SHERIFFDOM OF LOTHIAN AND BORDERS AT EDINBURGH

IN THE ALL-SCOTLAND SHERIFF PERSONAL INJURY COURT

[2025] SC EDIN 17

PIC-PN2612-18

JUDGMENT OF SHERIFF R D M FIFE

in the cause

THOMAS WARD

Pursuer

against

(FIRST) WM MORRISON SUPERMARKETS PLC; (SECOND) PPF LIMITED, trading as ADR NETWORK

Defenders

Pursuer: Allardice, Advocate; Thompsons, Solicitors, Edinburgh
Second Defender: Tosh, Advocate; Kennedys Law, Glasgow

EDINBURGH, 14 March 2025

The sheriff, having resumed consideration of the cause, finds the following facts to be admitted or proved:

Findings in fact

1. The pursuer has been employed by the second defender as a large goods vehicle driver since June 2013.

2. The second defender is a recruitment agency. The second defender supplies drivers, when needed, to drive vehicles operated and loaded by among others the first defender. The first defender has a regional distribution centre or depot at Bellshill.

3. On 16 October 2015, the pursuer was working in the course of his employment with the second defender.

4. The pursuer was detailed to drive a 52 foot articulated truck to pick up a load from the first defender's depot at Bellshill and to take it to the first defender's supermarket at Kirkintilloch Road, Bishopbriggs, Glasgow.

5. The trailer of the truck was loaded by employees of the first defender, with items stacked on about thirty pallets arranged in two columns running the length of the trailer.

6. During the journey from Bellshill to Bishopbriggs whilst driving on the M8 motorway, the pursuer required to brake sharply when another vehicle cut in front of his truck.

7. The pursuer was concerned that some of the load in the trailer might have moved during transit as a result of the braking manoeuvre.

8. On arriving at the first defender's supermarket at Bishopbriggs, the pursuer reported to the forklift driver and his assistant who were employees of the first defender. There was no docking bay or scissor lift at Bishopbriggs and a forklift required to be used from the ground to unload pallets from trailers.

9. The forklift driver was in charge of the unloading of the trailer. The pursuer informed the forklift driver that some of the load might have moved during transit.

10. The forklift driver operated the forklift on the ground to remove the first two pallets at the rear of the trailer. The forklift could only lift the pallets from the edge of the rear of the trailer.

11. In order to unload the other pallets from the interior of the trailer, the forklift driver's assistant had to enter the trailer with a manually operated pallet truck to bring the other pallets forward to the rear edge of the trailer and then unloaded by the forklift.

12. The content of one of the pallets had slipped towards the front of the trailer and it was necessary to try to right it before wheeling it on the pallet truck to the rear of the trailer to be unloaded.

13. The pursuer entered the trailer without being asked to do so, because he felt responsible for the load moving in transit and he wanted help the forklift driver and his assistant. The forklift driver's assistant remained in the trailer.

14. As the pursuer used the pallet truck to try to move the pallet to the rear of the trailer, the load overbalanced towards the front of the trailer and the pallet moved towards the rear of the trailer. The pallet struck the pursuer's left foot and pushed him off the trailer. The pursuer fell about four feet onto the ground sustaining injury.

15. The pursuer was given training on 19 June 2013 by the first defender. The training was delivered verbally and by the provision of documentation. The topics covered were outlined in training acknowledgements signed by the pursuer, numbers 6/14/2 and 6/14/3 of process, and included the first defender's store unloading procedure. The pursuer was supplied with a copy.

16. The first defender's store unloading procedure states that drivers are not required to assist with the unloading of vehicles and should allow the first defender's store personnel to unload and reload the trailer. The unloading procedure includes the following instruction:

> **Stores without a loading dock and no (or defective) scissor lift**
>
> Para 3
>
> "Unless assisting with the movement of pallets on the trailer, the driver must either remain in the warehouse in a safe position away from the unloading/loading operation, stay in their cabin or proceed to the canteen facilities."

17. The vehicles driven by the pursuer could have bulkhead doors to separate refrigerated goods from grocery. The bulkhead doors were normally near the front of the

trailer. If those unloading the trailer were struggling to lift open the bulkhead doors, the pursuer would go into the rear of the trailer and lift open the doors for them. The pursuer received no training from the second defender.

