's obligations under the Regulations which they still require to comply with as a matter of law: *Gilchrist* v *Asda Stores Ltd* 2015 Rep LR 95; *Dehenes* v *T Bourne and Son* [2019] SC EDIN 48. The court is entitled to have regard to the 1998 Regulations when considering whether there has been a breach of the defender's common law duty, along with any accompanying guidance or codes of practice.

1998 Regulations

Was the knife work equipment: *Regulation 2(1)*

[30] It was not disputed that the knife was work equipment.

Suitability: Regulation 4

[31] When assessing whether work equipment is suitable, an employer ought to have regard to any reasonably foreseeable risk which it may pose to the health and safety of the employee to whom it is provided.

[32] The knife which was provided to the pursuer prior to his accident was unsuitable when having regard to the risks to his health and safety posed by an exposed blade.

[33] The Code of Practice issued by the HSE issued in 2014 specifically advises against the use of knives which feature unprotected blades. The blade may have been retractable, but when the knife is in use, the blade is exposed and unprotected. Where it is possible for other cutting tools to be used, a reasonable and prudent employer would provide such equipment to an employee, in order to minimise the risk and severity of injury.

[34] The key factor was one of reasonable foreseeability: *Hide* v *The Steeplechase Company (Cheltenham) Limited & Ors* [2013] EWCA Civ 545.

[35] While this case pre-dated the 2013 Act, foreseeability was still relevant to the present action and the pursuer's accident was foreseeable.

[36] Regulation 4 is a central plank of the scheme: *Munkman on Employers' Liability.* Its obligations are broad and not constrained by the words 'as far as is reasonably practicable'. The increased cost of safer equipment is not a factor to be taken into account: *Skinner* v *Scottish Ambulance Service 2004* SC 790; *Munkman*, para. 24.55.

[37] This case supported the argument that there were alternative knives on the market that were safer. A large DIY chain should have access to and knowledge of the best and safest equipment to both sell to their customers and provide to their employees.

[38] The aim of the regulations is to ensure that the work equipment made available to workers may be used by them without impairment to their safety or health: *Robb* v *Salamis (M&I) Ltd* [2006] UKHL 56.

[39] In the present action, the defender allowed an upward trend of accidents for 4 - 6 years from 2012 until the Penguin knife was provided to employees in mid-2018. Remedial action ought to have been taken sooner, and the H&S Guidance confirmed that safer knives were available on the market prior to 2016.

Risk assessment

[40] *Robb* also highlights the employer's duty to risk assess, required by reg. 3 of the Management of Health & Safety at Work Regulations 1999 ("the 1999 Regulations"). The defender had a duty to prepare such a risk assessment.

[41] Reg. 3 begs the question of what such a risk assessment should seek to address in order to minimise the risk of hand injuries from the use of hand knives at work.

[42] Reliance was placed on HSE Information Sheet *"How to reduce hand knife injuries"* issued in September 2015 and intended to provide advice to employers in the plastics industry regarding the safe use of knives.

[43] It offers guidance about the standard of care and considerations to be taken by employers who provide knives to their employees for use at work, including some of the key factors to be taken into account when risk assessing the equipment which has been provided. It notes that actions can be taken to eliminate the risk of knife injuries completely. This guidance is of assistance when assessing the suitability of the work equipment such as the knife provided to the pursuer, and any other action which ought to be taken by a reasonable and prudent employer.

[44] It was accepted that the pursuer would require some form of cutting tool to unpack stock, etc. If the use of hand knives could not be avoided, the defender ought to have considered the right knife for the task. The guidance discusses the different types of knives which were available at the time of publication in 2015, listing them in a hierarchy from safest to least safe.

[45] The retractable safety knife involved in the pursuer's accident would fall within the lower end of the scale when it comes to the safety of cutting tools which may be provided to employees. The defender ought to have provided the pursuer with a knife with an enclosed blade to truly minimise the risk.

[46] The guidance goes on to consider the training which ought to be provided regarding the use of such knives.

[47] The pursuer and Mrs Goodwillie had never seen the risk assessments lodged by the defender and the crux of their evidence was that the actions identified had not been realised at the time of the pursuer's accident.

[48] Risk assessments form the basis of training which should have been provided to employees: reg. 13, 1999 Regulations.

[49] In *Allison* v *London Underground Limited* [2008] EWCA Civ 71, the central question was the meaning of "adequate training" as required by Regulation 9 of the 1998 Regulations.

[50] Even if the risk assessments were suitable and sufficient, the defender failed to take steps to implement the findings by way of training and instruction.

Training

[51] The pursuer's case is that the defender failed to provide adequate training on the use of the knife as defined: reg. 9 of the 1998 Regulations. This provision requires employers to provide training to those using the work equipment and have received adequate training for purposes of health and safety, including training in the methods which may be adopted when using the work equipment, any risks which such use may entail and precautions to be taken.

[52] Adequate training should include training on precautions to be taken, such as the use of gloves: *Milroy v British Telecommunications plc* [2015] EWHC 532 (QB).

[53] The definition of inadequate is "lacking the quality or quantity required; insufficient for a purpose".

[54] In the present case, the training which the pursuer did receive was inadequate. There was no specific training on the task he was undertaking at the time. So much so that the pursuer did not even link the training to the risk of using a safety knife. A single video as

part of a training module covering all aspects of health and did not represent adequate training.

[55] The pursuer's position is that he was not trained on the safe use of the knife until after the accident. There is no evidence whatsoever of this training having taken place. On this basis, it is not so much a question of adequacy of training, but rather a complete lack of it.

[56] If it is accepted that the pursuer was shown a video regarding potential accidents involving knives, it is submitted that one video as part of a training about many other aspects of health and safety within the store was inadequate: *Milroy*. This is supported by the fact that his recollection was that the message of the video was "Do not use these knives". No actual evidence of the content of this training has been led beyond the allegations put to him in cross examination, as there was no oral evidence from the defender's witness to support this claim. The interpretation of the video came purely from Mr Quinn.

[57] If the pursuer had been trained on the safe use of the knife, including the precautions to be taken such as the need to use gloves, then his accident could have been prevented. The pursuer said in evidence that had he been previously instructed in line with the information contained in the post-accident training, he would have known/ been trained to wear the gloves and his injury could have been prevented.

