SHERIFFDOM OF TAYSIDE CENTRAL AND FIFE AT DUNDEE

COURT REF: A1184/07

Judgment of Sheriff George Alexander Way

in causa

JOHN McCABE, 3 Ben Hogan Place, Golfview, Carnoustie, DD7 7TG

PURSUER

against

THE ROYAL MAIL GROUP PLC, a company incorporated under the Companies Acts and having a place of business at Dundee East Delivery Office, West Pitkerro Industrial Estate, Ivory Place, Dundee, DD5 3RY

DEFENDER

DUNDEE 13th April 2011

The Sheriff, having resumed consideration of the cause, repels the Pursuer's Pleas in Law; repels the Defenders Third Plea in Law for want of insistence; sustains the Defenders Fourth and Fifth Pleas in Law; finds the defenders entitled to decree of absolvitor; finds the Pursuer liable to the defenders in the expenses of the action as taxed; allows an account thereof to be given in and remitted to the Auditor of Court to tax and report; decerns accordingly.

Sheriff

Finds in Fact

1. The Pursuer is John McCabe residing at 3 Ben Hogan Place, Golf View, Carnoustie DD7 7TH.

2. He is 62 years old.

3. As at 27 August 2004, the Pursuer was working in the course of his employment with the Defenders as a postman driver at the Dundee East Delivery Office. He was nearly 56 years old at that time.

4. As part of his duties he was to deliver mailbags and insert pouches to a number of locations in Dundee on behalf of delivery postmen colleagues. He was required to manually handle these bags and inserts by collecting them at the depot and placing them in a van. He then deposited the bags and inserts at designated pick up points in the City.

5. The defenders carried out risk assessments of their premises including Dundee East. They identified that certain tasks had to be performed by manual handling. They determined that systems must be put in place to ensure that, so far as reasonably practicable, manual handling tasks, such as those undertaken by the pursuer, were in accordance with good manual handling practices and risk reduced to the lowest level. They liased on such matters with the Health and Safety representatives of the pursuer's Trade Union from time to time.

6. That the defenders provided the pursuer with equipment to assist him in moving the mail, such equipment including a van, and wheeled cage like receptacles called "York trolleys".

7. That the defenders had in place a system of work which provided employees with training on safe manual handling techniques supported by information on the weight of mail bags and insert pouches which were to be handled. No mailbag was to be filled with mail to weigh more than 16kg. Insert pouches were not to exceed 11 kg. If a bag were to be discovered that weighed more than 16kg the procedure was for the contents of the bag to be divided into two separate bags. The pursuer was aware of the defenders' system.

8. The pursuer was the final filter in the system. If he assessed that a mailbag weighed more than 16kg he was entitled to decline to lift it. He would leave such a bag in the York trolley and return it to a manager to be weighed and if necessary split into two bags by the postman who had originally packed it.

9. That at all times the pursuer adhered to the defenders' system of work and that at no time would he lift mailbags weighing more than 16kg.

10. The pursuer was given basic training on manual handling. The Pursuer attended a lifting and handling course in 1998.

11. The Pursuer's method of lifting a mailbag was to bend down and take the base of the strap of the bag in one hand, just where it met the mail pouch and put his other hand under the bag to control it whilst he lifted it. He had been lifting mailbags this way for at least the previous 10 years before his accident.

12. The Pursuer had been aware of a hot sensation in his left groin area for approximately 3 weeks prior to attending his general practitioner on 18th August 2004 when he was diagnosed as suffering from a left inguinal hernia, and as having an early weakness on the right side.

13. Hernia is a medical term describing a sac or piece of intestine or other visceral contents which protrude through the fascia or "covering" of the abdominal wall. A hernia that exploits a congenital weakness in the groin area to pass through is called an indirect inguinal hernia.

14. The condition is congenital and 27% of all males are either born with a hernia or will develop one over the course of their life.

15. The pursuer was not signed off work nor advised to seek light duties by his general practitioner on 18 August 2004 but was referred for surgical repair of his left inguinal hernia.

16. That on or around 19 August 2004 the pursuer informed Richard Turner, Delivery Office Manager, that he had been diagnosed with "a double hernia". On 19 August 2004 Richard Turner completed a Business Referral Form referring the pursuer to the defenders' occupational health service provider. That on 26 August 2004 the pursuer telephoned his general practitioner's surgery, and asked for a note to be made in his medical records of his referral to his employers' occupational health consultants.

17. On 27th August 2004 the Pursuer started his shift at 6 a.m. His shift that day involved lifting some thirty or so mailbags and pouches from a York trolley to his van.

18. It was during the course of lifting one of the mailbags that the Pursuer felt a sharp pain in his groin.

19. The Pursuer reported his symptoms to his manager, Richard Turner. He was not able to continue working that day. He went home. He did not complete an accident report form personally at that time.