18. The medical report of Mr John C McKinley, Consultant Orthopaedic Surgeon, following upon an examination of the pursuer on 10 June 2024, is a true and accurate account of the injury sustained, treatment received, consequences and prognosis for the pursuer following the accident. The pursuer sustained an injury to his left hindfoot, namely an open, comminuted fracture of his calcaneus. Mr McKinley was of the opinion it would be reasonable for the pursuer to reduce his hours at work and that a reduction from 11 shifts to 8 shifts over two weeks was reasonable as a result of his injury.

19. The pursuer returned to work on 1 December 2016. The pursuer is able to perform his normal employment as a lorry driver with reduced shifts. The pursuer's condition is unlikely to get any better or worse. The pursuer will be able to continue working as a lorry driver until retirement. The pursuer intends to continue working as a lorry driver until retirement.

20. The pursuer entered into an extra-judicial settlement with the first defender at a Pre-Trial Meeting on 12 December 2019 on the advice of his solicitors and Senior Counsel. The terms of the settlement between the pursuer and first defender were that:

(a) The first defender would pay the pursuer a sum of £110,000 net of any liability under section 6 of the Social Security (Recovery of Benefits) Act 1997.

(b) Upon payment of that sum, the first defender would be assoilzied from the craves of the initial writ.

(c) The first defender would be found liable to the pursuer in the expenses of the action as taxed.

21. Following the pre-trial meeting, the pursuer offered to abandon the action insofar as laid against the second defender on the basis that no expenses would be found due to or by either of those parties. The second defender rejected that offer. The first defender paid the sum of £110,000 to the pursuer in January 2020.

22. At appeal by the second defender, on 15 December 2022 the Sheriff Appeal Court determined the terms of settlement agreed between the pursuer and the first defender were not in full satisfaction of his claim and did not dispose of the pursuer's case against the second defender. The pursuer did not accept the sum of £110,000 in settlement of all claims.

Findings in fact and law

23. That the second defender is liable to make reparation to the pursuer in consequence of their breach of duty at common law.

24. That the injuries suffered by the pursuer were caused by the second defender's breach of duty at common law.

Findings in law

25. That damages in the sum of £56,818 is reasonable reparation for the loss, injury and damage suffered by the pursuer.

Note

Introduction

[1] This action arises out of an accident when the pursuer was injured in the course of his employment. The pursuer was employed by the second defender as a large goods vehicle driver in vehicles operated by the first defender. The pursuer raised proceedings

against both defenders. The parties attended a Pre-Trial Meeting in the course of which settlement terms were agreed as between the pursuer and the first defender. The second defender lodged a minute contending that the entire case had settled by way of compromise between the first defender and the pursuer. The pursuer contended that the settlement was only in relation to the action as directed against the first defender. The Sheriff Appeal Court agreed.

[2] A proof between the pursuer and the second defender proceeded on 21-24 January 2025.

Witness evidence

Pursuer

[3] As the circumstances of the pursuer's accident on 16 October 2015 were broadly agreed in a joint minute, the pursuer's evidence about the accident was relatively short, and focussed on the unloading of the trailer and the consequences of the injury.

[4] The pursuer was driving on the M8 motorway in the course of the journey from Bellshill to Bishopbriggs when he had to brake sharply as another vehicle cut in front of his truck. The pursuer was concerned that may have caused the load in the trailer to move. At Bishopbriggs, the pursuer informed the forklift driver who was in charge of unloading the trailer that some of the load might have moved during transit. After the unloading had started, the pursuer could see that the content of one of the pallets had slipped towards the front of the trailer and it was necessary to try and right this before using the manual pallet truck to bring the pallet to the rear of the trailer. The pursuer felt responsible for some of the load moving in transit. He wanted to help as this was his load. He wanted to stabilise the second lot of pallets. The pursuer entered the trailer and used the pallet truck to try to move

a pallet to the rear of the trailer. As he was doing so, the load overbalanced, the pallet struck the pursuer's foot and pushed him off the trailer where he fell to the ground, sustaining injury.

[5] The pursuer had received training from the first defender and was familiar with a number of documents including risk assessments, which he received in a Health and Safety pack. The pursuer received no training from the second defender. As far as the pursuer was aware, there was no prohibition on him entering the rear of the trailer.

[6] The vehicles driven by the pursuer could have bulkhead doors to separate refrigerated goods from grocery. If those unloading the trailer were struggling to lift open the bulkhead doors, the pursuer would go into the rear of the trailer and lift open the doors for them.

[7] The pursuer accepted a settlement of £110,000 from the first defender on the advice of his solicitors and senior counsel.

[8] After returning to work on 1 December 2016, the pursuer has been able to manage his job as a lorry driver, working reduced shifts.