Training and causation

[58] The defender may argue that, even if the pursuer had been trained to wear gloves and had done so, the injury might still have occurred. If so, what was the purpose of the gloves? Surely to minimise risk of injury. The pursuer had told the court today that, had he

been trained and instructed to wear gloves whenever he used the knife, he would have done so.

[59] The failure to train the pursuer to wear the gloves was a substantial cause of the accident, alongside the inherent dangers posed by the unsuitable work equipment. If the gloves were in wide use, would there still be over 100 accidents per year? Presumably not every employee using the knife without gloves would be injured, so this figure is consistent with the evidence we have heard today from the pursuer and his witness that not wearing gloves was common practice, due to the lack of direction to do otherwise.

[60] In *Doran* v *Shanks Waste Managemen*t [2010] CSOH 91, the submission that there had been a breach of Regulation 9 due to inadequate training was accepted where the pursuer had not been told directly not to access the back of the lorry, and this was an accepted practice. The pursuer in the present action reports a similar set of circumstances. He had not been instructed to use gloves prior to his accident.

Summary

[61] The defender was under a common law duty to provide the pursuer with suitable work equipment. Suitable work equipment can be defined as "suitable in any respect which it is reasonably foreseeable will affect the health or safety of any person".

[62] It was entirely foreseeable that the knife provided to the pursuer before his accident could pose a risk to his health and safety, due to the existence of an unprotected blade when the knife was in use.

[63] There was documentary evidence of an increasing number of accidents across the business in the years leading up to the pursuer's accident.

[64] There was evidence from HSE Guidance that safer knives were available on the market prior to the pursuer's accident. A reasonable and prudent employer, particularly one working in the hardware and DIY sector, ought to have properly assessed the risk posed by the use of such work equipment and have provided a safer alternative. Had they done so, the pursuer's accident would not have occurred.

[65] Accordingly, the "safety knife" was unsuitable work equipment for the purposes of the 1998 Regulations, which define the common law duty.

[66] Even if it is held that the knife involved in the accident was suitable work equipment, the defender was also under a duty to risk assess its use and take any actions which may be necessary, including the provision of adequate training.

[67] The risk assessments lodged show some limited consideration of the risk of hand-knife injuries, but the findings of them had not been properly actioned in the form of training and instruction. Adequate training and written instruction is required by Regulation 9 of the 1998 Regulations. There was no evidence of any pre-accident training provided to the pursuer on the safe method of handling the knife and the use of gloves.

[68] In all of the above failures, it is submitted that the defender's negligence has breached the common law duty of care owed to the pursuer.

Contributory negligence

[69] In employer's liability cases, the Inner House has repeatedly made it clear that, for contributory negligence to apply, momentary lapses or acts of inattention or inadvertence do not equate with negligence. Rather, it should only apply where the employee either embarks on a risky course of action; fails to follow their training and experience; or does not comply with specific instructions or training given to them beforehand. The evidence establishes

that the use of the knife without gloves was an accepted practice, and the defender has produced no pre-accident training records regarding the use of gloves.

[70] Any finding should be minimal to reflect the fact that the real and significant reasons for the accident were as a result of the defender's failures. The causative potency lies in the failure to provide training to the pursuer and to provide suitable work equipment in the form of a knife with an enclosed blade, such as the one introduced post-accident. 15% should be the highest percentage deduction that ought to be made in the circumstances of this case.

Submissions for defender

Objections

[71] The objections to the admissibility of the pursuer's evidence on training and PPE (gloves) were renewed. There has been no fair notice on these points. The pursuer should be precluded from seeking to establish a case that has not been foreshadowed in the pleadings. Otherwise, there will be significant prejudice to the defender: *Lamb v Wray* 2014 SLT (Sh. Ct) 2.

[72] Not only was the pursuer's evidence not foreshadowed in the pleadings, it was, in parts, wholly different to that which was argued for by the pursuer as being the case pled (no training). The objections raised should be sustained and the evidence ruled inadmissible.

[73] In any event, these cases were irrelevant. The pursuer attacks the adequacy of the training with a single line averment – a bare assertion that the training was inadequate. There were no averments and no evidence of the training or information he ought to have been provided with, which, had he known, would have prevented the accident: *Neil v East Ayrshire Council* 2005 Rep. L R. 18, per Lord Brodie at paragraph 26.

[74] In relation to a PPE case, there are no averments in the pursuer's pleadings. There was no evidence what gloves should be used. There was no evidence how gloves would have prevented what was described in evidence as a severe cut. Any case on PPE or gloves was irrelevant. As a matter of fact, the only evidence was that the pursuer had gloves in his pocket and opted not to use them.

[75] As stated in the objections, the defender submits that the pursuer has the bare bones of a relevant case based on suitability of work equipment and determination of the case ought to be restricted to that issue alone.

The pursuer's evidence

[76] The pursuer's evidence was at best unreliable, and on certain points, not credible. It was contradictory at times and there were inconsistencies in it.

[77] It was at times wholly inconsistent with the case on Record (*no training v. inadequate training*). On material issues, the pursuer's evidence was not reliable and ought not to be accepted.

The accident mechanics

[78] The pursuer's evidence in chief was bare and on the material point of the accident mechanics, difficult to follow. The court had to take the pursuer through it. However, it was still not clear on how the injury was sustained. The orientation of the panels seemed implausible, or at least, there were far easier ways of doing the task. It was not clear how the blade came into contact with the dorsum of his index finger if his index finger was behind the panel. It had not been proved how the accident happened.

[79] Esto the Court allows the pursuer to seek to establish a case on training, his initial position was that there had been no training or advice on the use of knives. During cross-examination, he conceded there was yearly training including a video. The pursuer's ultimate position in cross when it was put to him that training/guidance was provided was "*I don't know, it's possible…I don't know*". The pursuer's evidence on this point was not credible.

The pursuer's wife

[80] The pursuer's wife added little. She worked in a different department from the pursuer and her role did not involve the use of safety knives. Her evidence was that there was an annual health and safety video to remind staff to be careful with knives.

The law

[81] The burden of proof rests on the pursuer to show on the balance of probabilities that the defender was negligent and caused the pursuer loss, injury and damage. The first element of that is that the pursuer requires to prove his accident occurred as averred on Record. The defender submits the pursuer has failed to prove that.