20. On or around 11 May 2006 the pursuer completed an Accident Report & Record Form on the advice of his Trade Union. The form contains a box, which asks for the weight of any item involved in the accident in which the pursuer wrote "N/A". It contains a box which asks why the item was not weighed, in which the pursuer wrote "not overweight"

21. On around 11th May 2006 Craig Dorward for the Defenders also completed a Managers Accident Investigation Report Form. The form notes: "Mr McCabe was unable to provide exact details of bag weights or the amount of bags he was lifting at the time as this occurred over 20 months ago" and that the pursuer "did not feel it necessary" to ask for assistance.

22. After the incident on 27 August 2004 the Pursuer self-certified his ill health for 7 days. He, thereafter, attended his general practitioner on 2 September 2004. He was signed off work to await an appointment from Stracathro Hospital for an operation to repair his left inguinal hernia.

23. During the period from the date of the accident for the following 3 months until his operation, the Pursuer was in discomfort at the site of his hernia throughout. He did not walk far. He felt inhibited from lifting heavy items because he had lost confidence. This prevented him from fully participating in household chores or working in his garden. His sexual performance was affected. He became irritable and moody. The relationship with his partner, Anne Grogan, was put under strain during this period.

24. On 9 September 2004 the pursuer met with an occupational health adviser appointed by the defenders.

25. On 7 December 2004 the pursuer underwent operative repair of his left inguinal hernia. The repair was carried out by Mr Aitchison, Specialist Surgeon, at Stracathro Hospital.

26. 27.That by letter dictated on 7 and typed on 20 December 2004 Mr Aitchison advised the pursuer's GP that the pursuer could return to normal physical activity as he feels fit.

27. That the pursuer attended his general practitioner on 8 February 2005 and the practitioner record of that attendance notes: "Light duties for 4 weeks - After that may go back to previous job" and "Retire maybe in 6 years".

28. That the pursuer attended his general practitioner on 24 February 2005 and that the general practitioner record of that attendance notes: "Back to work full time. Happy in job - Not much lifting".

29. On 14 March 2005 Dr Y Chong, GP Registrar, wrote to Carol Blain, Occupational Health Adviser. Page 35 of Production 5/3/14 of Process is a copy of that letter.

30. Mr Colin Buck, a retired Consultant Neurologist, examined the pursuer on 29 May 2008. Mr Buck identified a hitherto undiagnosed hernia in the right inguinal area. The hernia was a-symptomatic at that point.

31. The pursuer was signed off work following Mr Buck's examination. He was referred for surgical repair.

32. That on around 1 October 2008 the pursuer was reviewed by Ms Paula Burns, Occupational Health Adviser. The note of that review records "Current health situation: Large hernia and painful at times requires rest periods."

33. That on around 14 November 2008 the pursuer was reviewed by Ms Helen Paterson, Occupational Health Adviser; The note of that review records "Hernia op scheduled for 19th November still having same problem; Not able to walk very far; Groin pain+++(*sic*);Very tired; not able to do any lifting or

any heavy work. Not able to stand for any length of time; Unable to bend or stretch. Uncomfortable all the time"

34. That on 19 November 2008 the pursuer underwent an elective operation on his right side to repair that inguinal hernia.

35. That on 11 December 2008 the pursuer attended his general practitioner. The note of that attendance records "Consultation; well; made good recovery from RIH repair; 4 weeks post op. [illegible] off line. May retire next year"

36. That on 6 January 2009 the pursuer was reviewed by Mr M Abded-Fattah, Specialist Registrar at Ninewells Hospital. Following that examination Mr Abdel-Fattah wrote to the pursuer's GP. In that letter he stated that the pursuer "is very pleased with the outcome with no pain and no other symptoms".

37. On 4 August 2009 the pursuer attended his general practitioner. The note of that attendance records "struggling at work; does not feel up to it; cannot manage any heavy lifting; causes pain in left groin; LIH op 2004. also generally TATT. Feels exhausted by end of the day"

38. In all the Pursuer was off work from 27 August 2004 to 7 February 2005; returned to work and was put on light duties for an initial period of 3 months extended for a further three months to August 2005 at which point he resumed his normal duties; in June 2008 he was again off work . On 15th August 2009 he was medically retired.

39. The Pursuer had been assessed as 10% disabled for life in January 2005.

40. The Defenders' postmen did not weigh their mailbags in a systematic fashion to check that they did not exceed 16 kgs. They largely relied upon experience to gauge the weight of bags. They regularly failed to complete the sign in/sign out sheets provided by the Defenders to record bag weights.

41. The management of the Defenders at Dundee East failed to put in place adequate monitoring procedures to check that employees were complying with Royal Mail manual handling procedures and in particular the maximum bag weight rules.

42. The management of the Defenders at Dundee East failed to carry out adequate spot checks on the weight of bags as packed by postmen or only did so by giving prior notice to named employees. They also failed to enforce bag weight record keeping.

43. They also failed to adequately monitor that the training they provided on safe lifting techniques, which they had assessed to be necessary in support of the weight limits they had imposed, was effective and being complied with. They failed to provide adequate refresher courses on manual handling or, in any event, to monitor that employees, such as the pursuer, directly involved in manual handling received effective refresher training.