Stan Johnston

[9] Mr Johnston was a Health and Safety Consultant. Mr Johnston adopted his report dated 21 May 2019.

[10] In summary, Mr Johnston expressed the opinion that both defenders were at fault for the accident for the following reasons:

1. The defenders had devised a system of work for dealing with vehicle unloading operations. The system required supervision and training provided by management, which appeared to have been completely lacking at the time

of the accident. The system provided a clearly described method of dealing with unstable loads, which specifically required manual de-stacking before the use of pallet trucks. There was no evidence the defenders attempted to comply with this procedure. No fork extension sleeves were provided or used.

2. There was no evidence the two defenders had prepared a joint Safe System of Work document as suggested by HSE.

3. There was no evidence of the defenders having provided proper supervision for the tasks in question. The supervisor would have prevented the employee from giving the pallet truck to the pursuer for his use in a task for which he was unauthorised and untrained by the defenders.

[11] There was also a failure to comply with regulation 4 of the Provision and Use of Work Equipment Regulations 1998. The pallet truck was not suitable for the task of unloading the trailer. It was used in a narrow space with a significant drop at the edge of the workspace. The provision of extended sleeves for the forklift would have removed any need for the pallet truck to have been inside the trailer. If the manual de-stacking of the unstable load procedure had been followed, the pallet truck could not have slipped backwards as it did, and the accident could have been avoided.

[12] When the pursuer arrived at the first defender's premises, he should not have been allowed to take any involvement in the unloading process. It was unfortunate that throughout the report Mr Johnston referred to the defenders, not identifying the different roles of the first defender and second defender.

Craig Martin

[13] Mr Martin was a Regional Director for the second defender. The second defender was a recruitment company specialising in supplying lorry drivers to a multitude of companies across the UK. The second defender undertakes a number of checks before registering the driver and placing the driver with a customer. The second defender employs the drivers. The second defender provides no training. That was the responsibility of the customer. In the case of the pursuer, the first defender would undertake all training. The second defender would not expect drivers to be involved with loading or unloading trailers.

[14] The second defender carried out no risk assessments. They would do a yearly health and safety check with customers to ensure customers were looking after all drivers placed with them. That check was carried out in February/March each year. The second defender would not review any risk assessments carried out by the first defender.

[15] While Mr Martin accepted there were certain duties incumbent on the second defender at common law, as far as he was concerned it was the responsibility of the first defender to provide a safe place of work as any drivers were under their control. Mr Martin was unable to explain what duties of care were incumbent on the second defender. It was Mr Martin's understanding the pursuer would not be working with any equipment nor would he have any interaction with any pallets.

Submissions

Submissions for pursuer

[16] There was no dispute about the circumstances of the accident. The pursuer came across as straightforward and honest despite the passage of time.

[17] The position of the second defender was that they supplied labour and as the drivers were under the control of the first defender, they had complied with all duties incumbent upon them. The minimum requirement at common law was for the second defender to carry out a risk assessment. The common law duties were non-delegable. The second defender had effectively done nothing but rely on the first defender. Mr Martin was unaware of the duties of care on an employer. Mr Martin's understanding was that the pursuer was not involved in any loading or unloading operation.

[18] There were occasions when the pursuer may require to go into the trailer eg difficulties with the internal bulkhead doors and checking the pallets were safe and secure after a delivery. Specifically, in terms of the first defender's own procedure, drivers should not enter a trailer "unless assisting with the movement of pallets in the trailer".

[19] In the particular circumstances, the pursuer was legitimately in the rear of the trailer. This was foreshadowed in the risk assessments for the first defender: "Control measures for accessing and removing the stock from the vehicle; hazard: falls from height – from rear of trailer; persons affected: Colleagues, Contractors, Visitors".

[20] Mr Johnston addressed the common law case in his report. There were no restraining bars or straps in the rear of the trailer. The occurrence of pallets shifting within trailers was well known and something should have been done about that. That is what started the chain of events leading to the accident.

Liability

[21] It was not in dispute that common law duties of care were non-delegable, *Munkman* at paragraph 4.56. The starting point was for a defender to carry out a risk assessment, *Kennedy* v *Cordia (Services) LLP* [2016] UKSC 6 at paras [110] and [111]. The second defender

did not do that. In carrying out a risk assessment as an employer, the second defender required to seek out potential problems and ones that were not obvious.