[82] Further, in a case such as this where the fault is one of omission, it is for the pursuer to prove what steps should have been taken. That is a key part of showing negligence. The onus is squarely on the pursuer to lead evidence to satisfy the court on these essential elements. The defender submits that the evidence does not support such a finding.

[83] This is a case based on a failure at common law. The pursuer's pleadings are skeletal. The defender called on the pursuer to specify his case from the outset and that was not done. There are no averments on common practice or precautions at the time of the accident. At

their best, the pursuer's averments infer a duty to have provided "a knife with a concealed blade". But the safety knife being used by the pursuer at the material time did have a concealed blade – it was a self-retracting safety knife.

[84] Insofar as the pursuer's case is that the Penguin knife ought to have been provided at the material time, that is not averred and there was no evidence

a. that the defender ought to have done so before the pursuer's accident or that was commonly done by others;
b. to show a retractable safety knife was unsuitable;
c. that the introduction of Penguin knives has reduced the incidence of injuries;
d. on the utility of the Penguin knife in comparison to the self-retracting safety knife;
e. on whether the self-retracting safety knife continues to be used by the defender's staff in addition to the Penguin knife; or
f. upon which the Court can perform an analysis of the standard of reasonable care and determine whether the defender's actions fell short.

[85] The Penguin knife was not introduced until around 1½ years post-accident. There are no averments to connect the two. There was only *a* post hoc ergo *propter* hoc or hindsight argument, i.e. a state of affairs existed before the accident and a certain state of affairs existed some 1½ years later. If that is the pursuer's case, there is no evidence to support such a proposition. There is no evidence of a causative connection between the accident and the defender's introduction of a different style safety knife.

[86] Authority on what the pursuer ought to prove in the case of a negligent omission can be found in *Morton* v *Dixon* 1909 SC, per the Lord President at page 809.

[87] The knife in use at the time was a safety knife. It was not an open exposed blade knife. It was not a Stanley knife as averred on Record. It had safety features. The pursuer accepted that. It was implemented as a control measure following a risk assessment by the defender. The pursuer must establish that this was not common practice followed in the industry or something so obviously wanting. There was no evidence of industry practice nor of what cutting tools were available to the defender in 2016. There was no evidence of something so obviously wanting. In isolation and absence of evidence, it was not folly to continue with the use of a self-retracting safety knife.

[88] Furthermore, safety is not guaranteed or absolute, but relative*: Baker* v *Quantum Clothing Group Limited* (SC (E)) [2011] 1 WLR, Lord Mance, para. 64.

[89] Safety is a changing concept. It is submitted that the introduction of a new tool some years after the pursuer's accident does not render the previous tool unsuitable in the eyes of the law.

[90] The defender further refers to *Baker* para 9, where the common law test of the employer's duty is discussed, Lord Mance quoting a well-known passage from *Stokes* v *Guest* [1968] 1WLR 1776:

> "'the overall test is still the conduct of the reasonable and prudent employer, taking positive thought for the safety of his workers in the light of what he knows or ought to know; where there is a recognised and general practice which has been followed for a substantial period in similar circumstances without mishap, he is entitled to follow it, unless in the light of common sense or newer knowledge it is clearly bad; but, where there is developing knowledge, he must keep reasonably abreast of it and not be too slow to apply it; and where he has in fact greater than average knowledge of the risks, he may be thereby obliged to take more than the average or standard precautions. He must weigh up the risk in terms of the likelihood of injury occurring and the potential consequences if it does; and he must balance against this the probable effectiveness of the precautions that can be taken to meet it and the expense and inconvenience they involve. If he is found to have fallen below the standard to be properly expected of a reasonable and prudent employer in these respects, he is negligent.'"

[91] There was no evidence which established the knowledge and standards of the time or to assist the Court in carrying out any sort of balancing exercise as envisaged in *Stokes*. There is no evidence as to what a reasonable and prudent employer should have done in 2016. On the contrary, there was evidence that the defender had proactively considered the manner in which employees were using knives. There was evidence that a risk assessment had been carried out. The defender provided a self-retracting safety knife, and they sought to remind everyone to take care through annual Health and Safety training which included a video urging care around the use of knives.

Contributory negligence

[92] If there was a causative negligent omission, the pursuer ought to hold the lion's share of responsibility. The Court should apply a figure which would reflect that. Contributory negligence is always dependent on the precise circumstances of each case. The contribution by the pursuer in this case would be high. He had clearly failed to exercise reasonable care. He was using a tool he was familiar with and used regularly without incident. It was wholly unclear why he continued to bring the knife 3-4 inches below the Sellotape after cutting. Carelessness or complete disregard for safety was apparent here.

Comments on pursuer's submissions

[93] The pursuer could have called Mr Clubb. He was on the pursuer's witness list.

[94] The pursuer's pleadings disclosed no case about gloves. What was before the court was an attempt to bring a case about gloves in by the back door via an "inadequate training" case. If the pursuer's case did concern gloves, that should have been averred. The only evidence about gloves was that the pursuer had them in his back pocket. In any event, there

was no evidence that gloves would have made any difference, so the pursuer's case, in so far as it was based on gloves, fell away.

[95] There was an opposed motion on 21 August 2020 in relation to the pursuer's specification of documents, which included a call about the use of gloves. Commission and diligence was refused in respect of the call directed to that matter because no such case was pled. This highlighted the fact that the pursuer could not now seek to rely on such a case.

[96] The pursuer had sought to rely on Health and Safety Executive documents. These were not admissible. They were not legal authorities but items of evidence. They needed to be spoken to and had not been put into context. Such documents were self-proving in criminal cases but not in civil cases: 1974 Act, s. 17. They had no special evidential status.

[97] In any event, the content of the Instruction Sheet was not relevant because it bore to relate to the plastics industry.

[98] There was no great divergence between the parties on the applicable law. This was a common law case. There was no strict liability: *Munkman,* page 180. The relevance of the authorities relied on by the pursuer was not clear.

[99] No case based on the absence of training in the safe handling of the knife or the provision of personal protective equipment was canvassed in the averments.

[100] Furthermore, insofar as the training case was concerned, the pursuer did not say what he did not know which he should have known and there was no other evidence on that point.

[101] It had been asserted that there was a clear upward trend in the number of knife-related accidents but the number went down in 2013.

[102] It had been said that there was an obligation on the defender to provide "the most up-to-date safety knife", but there was no evidence about what that might have been.

[103] It was accepted that the Regulations inform the position as to the duty imposed. However, what had to be established was a negligent breach of duty of the regulations: *Cockerill* v *CKX Ltd* [2018] EWHC 1155 (QB).

[104] Reliance had been placed on *Allison*. But the pursuer did not say what he did not know e.g. to cut away from his body, so any case based on inadequate training fell away.

[105] There was no evidence that the defender had not acted prudently.

[106] Training about the use of knives had been given. The pursuer claimed not to be clear about what the training video was about, but his wife had been clear.

[107] The pursuer's case was that had he been trained to wear gloves, he would have done so. But that was not his evidence.

[108] The defender's objections to lines of evidence about training and the provision of gloves should be sustained.

[109] The pursuer's case about "suitability" was also attacked on the basis that there was no averment or evidence about what any safety features these might have encompassed.

[110] There was no evidence meeting the point made in *Neil.*

[111] The defender should be absolved with expenses.

[112] *Hide* and *Robb* had no applicability. *Gilchrist* was not binding and the facts were different.

Reply for pursuer

[113] The case law indicated that a low level of contributory negligence was appropriate.

[114] The HSE publications had been produced as assistance to the court. They had some evidential value as such.

Grounds of decision

Preliminary matters

Recording of agreed matters

[115] In the course of his submissions, Mr Dempsey told me that "We have…agreed the following from the joint minute of the pre-trial meeting…" and then went on to identify certain productions as being what they bore to be (see para. [21], above). Although there did not seem to be any dispute in this case about the scope of what was agreed, I was concerned that it might be thought that the recording of matters agreed at the pre-trial meeting in the minute thereof obviated the need for a formal written agreement. In my view it does not. In the interests of avoiding any misunderstandings, any significant matters agreed between parties should be reduced to writing in a formal joint minute and lodged in process. Apart from anything else, I was not aware of the agreement referred to above until after the evidence concluded. Such matters should be dealt with, where possible, before the first witness is called.

[116] In any event, the extent of the agreement was that no. 6/1 of process (CB 1-4) was an accident report prepared by the defender and was what it bore to be and no. 6/2 (CB 5-6) were photographs of the self-retracting safety knife in use at the time of the accident. In relation to the latter, these were not used in evidence. Instead, other photographs (CB 45-46) were referred to, but as the items shown in each appear to be similar nothing turns on that. As to the former, it was not suggested that the agreement extended to one that the content of the accident report was true and accurate. Only very limited evidence was given about it, the pursuer simply indicating that there were some "words missing" which I took to be a reference to that fact that when the document has been printed or copied, certain letters of

certain words have been omitted. Accordingly, as the content of the accident report has not been agreed or spoken to, it has not been proved and I can attach no weight to it.

[117] I was advised also, as a preliminary matter, that quantum had been agreed in this case. Again, such matters should be formally agreed in a joint minute, so that there is no dubiety as to precisely what is agreed.

Evidential status of documentary productions

[118] Mr Quinn argued that the HSE Code of Practice and Information Sheet had no evidential value; Mr Dempsey maintained the position that they had some evidential value.

[119] They were produced by Mr Dempsey as authorities, not productions. They were not spoken to in evidence. Both bear to be published by the HSE, but they have no special evidential status. They are not self-proving documents. Accordingly, they have no evidential value. This is not a matter of admissibility but a more basic point – the content of the documents not having been spoken to or agreed, they are not proved and accordingly cannot form part of the evidence in this case.

[120] In any event, reliance was placed on para. 69 of the Code of Practice, the relevant part of which provides:

> "Work equipment must be used only for tasks that it is fit for and in conditions for which it is suitable, for example: … (b) knives with unprotected blades are often used for cutting operations where scissors or other cutting tools could be used, which would reduce both the probability and severity of injury."

Given its configuration, it is not evident that the safety knife in this case is properly described as having an "unprotected blade".

[121] The relevance of the Information Sheet it is doubtful. It clearly bears to relate to the plastics industry and thus it cannot be assumed that the type of knives or the context in which they may be being used is the same or even similar to that in the present case.

[122] For the foregoing reasons, both documents fall to be left out of account.

The witnesses

[123] I was invited to find the pursuer and his wife credible and reliable. Ultimately, the pursuer gave a clear and what I consider to be an honest account of the precise accident circumstances. Initially, the account was very vague (reflecting, perhaps, the somewhat coy averments) and there was no real attempt to have him explain it fully. The pursuer initially said that he received no training about the use of knives, though ultimately accepted that he had seen a training video which included a sequence on knife safety. I thought that the pursuer was somewhat reluctant in his account of what the training video showed, which contrasted with the evidence of his wife which I preferred on this point.

The pursuer's case as pled

[124] The pursuer's case is based on a breach of the defender's common law duty to take reasonable care.

[125] In Statement of Claim 4 which deals with the facts which the pursuer offers to prove, the pursuer makes the following specific averments directed to the specific steps which he says the defender ought to have taken:

> "The defender ought to have ensured, so far as reasonably practicable that they (*sic*) provided the pursuer with suitable work equipment as required by Regulation 4 of the [1998 Regulations]. The Stanley knife ought to have had a sufficient guard or barrier in order to prevent so far as reasonably practicable the pursuer's fingers coming into contact with an exposed blade which is a dangerous part of the work

> equipment in compliance with Regulation 11 of the [1998 Regulations]. It was reasonably foreseeable that having an exposed blade would pose a risk of injury to employees such as the pursuer using that Stanley knife. The defender also failed to provide adequate training in the use of the knife as required by Regulation 9 of the [1998 Regulations]. A reasonable (*sic*) prudent employer would have provided employees with an appropriate knife which featured sufficient safety measures…The defenders ought to have prepared risk assessments in terms of the Management of Health and Safety at Work Regulations 1992 and Management of Health and Safety at Work Regulations 1999."

[126] In his submissions, Mr Dempsey did not mention Regulation 11 of the 1998 Regulations. Accordingly, I make no further reference to it, not least because it appears to have no application whatsoever to the facts of this case.