[22] Mr Martin did not seem to understand what duties were incumbent on the second defender. Having regard to the risk assessments for the first defender and HSE Guidance it was unclear what was agreed between the first defender and second defender "who does what". The second defender produced no documents about what was agreed.

[23] The pursuer submitted there was no prohibition on the pursuer to go into a trailer. It was very difficult for the driver not to assist in the circumstances of the present case. The pursuer himself did not think he was doing anything wrong nor did any of the first defender's staff. It was up to the second defender to make it clear the pursuer ought not to be going into the trailer. The second defender failed to do so. The common law case of fault against the second defender was made out. There should be no finding of contributory negligence.

Provision and Use of Work Equipment Regulations 1998 ("PUWER")

Regulation 4

[24] The pursuer sought to rely on *Kennedy* establishing the requirement to do a risk assessment. The pursuer submitted the court now needed to ask the following questions:

1. How can I interpret the regulations in such a way that is in accordance with the purpose to guarantee the health and safety of the workforce is improved and ensure that they are safe?
2. How can I interpret the regulations in a way that will help in avoiding an accident happen in the first place?

[25] *Kennedy* gave approval to the interpretation of the regulations in light of the Framework Directive 89/391/EEC at paras [77] - [82]. The effect of section 69 of the Enterprise and Regulatory Reform Act 2013 ("the 2013 Act") is dealt with in *Redgrave Health and Safety*, 10th Edition, at para [2.59]: "… employers… are still subject to those duties which are in no way diminished by the 2013 amendment."

[26] Further, in *Kennedy* at para [64] the court stated:

> "The expansion of the statutory duties imposed on employers in the field of health and safety has given rise to a body of knowledge and experience in this field, which, as we explain later in this judgment, creates the context in which the court has to assess an employer's performance of its common law duty of care."

[27] That body of knowledge and experience from the regulatory legal framework that employers have to comply with now informs the common law. The second defender failed to assess the risks to the pursuer and take into consideration regulation 4 in informing the common law duty of care on the second defender.

Quantum

Solatium

[28] An appropriate award would be £42,500 with 75% to past loss: Judicial College Guidelines Chapter 7 - Orthopaedic Injuries; Section N - Foot injuries, not in either the Modest (g) or Moderate (f) categories and either just in the Severe (d) or upper end of the Serious (e) categories.

[29] The claims for past wage loss, future wage loss, pension loss, services and miscellaneous expenses are agreed.

Satisfaction of the pursuer's claim

[30] What was agreed in terms of the joint minute, the Sheriff Appeal Court determined that agreement did not mean that the claim has been paid in full.

[31] The value of the claim depends entirely on what the court assesses the value. What the pursuer thought about the settlement or what the agreement means was neither here, nor there. The terms of the agreement and the court's assessment of the value of the claim are what matters. The second defender was trying to assert that the pursuer had accepted that sum from the first defender in full and final settlement. That was misconceived. In cases for reparation for personal injury, the only way that you know that a claim has been met in full is when the court makes a finding what your claim is worth.

[32] At best, the pursuer was saying that he was happy with what he was offered. In reaching that settlement, the claim has been compromised: for the risk of losing, for the certainty of success, for the risk of contributory negligence. This is what the pursuer was told was a reasonable offer by those advising him, and he accepted that advice. That is different from saying that the pursuer had accepted that his claim was settled for full value. Reparation cases are generally not settled without a compromise.

[33] The time for the valuation of the pursuer's claim is in the normal way, at the date of the proof.

Submissions for second defender

Objection

[34] There was no record for any evidence that the pursuer had entered the trailer of his truck at any time before 16 October 2015 to help to stabilise a load, which had moved in transit. The averments in stat 5 (page 8, last three lines) do not provide notice fair or

otherwise, of any such line of inquiry. The objection to the evidence of the pursuer bearing on this issue, heard under reservation, should be sustained.

Satisfaction: part (1)

[35] Where an injured party accepts a sum in full and final satisfaction of all his claims for harm done to him, the full measure of his loss is fixed in that sum so as to preclude any further proceedings: *Kidd* v *Lime Rock Management LLP* 2021 SLT 1499 at [31].

[36] If an injured party admits that he has accepted a sum in full and final satisfaction of all his claims for harm done to him, he would no doubt have no reason to bring or continue any proceedings. If he did so, he would commit an abuse of process: Macphail, *Sheriff Court Practice* (4th Edition, 2022), paragraph 2.23.

[37] The authorities bearing on this issue are concerned principally with whether it may be *inferred* from the terms of a settlement agreement, viewed in its surrounding circumstances, that the pursuer has done do. There was no need for inferences in this case. The pursuer's own evidence was unequivocal. He accepted the sum of £110,000 paid to him by the first defender in full and final satisfaction of all his claims for any harm done to him. For these reasons alone, the second defender falls to be assoilzied.

[38] The decision of the Sheriff Appeal Court does not preclude that:

(1) The Sheriff Appeal Court's decision was not binding on this court. It did not lay down any principle of law, which could bind this court on the basis of the doctrine of precedent. It was merely engaged in an exercise of reviewing whether an established principle of law had been properly applied to the facts. It held that the material before it was insufficient to discharge the onus on the

second defender to show that the pursuer had accepted the settlement in full satisfaction of his claim: [2022] SAC (Civ) 35 at [17].

(2) The Sheriff Appeal Court did not make any findings in fact of its own. There are no earlier findings in fact in this action by which this court is bound. Even if such findings had been made, they would have been made only for the purpose of the procedure, which followed upon the minute for the second defender (no 29 of process) and on the basis of the facts and evidence before the court at that time: *Noble* v *De Boer* 2004 SC 548 at [5] and [42].

(3) The Sheriff Appeal Court determined a different issue on the basis of different materials. It was not concerned with whether the pursuer had actually accepted a sum in full and final satisfaction of all his claims for any harm done to him, but whether that could be inferred from the material before it: essentially, the terms of two joint minutes of admissions.

(4) The pursuer's explanation why he has continued with the action (that the second defender would not give it up) was obviously wrong. The pursuer could have abandoned the action at any time. He should have done so as soon as he received payment from the first defender in January 2020.

[39] Since January 2020, the pursuer has continued with his action despite having accepted payment in full and final satisfaction of any harm done to him. From that time, the pursuer has acted incompetently and unreasonably in electing to continue with his action in circumstances, which amount to an abuse of process. In the circumstances, the pursuer should be found liable to the second defender in the expenses of the action and that on an agent-client, client-paying basis after 31 January 2020: *McKie* v *Scottish Ministers* 2006 SC 528 at [3].

Satisfaction: part (2)

[40] Even if the pursuer did not accept the sum paid to him by the first defender was in full and final satisfaction of all his claims for any harm done to him, if the payment made by the first defender made up for any loss, injury and damage he sustained, no damage will remain and the second defender will have been discharged from any obligation to make reparation to the pursuer: *Kidd* at [2], citing Erskine, *Institute*, II,I,15.

[41] It is necessary for the court to determine whether the payment made by the first defender to the pursuer in January 2020 represented at that time reasonable reparation for any loss, injury or damage that he had sustained. If so, any obligation that the second defender will have been discharged at that time regardless of any intentions of the pursuer.

Liability

[42] There is no dispute that the second defender owed the pursuer a common law duty to take reasonable care to avoid acts and omissions, which could foreseeably result in loss, injury or damage to the pursuer as one of their employees. There is also no dispute that the duty is personal to the second defender and that they remain liable for any breach of that duty even if its performance was delegated to a third party, such as the first defender. The issues in dispute are the scope and content of that duty, and whether any breach of duty caused the pursuer to sustain loss, injury and damage.

Scope

[43] An employer only owes a duty of care to an employee when the employee is acting in the course of his employment. If the employee is engaged in activity outside the course of

his employment, the employer owes him no duty as employer: *Vaughan* v *Ministry of Defence* [2015] EWHC 1404 (QB) at [13] and [20].

[44] An employee is acting in the course of his employment when he is doing what he is employed to do or something which is reasonably incidental to his employment: *Smith* v *Stages* [1989] AC 928, 936B-E per Lord Goff of Chieveley.

[45] Whether an employee is acting in the course of his employment is analysed by asking whether his act was authorised by the employer or an unauthorised mode of doing some act authorised by his employer. It can include things that the employer has not authorised the employee to do or even expressly forbidden, provided that it is an improper mode of carrying out what the employee has been authorised or instructed to do. The ultimate question is whether there is a sufficiently close connection between the activity and the role the employee was tasked to carry out: *Wilson* v *Exel UK Ltd t/a Exel* 2010 SLT 671 at [2] and [7] per the Lord President (Hamilton) and [25] per Lord Carloway.