[127] Before turning to examine each of the specific arguments put forward on behalf of the pursuer, it is appropriate to make some general comments about the effect of the amendment to the Health and Safety at Work Act 1974 wrought by the Enterprise and Regulatory Reform Act.

The elements of a case based on negligence

[128] In order to focus matters, it should be noted that the pursuer relies on the common law. In order to succeed in a claim for reparation at common law, a pursuer must show each of the following:

a. that a legally protected interest of his has been infringed;

b. that the defender owed him a duty not to infringe that interest in the way complained of;

c. that the duty was breached by the defender's failure to achieve the standard of care required by the law in the circumstances;

d. that the infringement was not too remote from the breach complained of; and

e. that the injury suffered was caused by the breach of duty: *Stair Encyclopaedia*, Obligations, para.254.

[129] It is clear that an injury of the type suffered by the pursuer infringed his legally protected interest not to have his bodily integrity damaged; and that the defender owed to the pursuer a duty of care not to infringe that interest: factors a. and b., above. The standard of care is one of reasonable care.

[130] Accordingly, the focus turns to whether there was a breach of that duty by the defender. In assessing that matter, the questions to be considered may be expressed as (a) what did the defender do which it should not have done and/or (b) what did the defender not do which it ought to have done?

[131] A number of points must be borne in mind. First, the existence of a duty of care is not sufficient for liability for foreseeable loss. *Culpa*, or fault, must also be established; and the standard of care is neither absolute nor strict, but to take reasonable care. Second, it is for the pursuer to aver (and ultimately prove) the "…facts necessary to establish the claim": Ordinary Cause Rules, r. 36.B1(1)(a). In this case, the pursuer asserts a case based on omissions by the defender, so the requirement is to identify in the pleadings the facts which the pursuer is offering to prove to show that the defender did not do that which it ought to have done. In a case of this type, a bald assertion that a defender failed to comply with a duty will not ordinarily be enough give fair notice of the case being made. Third, in this case, the pursuer seeks to establish that the applicable common law standard of care is wholly derived from certain statutory regulations. That being so, it is necessary to examine the current statutory framework.

The significance of the Regulations

[132] Section 47 of the Health and Safety at Work etc. Act 1974 now provides as follows:

> "Civil liability
>
> (2) Breach of a duty imposed by a statutory instrument containing (whether alone or with other provision) health and safety regulations shall not be actionable except to the extent that regulations under this section so provide."

[133] The effect of the amendment is summarised thus in the relevant part of Explanatory Notes to the 2013 Act:

> "465. The amendment to the Health and Safety at Work etc. Act 1974 ("HSWA 1974") reverses the present position on civil liability, with the effect, unless any exceptions apply, that it will only be possible to claim for compensation in relation to breaches of affected health and safety legislation where it can be proved that the duty holder (usually the employer) has been negligent. This means that in future, for all relevant claims, duty-holders will only have to defend themselves against negligence."

[134] It is clear that this was a major change in the law, although the precise effect of it remains uncertain: *Delict: Law & Policy*, Pillans, 5th edition (W. Green: Edinburgh, 2014), para. 21:09.

[135] It has been said that:

> "It is to be expected that cases interpreting the Regulations will continue to be referred to, but their precise future influence in actions brought in negligence ... is difficult to predict.": *Clerk & Lindsell on Torts*, ed. Jones, 22nd edition (Sweet & Maxwell: London, 2018).

[136] It appears that this issue has not yet been specifically considered in the superior courts which adds to the difficulty: *Charlesworth & Percy on Negligence*, ed. Walton, 14th edition (Sweet & Maxwell: London, 2018), para. 13.74.

[137] The cases of *Gilchrist* and *Cockerill* highlight part of the problem. As it is put in *Clerk & Lindsell* in the Second Supplement to the 22nd edition at para. 13-02:

> "… if it is a criminal offence to fail to comply with the relevant statutory duty it is difficult to see how the employer can argue that it was reasonable to breach the duty."

[138] In addition, the Supreme Court has said that:

> "…in more recent times it has become generally recognised that a reasonably prudent employer will conduct a risk assessment in connection with its operations so that it can take suitable precautions to avoid injury to its employees. In many circumstances, as in those of the present case, a statutory duty to conduct such an assessment has been imposed. The requirement to carry out such an assessment, whether statutory or not, forms the context in which the employer has to take precautions in the exercise of reasonable care for the safety of its employees.": *Kennedy v Cordia,* [2016] UKSC 6, para. 110.

[139] That approach has been described as being:

> "… consistent with those decisions where the existence of a statutory duty has been regarded as evidence of the state of knowledge of a reasonable (i.e. non-negligent) employer as regards a particular risk": *Charlesworth & Percy*, para. 13.73.

[140] On the other hand, it cannot be the case that the law remains the same as it was prior to the 1974 Act being amended: *Cockerill.* A claimant must now demonstrate negligence; and there may be other consequences, bearing on matters such as pleadings, evidence and onus: *Charlesworth & Percy,* paras. 13-70 and 13-76.

[141] Therefore, I accept, as a matter of general principle, that the regulations[1] relied on by the pursuer in this case are relevant to an assessment of the specific obligations (i.e. steps to be taken) which may be incumbent upon an employer in discharging its general duty to exercise reasonable care towards its employees. But the precise impact of that in any given case will depend on (a) the factual circumstances prevailing and (b) the precise way in which the statutory duty relied upon is formulated and/or has been interpreted.

[142] I suggest that it may work in the following way. If a duty identified in a regulation can reasonably be said to fall within the duty of reasonable care incumbent on an employer (i.e. in the same way as certain elements have been held at common law to form part of that

[1] Though there appears to be an unresolved question as to the status of the 1999 Regulations: *Charlesworth & Percy*, para. 13-72.

general duty, (e.g. to provide and maintain proper machinery: *Pillans*, para. 21-02), then it should be treated as creating such a duty. Moreover, where a regulation provides specific, concrete steps to be taken in the fulfilment thereof, they may also form part of the duty to take reasonable care.[2] However, where the element which is subsumed into the common law duty of care in that way has as its source a regulation which otherwise creates an absolute or strict standard of care, the new element must be moderated to the standard of reasonable care.

[143] Against that background, I now turn to consider the regulations relied on by the pursuer in this case and their application and effect in a case based on negligence.