[46] An employee is not generally acting in the course of his employment when he does work which he is not engaged to perform eg, where the employee has arrogated to himself duties which he was neither engaged nor entitled to perform. Where an employee is prohibited from doing some act, a distinction must be drawn between a prohibition which limits the scope of the employment, and a prohibition which deals only with conduct within the scope of the employment: *Plumb* v *Cobden Flour Mills Co Ltd* [1914] AC 62, 67-68 per Lord Dunedin; *Iqbal* v *London Transport Executive* [1973] EWCA Civ 3.

[47] The loading and unloading of the trailer was, and is admitted to have been, the responsibility of the first defender. There was an agreement to that effect between the defenders and a corresponding reasonable expectation on the part of the second defender that the pursuer would not be engaged in loading or unloading or in having any load

interaction in the course of his employment. The unloading procedure and risk assessments prepared by or on behalf of the first defender were consistent with that agreement and expressed a similar expectation.

[48] Paragraph 7 of the first defender's unloading procedure, which the pursuer had been given and trained to follow during his induction training in June 2013, made clear to him that he was not required to assist with unloading. Whether it amounts to a prohibition or not is not important. It is clearly a statement that is definitive of the sphere of his employment: see 6/2/10 and 6/3/14.

[49] The provenance of the document labelled "Vehicle unloading and loading operations procedure" is unknown: 6/2/11. The pursuer did not recognise it and it was inconsistent with his understanding and normal practice.

[50] The risk assessments did not contemplate drivers being involved in unloading or exposed to risk of falling from height during unloading. The pursuer was right to draw a distinction between staff of the first defender and contractors such as the pursuer. Unloading (including handling unstable loads) was a task, which was reasonably anticipated to expose only colleagues to risk: see 5/3/7.

[51] The pursuer was not acting in the course of his employment when he took it upon himself to enter the trailer to assist with unloading it. He arrogated to himself the duties of the forklift driver's assistant and the use of the pallet truck to move pallets.

Content

[52] The content of the employer's duty of reasonable care in any given case is an evidential matter. The fact that an employer or other duty holder is under a statutory duty in certain situations to do particular things or achieve a specific result is not in itself relevant

to inform the existence of any common law duty in those situations. The existence and content of such regulations may inform the court about what risks have been generally recognised as inherent in a particular situation or activity and what steps have been similarly recognised as apt to mitigate or eliminate those risks. Reference to health and safety regulations is properly aimed at providing a factual basis, or factual support, for those kinds of proposition, rather than at claiming any residual legal effect said to inhere in the regulation for the purposes of informing common law duties of care, for no such effect exists. There is no greater role for the content of health and safety regulations or guidance in the determination of common law duties than that: *Swierzko* v *Mathiesons Bakery* 2024 SCLR 829 at [30] - [41].

Breach

[53] There are three allegations of breach of duty made against the second defender:

a. A failure to suitably and sufficiently assess the risks to which the pursuer was exposed in the course of his employment;

b. A failure to devise, institute, maintain or enforce a safe system of work; and

c. A failure to train the pursuer in what he was to do in the event that a load moved in transit.

(1) Risk assessment

[54] There is no dispute, in general terms, that at common law an employer requires to carry out a risk assessment (in the sense of an assessment of risk rather than the preparation of any written document) in order to identify whether a particular operation gives rise to

any risk to safety and, if so, what is the extent of that risk, and what can and should be done to minimise or eradicate the risk. However:

(1) Any duty to conduct a risk assessment requires only that the employer seeks to identify risks that may arise in the course of the employer's operations or, in other words, in the course of the employee's employment: *Kennedy* at [110].

(2) A failure to carry out a risk assessment can never be the direct cause of an injury. It can only be indirectly causative if it is shown that a hypothetical suitable and sufficient risk assessment would have resulted in a precaution being taken which would probably have avoided the injury: *Gemmell* v *Scottish Ministers* 2022 Rep LR 78 at [14].

[55] There has been no failure on the part of the second defender to suitably and sufficiently assess the risks to which the pursuer was exposed in the course of his employment. The risk which eventuated was not one to which he was exposed in the course of his employment. In any event, suitable and sufficient risk assessments were prepared by or on behalf of the first defender. Mr Johnston's opinion was that they were sufficient and that they were simply ignored at the time of the accident by members of the first defender's staff.

(2) Safe system of work

[56] There has been no failure on the part of the second defender to devise, institute, maintain or enforce a safe system of work. Unloading was not part of the pursuer's work. There was evidence that other systems such as a dock leveller or scissor lift were available and potentially safer, but there was no evidence that the system of unloading by forklift operated by the first defender was failing to control any identified risk. That being so, there

was no duty on either of the defenders to implement a more stringent system: *Gemmell* at [16].

(3) Training

[57] There has been no failure on the part of the second defender to train the pursuer in what he was to do in the event that a load moved in transit. An employer has a duty to provide employees with sufficient information and training on the tasks they are expected to perform, but the pursuer was not expected and did not expect to perform any task associated with the unloading of a trailer. It was not his purpose and, as he said, he did not make it his purpose: *Gemmell* at [18]. In any event, for an alleged inadequacy in information or training to be of relevance, it must be possible to point to something which the employee did not know, but which he would have known had he received adequate information and training, and which, had he known, would have prevented the accident. Nothing was identified.

Conclusion

[58] There has been no breach of duty on the part of the second defender.

Contributory negligence

[59] The pursuer elected to use equipment he had not been trained to use to perform a task he was not trained, employed, asked or authorised to do. Any award of damages made in favour of the pursuer should be reduced to such extent as the court thinks just and equitable having regard to the pursuer's share in the responsibility for his own injury. In the circumstances, an appropriate reduction would be at least 50%.

Quantum

Solatium

[60] *An appropriate* award would be £20,000 with half to past loss: Judicial College Guidelines, paragraph 135 (£16,770 to £32,450; adjusted for inflation: £17,195 to £33,200); *Kenny* v *Lightways (Contractors) Ltd* 1994 SLT 306 (£10,000; adjusted for inflation: £21,150); *Souter* v *Allarburn Holdings Ltd* 1997 SCLR 587 (£10,000; adjusted for inflation: £19,700).

Other heads of claim

[61] Parties have agreed past wage loss, future wage loss, pension loss, services and sundry expenses as at the date of proof.

Note and decision

Second defender's objection

[62] The second defender maintained the objection in submissions that there was no record that the pursuer had entered the trailer on any occasion prior to 16 October 2015. The pursuer did not address this in submissions. The objection is well made and upheld. The pursuer's evidence about this is inadmissible. Esto, I am wrong and the objection should have been repelled, the evidence was in very short compass and would have had no impact on my decision.

Satisfaction part (1)

[63] The second defender submitted the pursuer had accepted £110,000 in full and final settlement of all his claims:

> "The pursuer's own evidence was unequivocal. He accepted the sum of £110,000 paid to him by the first defenders in full and final satisfaction of all his claims for any harm done to him."

[64] In *Kidd* v *Lime Rock Management LLP* 2021 SLT 1499 at [31] the court stated the settlement agreement had to be viewed in its surrounding circumstances. The pursuer was asked questions in isolation, whether the first defender had settled the claim paying £110,000. The pursuer understood that was the claim finalised, but that is inconsistent with the surrounding circumstances. No reliance can be made of the pursuer's understanding in the context in which these questions were asked. That settlement took place at a Pre-Trial Meeting where the pursuer was represented by solicitors and senior counsel. The pursuer relied on advice from senior counsel and the solicitors. Their position, on behalf of the pursuer, was that the settlement was only in relation to the action as directed against the first defender.

[65] At appeal, the Sheriff Appeal Court applied the test in *Kidd*. The terms of the settlement agreement, viewed in its surrounding context, did not indicate the pursuer had accepted the sum in full and final satisfaction of all his claims against the first defender and the second defender. The pursuer did not accept £110,000 from the first defender in full and final settlement of all his claims. Accordingly, the action has continued to a proof against the second defender.

Satisfaction part (2)

[66] The second defender submitted if the payment made by the first defender made up for the loss, injury and damage the pursuer sustained, no further damages will be payable and any obligation the second defender may have will be discharged. I will address this later.

Liability

[67] It is accepted by the second defender that they owed a common law duty to take reasonable care for the health and safety of the pursuer, and that duty of care was non-delegable.

[68] The second defender carried out no risk assessments. The second defender carried out no training for any of their employees including the pursuer. The second defender relied entirely on the first defender for any procedure in unloading and loading of trailers. In terms of their procedure, the pursuer required to be in a safe position away from the unloading/loading operation unless assisting with the movement of pallets.

[69] The pursuer was acting in the course of his employment at the time of the accident. The pursuer entered the rear of the trailer as the load had moved in transit, and the pursuer wanted to assist in righting a pallet, which had slipped towards the front of the trailer, and moving the pallet towards the rear of the trailer. The pursuer was not prohibited from entering the rear of the trailer.