Risk assessment

[144] Regulation 3 of the 1999 Regulations provides:

> **"<u>Risk assessment</u>**
>
> 3.—(1) Every employer shall make a suitable and sufficient assessment of—
>
> (a) the risks to the health and safety of his employees to which they are exposed whilst they are at work; …
>
> for the purpose of identifying the measures he needs to take to comply with the requirements and prohibitions imposed upon him by or under the relevant statutory provisions and by Part II of the Fire Precautions (Workplace) Regulations 1997."[3]

[145] The relevant averments are as follows:

> "… The defenders ought to have prepared risk assessments in terms of the Management of Health and Safety at Work Regulations 1992 and Management of Health and Safety at Work Regulations 1999."

[2] e.g. reg. 4(1)(b)(i) and Schedule 1 of the Manual Handling Operations Regulations 1992 – factors informing assessment on manual handling operations.

[3] Regulation 3 of the 1992 Regulations is in similar terms.

[146] I had some difficulty in following Mr Dempsey's submissions on this aspect of the case and the extent to which reliance was being placed on an alleged breach of Regulation 3 was unclear. The averment set out above is ambiguous in that it could support a case based on no risk assessment having been done at all or, alternatively, it being accepted that a risk assessment had been done but it being alleged that it was not "suitable and sufficient". Mr Dempsey's submissions proceeded on the basis of both propositions. In my view, neither is properly foreshadowed in the pleadings.

[147] Ultimately, the criticism appeared to be that the risks identified were not addressed through training and provision of gloves, in breach of regulations 4 and 9 of the 1998 Regulations. These points are addressed below. For the sake of completeness, I offer the following remarks as to risk assessments.

[148] The first question to be considered is the extent to which the duty imposed by Regulation 3 informs the common law duty of reasonable care incumbent upon the defender in this case. In my opinion, it is relatively easy to conclude that the carrying out of risk assessments now forms a constituent element of an employer's common law duty towards its employees. The Supreme Court said as much in *Kennedy*. Accordingly, for the purposes of this decision in this case, I consider it appropriate to substantially read across the terms of Regulation 3 into the employer's common law duty of care, thus: every employer shall make a suitable and sufficient assessment of the risks to the health and safety of his employees to which they are exposed whilst they are at work for the purpose of identifying the measures which require reasonably to be taken to prevent or minimise the risk of injury.

[149] Turning to the question as to whether there was a breach of duty, it is necessary to consider the standard of care required to comply with it. As Mr Dempsey accepted, the

words used in the regulation beg the question as to what is "suitable and sufficient". So how does one go about assessing whether a risk assessment is suitable and sufficient?

[150] The duty to carry out a risk assessment must depend on the circumstances of any given case and must now be assessed at the common law standard, the court requiring to make findings in fact as to when the reasonable employer, taking reasonable care for his employees, would identify the risk in question, consider solutions to it and implement the identified solution by acquiring and supplying appropriate equipment and providing relevant training. In order for a pursuer to succeed in establishing a breach of the duty to carry out a suitable and sufficient risk assessment, the court would need to conclude that the employer had fallen short in some way.

[151] Before a breach of the duty to carry out a risk assessment can be established, there would need to be averred and proved (i) what a suitable risk assessment would have entailed (i.e. the respects in which it was inadequate) and (ii) what steps would have been identified by a suitable risk assessment which would, if implemented, have eliminated or reduced the risk of an accident occurring in the way it did occur.

[152] The onus is on the pursuer to prove the breach of duty by leading evidence to show what risks would have been identified by the reasonable employer in the circumstances; and what precautions against those risks, which would have prevented (or reduced or minimised the risk of) the accident which in fact occurred, should have been implemented: *Sharp* v *Scottish Ministers*, [2019] SC EDIN 92 at para. [96]; *Uren* v *Corporate Leisure Ltd,* [2011] EWCA Civ 66.

[153] As already noted, the pursuer's pleadings are silent on these matters and I was not really addressed on how the hypothetical assessment of risks and precautions should be approached, either in general, or in this case in particular. In some cases, the types of risks

associated with a work activity may be obvious. That is likely to be so where the work activity is simple and straightforward. In the present case, the work activity may properly be described as use of a blade to cut tape: in other words, a straightforward exercise that is within the experience of many people within and outside the workplace. Therefore, the identification of risk is also straightforward, namely the risk of injury by cutting.

[154] As to the question of precautions, that is also I think relatively straightforward in this case. The likely precautions would entail provision of suitable equipment and training in how to use a knife safely. But in assessing the adequacy or otherwise of a risk assessment where (as here) reliance is placed on a breach of duty derived from a regulatory source, the relevant common law principles must be superimposed, because what is now required is a negligent breach of duty. Thus, the balancing of factors such as probability of harm occurring, extent of harm if it does occur and cost and/or complexity of precautions will be relevant.

[155] Turning to the evidence, the risk assessments were lodged by the defender and formed part of the core bundle: CB 3, 4 and 5. The defender did not call any witness to speak to them but they were put to the pursuer in examination in chief who accepted that they were risk assessments.

[156] The only risk assessment which is relevant is the Work Equipment Risk Assessment, CB 15 – 27. That document specifically identifies knives as giving rise to the risk of harm from cuts due to use of knives with exposed blades and the precautions are use of safety knives issued by the defender only, unless otherwise instructed; use of gloves where appropriate; and on-the-job training in accordance with the manufacturer's instructions before using tools when required.

[157] On the pursuer's own evidence, he was provided with a knife with safety features (which had at some earlier stage replaced the knife previously provided which did not have such features). Training had been provided about knife safety.

[158] Mr Dempsey submitted that in assessing whether the risk assessment was 'suitable and sufficient', the defender should have taken account of the HSE Information Sheet; and had it done so, would have identified a better precaution, namely a safer knife which should have been provided to employees such as the pursuer and which, since it had a concealed blade, would have prevented the pursuer's accident.

[159] The primary difficulty with this argument is that for the reasons set out above at paragraphs [118] – [119], this document has no evidential weight.

[160] In any event, even if the defender's risk assessment should have been informed by HSE guidance, I do not consider that it was incumbent upon it to take account of an Information Sheet which is in its own terms directed at the manufacturing sector and the plastics industry in particular.