[70] Mr Martin, the representative of the second defender was unable to assist the court about what duties of care were incumbent on the second defender. He simply did not know. Mr Martin's evidence was unimpressive. He purported to rely on a yearly health and safety check with customers in February/March of each year. The check for 2015 was not produced. The second defender failed to take reasonable care for the health and safety of the pursuer. They failed to carry out a suitable and sufficient risk assessment. They did not devise, institute, maintain or enforce a safe system of work. They failed to give the pursuer any training including that the pursuer must not enter the trailer when pallets were being unloaded.

[71] The pursuer has established liability against the second defender at common law. The pursuer also sought to rely on regulation 4 of PUWER as informing the common law. The pursuer made a submission on the application of PUWER by the courts since *Kennedy* and the effect of section 69 of the 2013 Act. I did not find this submission necessary or helpful in this particular case. The unusual circumstances of this case and the very limited evidence did not make this case suitable for an exposition of the law. In any event, this matter was fully considered and addressed by Sheriff Campbell KC in the recent case of *Swierko* v *Mathiesons Bakery* 2024 SCLR 829 at [30] - [41]. Counsel for the pursuer did not address the court in any detail on that decision. I approve of the decision.

Contributory negligence

[72] Contributory negligence was a live issue before the court. The pursuer had fair notice, see Answer 5 for the defenders. The pursuer was asked by counsel in examination in chief if he thought he was doing anything wrong. He did not think so.

[73] The pursuer decided to enter the rear of the trailer without being asked to do so, because he wanted to assist in righting the load that had moved in transit. The pursuer was not prohibited from being in the rear of the trailer in these circumstances, but he was not trained in the use of a pallet truck. While using the pallet truck, the load overbalanced and the pallet struck the pursuer's left foot causing him to fall off the trailer. The pursuer's own actions contributed to the accident. A reasonable assessment of contributory negligence is 30%.

Quantum

Solatium

[74] The pursuer sustained a serious injury to his left hindfoot, being a comminuted fracture of his calcaneus. The medical evidence was agreed in terms of the report from Mr McKinley, Consultant Orthopaedic Surgeon, following upon an examination on 10 June 2024.

[75] The pursuer required extensive surgery. He was unable to start weight bearing until after 3 months. He has ongoing pain in his foot. He has a reduced ability to walk distances and cannot stand for a prolonged period of time, partially because of the injuries sustained and partially his obesity. He returned to work after 14 months on a reduced shifts pattern. While he has post-traumatic osteoarthritis in the subtalar joint and calcaneocuboid joint, once the joints stabilise there will be no further deterioration in the function. On the balance of probabilities, the pursuer's symptoms will not deteriorate further, and further surgery is unlikely. The pursuer is likely to continue working as a lorry driver until normal retirement age.

[76] In assessing an appropriate award for solatium, I have had regard to the Judicial College Guidelines, 17th Edition, Chapter 7 - Orthopaedic Injuries *(N) Foot Injuries* and, in particular, (f) Moderate and (e) Serious. The cases referred to by the counsel for the second defender were of no assistance. In all the circumstances, a reasonable award of solatium is £32,000. Interest will apply to past loss, 75%, at 4% from the date of accident until the date of decree. Interest to 14 March 2025 is £9,032, giving a total of £41,032.

Other heads of claim agreed

1. **Wage loss**

    - Past wage loss to the date of decree £78,000, with interest at 4% from 16 October 2015. Interest is £29,354, giving a total of £107,354.
    - Future wage loss £71,705 as at the date of decree.

2. **Pension loss** £7,360.

3. **Services** £6,000, with interest at 4% for 6 months from 16 October 2015 then at 8%. Interest is £3,994, giving a total of £9,994.

4. **Miscellaneous** £500, with interest at 8% from 1 January 2016. Interest is £366, giving a total of £866.

[77] The total damages, inclusive of interest to the date of decree, is £238,311. Applying a 30% reduction for contributory negligence, gives a figure of £166,818.

[78] It is then necessary to deduct the payment of £110,000 made by the first defender to the pursuer in January 2020, resulting in a sum payable in damages of £56,818. As the payment of £110,000 has not exhausted the pursuer's claim, the second defender has not been discharged of their liability.

Summary

[79] The pursuer has established liability at common law against the second defender subject to a finding of contributory negligence of 30%. I will make an award of damages against the second defender for payment to the pursuer in the sum of £56,818 inclusive of interest to the date of decree.

[80] As agreed by parties, expenses are reserved. The sheriff clerk will fix a hearing on expenses.