[161] Finally, no inference about the adequacy or otherwise of the risk assessment can be drawn from the availability of the Penguin knife 2018, given that there is no evidence to show that the defender was or should have been aware of it.

[162] For all these reasons, I am unable to conclude that there was some obvious risk or obvious precaution which was not identified in relation to the work activity which the pursuer was carrying out when his accident occurred and no breach of the duty derived from regulation 3 to carry out a risk assessment has been established.

Suitability of knife

[163] Regulation 4 of the 1998 Regulations provides:

> "Suitability of work equipment
>
> (1) Every employer shall ensure that work equipment is so constructed or adapted as to be suitable for the purpose for which it is used or provided.
> (2) In selecting work equipment, every employer shall have regard to the working conditions and to the risks to the health and safety of persons which exist in the premises or undertaking in which that work equipment is to be used and any additional risk posed by the use of that work equipment.
> (3) Every employer shall ensure that work equipment is used only for operations for which, and under conditions for which, it is suitable.
> (4) In this regulation "suitable" means suitable in any respect which it is reasonably foreseeable will affect the health or safety of any person."

[164] The relevant averments are:

> "The defender ought to have ensured, so far as reasonably practicable that they (*sic*) provided the pursuer with suitable work equipment as required by Regulation 4 of the [1998 Regulations]. The Stanley knife ought to have had a sufficient guard or barrier in order to prevent so far as reasonably practicable the pursuer's fingers coming into contact with an exposed blade which is a dangerous part of the work equipment in compliance with Regulation 11 of the [1998 Regulations]. It was reasonably foreseeable that having an exposed blade would pose a risk of injury to employees such as the pursuer using that Stanley knife…A reasonable (*sic*) prudent employer would have provided employees with an appropriate knife which featured sufficient safety measures…".

[165] The meaning of the pursuer's averments is obscure. First, they mention 'reasonable practicability', but that does not form part of Regulation 4 (or the common law). Second, they articulate the duty as one of insurance, but that is not the law given the amendment to the 1974 Act. Third, although Regulation 11 was not ultimately relied on, if it is ignored, what is to be made of the second sentence quoted above? Is this supposed to be part of the case brought under Regulation 4? None of this is clear.

[166] Pleading difficulties apart, the initial question is the extent to which Regulation 4 should be treated as informing the common law standard of reasonable care. Regulation 4(1) has been recognised as a "central plank" of the PUWER: *Munkman*, paragraph 24.55. It is not

controversial to say that an element of the employer's duty of care at common law is to provide appropriate equipment: *English v Wilsons and Clyde Coal Co* 1937 SC (HL) 46; *Charlesworth & Percy*, para. 12.56. Therefore, subject to what I say below, I have no difficulty in finding that the general duty to provide suitable equipment provided for in Regulation 4 is co-extensive with the common law duty.

[167] Mr Dempsey sought to rely on *Robb*, where in discussing Regulations 4 and 20 of the 1998 Regulations, it was said:

> "The aim in both regulations is the same. It is to ensure that work equipment that was made available to workers could be used by them without impairment to their safety or health: see article 3(1) of the Work Equipment Directive. This is an absolute and continuing duty, which extends to every aspect related to their work: see article 5(1) of the Framework Directive. It is that context that the issue of foreseeability becomes relevant. The obligation is to anticipate situations that might give rise to accidents. The employer is not permitted to wait for them to happen." Lord Hope, para. 24 (emphasis added).

[168] But the issue in *Robb* substantially concerned how the question of foreseeability was to be approached and resolved in cases dealing with breach of statutory duty not negligence. It is not clear that the case law such as *Robb* remains relevant in the context of liability in negligence *post*-1 October 2013: *Munkman*, para. 24.126. As such, caution is required. It is clear that the statutory duties are stricter than the common law. The words emphasised in the passage quoted above serve to highlight the distinction.

[169] Bearing in mind that it is the common law duty with which I am concerned, it is not appropriate simply to read Regulation 4(1) across, thereby superimposing on the common law a duty of insurance.

[170] I suggest the following formulation of this element of the duty of reasonable care: that every employer shall take reasonable care (i) that work equipment is so constructed or adapted as to be suitable in any respect which it is reasonably foreseeable will affect the

health or safety of any person for the purpose for which it is used or provided and (ii) in selecting work equipment, to have regard to the working conditions and to the risks to the health and safety of persons which exist in the premises or undertaking in which that work equipment is to be used and any additional risk posed by the use of that work equipment.

[171] Mr Dempsey appeared to be inviting me to apply Regulation 4 as it would have been applied prior to the amendment to the 1974 Act, but that cannot be correct. It has been suggested that what now must be demonstrated is a breach of the common law standard of care: *Pillans*, para. 21-09. I respectfully agree with that approach. There is no absolute requirement to eliminate risk: c.f. *Robb*, para. 25. Furthermore, it is for the pursuer to aver and prove a breach of duty, in the sense that the employer took an unreasonable risk: *Pillans*, para. 21-09; *Clerk & Lindsell*, para. 13-41.

[172] There may be cases where the equipment in question is plainly not suitable. But in this case, the knife provided was designed for the task for which it was used. I agree with Mr Dempsey that there was a foreseeable risk of injury. But that is not the only factor to be taken into account. As already noted, the probability of harm eventuating and the seriousness of the harm if it does eventuate are all relevant factors, as is the availability of safer alternatives.

[173] Dealing with the latter first, I adopt what I have said at para. [161]. There is no evidence that enables a finding in fact to be made that the defender knew or should have known that a safer alternative, in the form of the Penguin knife, was available prior to the pursuer's accident.

[174] Even if there were such evidence, there is no evidence about any cost differential which, since this is a case brought at common law, is a relevant factor.

[175] Mr Dempsey sought to rely on the data about the previous accidents. For my part, I consider that a more useful figure would be the number of such accidents per employee, but in any event it is clear that although rising slightly in the years prior to the pursuer's accident, the total number per year was at a relatively low level across the defender's business.

[176] As already noted, the knife was not clearly unsuitable and it had safety features to reduce the risk of accidental injury.

[177] There was no evidence of different practice by other employers.

[178] It was submitted that the Code of Practice issued by the HSE issued in 2014 specifically advises against the use of knives which feature unprotected blades, such as the one used by the pursuer at the time of his accident in November 2016. But as already noted, the Code of Practice has not been proved. The upward trend in accidents was gradual and remedial action was taken. I am not satisfied that such action should have been taken sooner, particularly as it has not been proved that safer knives were available on the market prior to 2016.

[179] Finally, the pursuer had during his career of 35 years used (i) a knife with a hooked (but exposed) blade and (ii) the knife provided at the time of the accident around 2 or 3 times per week. (There was no clear evidence as to when the change had been effected.) So even on a conservative approach (e.g. 2 uses x 46 weeks x 35 years) the pursuer had used a knife of one or other type several thousand times without difficulty or incident nor was there any evidence of complaints about unsuitability.

[180] Drawing these factors together and balancing them one against the other, I conclude that the defender did not breach its duty of reasonable care towards the pursuer by

providing for use by him the knife in question or failing to provide a knife with additional features such as the Penguin knife.

Training

[181] The third strand of the pursuer's case was based on regulation 9 of the 1998 Regulations which provides:

> "Training
>
> (1) Every employer shall ensure that all persons who use work equipment have received adequate training for purposes of health and safety, including training in the methods which may be adopted when using the work equipment, any risks which such use may entail and precautions to be taken."

[182] The relevant averments are:

> "The defender…failed to provide adequate training in the use of the knife as required by Regulation 9 of the [1998 Regulations]."

[183] To what extent should the duty as set out in regulation 9(1) be taken as informing the common law duty of care? A duty to train does not seem to fall expressly within the recognised elements of the common law duty to take reasonable care: *Pillans,* 21-02 – 21-04; *Charlesworth & Percy*, paras 12-24 – 12-77.

[184] Nevertheless, I think that it is reasonable to suggest that a duty to train is part of the generalised common law duty to take reasonable care: *Clerk & Lindsell*, para. 13-13.

[185] As to the precise formulation, the duty might be articulated as: every employer shall take reasonable care that all persons who use work equipment have received adequate training for purposes of health and safety, including training in the methods which may be adopted when using the work equipment, any risks which such use may entail and precautions to be taken.

[186] The next question is whether there was a negligent breach of the duty so formulated. Turning to the evidence, the pursuer was asked in his evidence in chief, "Did you get any training in the use of the knife?" to which he responded "No". Before any more evidence was led, an objection was taken by Mr Quinn on the ground that the case made on Record was not that no training had been given, but that the training was not adequate and that the averments about adequacy of training were lacking in specification did not provide fair notice and were irrelevant.

[187] Mr Dempsey's position was that he wished to elicit evidence about training to meet the defender's averment about training and I allowed the line, under reservation of relevancy and competency, on that basis.

[188] The evidence about training came from the pursuer and his wife. I found the pursuer's evidence unconvincing about the content of the training video, which he accepted he had seen, and the 'message' he had taken from it.

[189] He initially said he had had no training about the use of knives and said that the Health & Safety training dealt only with fire safety and other such considerations, rather than any specific training on the use of knives. During cross-examination, he recalled a video in which an employee using a knife suffered a gruesome injury to his thigh. From his recollection, he considered the message of the video being "Do not use these knives". Ultimately, he advised that he was about 70 to 80% sure that it was a fixed blade Stanley knife.

[190] Mrs Goodwillie was somewhat more – though in my view reluctantly – forthcoming. She remembered the training video and accepted that there had been some attempt to convey a message about using knives safely. In her evidence in chief, she could not

remember the type of knife and but thought it would have been a Stanley knife. The message of the training was "to be careful".

[191] In my view, the objection to this evidence falls to be sustained. The averment about training is a bald averment that there was a failure to provide adequate training. No notice or specification was given of the respect in which it was said the training provided was inadequate.

[192] In any event, even in cases brought under the statutory regulation, there requires to be evidence about something which the pursuer did not know but which he would have known had he received adequate training, and which had he known would have prevented the accident: *Neil*. Accordingly this part of the pursuer's case is irrelevant because a crucial matter has not been proved.

[193] Mr Dempsey sought to argue that the training was inadequate because the pursuer had not been trained to wear gloves. He suggested that the pursuer had said in evidence that if he had been given gloves he would have worn them. My notes of evidence do not support that but even if he did give that evidence, I consider that that argument cannot succeed.

[194] Early on in his evidence in chief, the pursuer was asked if he had been wearing gloves or not. An objection was taken to that line of evidence on the basis that there was no Record for a case based on the provision of gloves. I sustained that objection.

[195] Accordingly, there was no competent evidence before me about a putative breach of duty on the part of the defender to provide gloves. For there to be a relevant case that the training was inadequate because the pursuer had not been trained to wear gloves, he would require to show that the defender had a duty to provide gloves and had breached that duty. No such case has been made or established here.

[196] In any event, the pursuer would also have to have shown that the provision and use of gloves would have prevented or minimised the risk of an accident. Without evidence as to what type of gloves might have been appropriately provided, no such inference can be drawn.

[197] Finally, and in any event, the pursuer did not attribute his accident to a lack of training. He was specifically asked by Mr Dempsey how he thought the accident could have been prevented and his evidence was "If I was wearing gloves and if I had been given a safe knife to use." Accordingly, he attributed the accident to the lack of gloves and a 'safe' knife, and not to a lack of, or inadequacy in, the training he had received.

[198] In these circumstances, the case based on inadequate training cannot succeed.

Contributory negligence

[199] The effect of the amendment to s. 47 of the 1974 Act on the assessment of contributory negligence is not yet settled. Nevertheless, I agree with Mr Dempsey's submission that momentary lapses or acts of inattention or inadvertence will not ordinarily attract a deduction for contributory negligence.

[200] But what happened in this case was not a momentary lapse in attention. The pursuer made a conscious decision to embark on a risky course of action while carrying out a simple task with a piece of equipment which he had used many times before. He must have known that the blade was sharp and that in cutting vertically downwards with his left hand there was a serious risk he might cut his right hand which he had positioned a few inches down from the tape he was cutting through. Had liability been established in this case, I would have assessed contributory negligence at 50%.

Disposal

[201] I shall absolve the defenders from the first crave. All questions of expenses are reserved meantime. A hearing on expenses can be arranged if required.