44. It would have been reasonably practicable for the Defenders to properly monitor safety procedures to enforce worker compliance. Regular refresher training would have been reasonably practical and would have enabled managers to effectively ensure that both they and employees under their supervision understood and followed best practice and appropriate techniques. They did not take any of these precautions. Had these precautions been followed this would have reduced the risk of injury to the pursuer when undertaking manual handling operations.

Finds in Fact and Law

1.The task of loading mail bags and insert pouches in the defenders' depot from a York container to a delivery van on which the pursuer was engaged on 27th August 2004 was a Manual Handling Operation which involved the risk of injury within the meaning of Regulation 4(1)(a) of the 1992 Regulations.

2. The defenders are not in breach of the said regulation 4(1)(a) as it was not reasonably practicable for the defenders to have eliminated manual handling as a method of loading mailbags and insert pouches into delivery vans.

3. The defenders failed in their duty to reduce the risk of injury to employees including the pursuer in undertaking manual handling operations to the lowest level reasonably practicable in terms of Regulation 4(1)(b)(ii) in that, having set safe maximum weights for mail bags and pouch inserts to protect employees from the risks associated with lifting such items and establishing systems for objectively verifying the weight of such items being presented for loading into vans they failed to adequately monitor and enforce employee compliance with the system.

4. The defenders also failed in their duty to reduce the risk of injury to employees including the pursuer in undertaking manual handling operations to the lowest level reasonably practicable in terms of Regulation 4(1)(b)(ii) in that, having instituted. training for employees in the method of lifting mailbags and pouches they failed to take such steps, as were reasonable and practicable, to ensure that such training was refreshed from time to time or to monitor employees understanding of and compliance with such training as they had received.

5. The most probable cause of the severe pain event experienced by the pursuer on 27th August 2004 was the protrusion or stretching of the hernial sac in his left groin through his abdominal membrane.

6. The pursuer has not proved, on the balance of probabilities that the protrusion or stretching of the hernial sac on 27th August 2004 was caused by lifting a 16 kg bag in the course of his employment with the defenders.

FINDS IN LAW

The pursuer having failed to prove that any loss, injury and damage sustained by him was caused by the defenders' breach of either common law or statutory duty, the defenders are entitled to decree of absolvitor.

<u>Legislation Considered</u>

Manual Handling Operations Regulations 1992/2793

4.- Duties of employers

(1) Each employer shall-

(a) so far as is reasonably practicable, avoid the need for his employees to undertake any manual handling operations at work which involve a risk of their being injured; or

(b) where it is not reasonably practicable to avoid the need for his employees to undertake any manual handling operations at work which involve a risk of their being injured-

(i) make a suitable and sufficient assessment of all such manual handling operations to be undertaken by them, having regard to the factors, which are specified in column 1 and the corresponding entry in column 2 of that Schedule,

(ii) take appropriate steps to reduce the risk of injury to those employees arising out of their undertaking any such manual handling operations to the lowest level reasonably practicable, and

(iii) take appropriate steps to provide any of those employees who are undertaking any such manual handling operations with general indications and, where it is reasonably practicable to do so, precise information on-

(aa) the weight of each load, and
(bb) the heaviest side of any load whose centre of gravity is not positioned centrally.

(2) Any assessment such as is referred to in paragraph (1)(b)(i) of this regulation shall be reviewed by the employer who made it if-

(a) there is reason to suspect that it is no longer valid; or

(b) there has been a significant change in the manual handling operations to which it relates;

and where as a result of any such review changes to an assessment are required, the relevant employer shall make them.

[

(3) In determining for the purposes of this regulation whether manual handling operations at work involve a risk of injury and in determining the appropriate steps to reduce that risk regard shall be had in particular to-

(a) the physical suitability of the employee to carry out the operations;

(b) the clothing, footwear or other personal effects he is wearing;

(c) his knowledge and training;

(d) the results of any relevant risk assessment carried out pursuant to regulation 3 of the Management of Health and Safety at Work Regulations 1999;

(e) whether the employee is within a group of employees identified by that assessment as being especially at risk; and

(f) the results of any health surveillance provided pursuant to regulation 6 of the Management of Health and Safety Regulations 1999.

Cases considered

Calderbank v Lanarkshire CC [1992]CLY1667

Forsyth -v- Lothian Regional Council CSOH 17TH December 1993 (Lord Coulsfield)

Anderson -v- Lothian Health Board 1996 RepLR 88

Cowan v Allis Chalmers (GB) Ltd 1998 SLT 903

Hall -v- City of Edinburgh Council 1999 SLT 744

Logan -v- Strathclyde Fire Board CSOH 12TH January 1995 (Lord Eassie)

Koonjul v Thameslink Healthcare Services [2000]PIQR 123

Taylor -v-Glasgow City Council 2002 SC 364

Rowland v North Durham Healthcare NHS Trust [2003]CLY3243

Anderson -v-DD Glover Construction [2004]2QR 10

James Walsh -v- TNT UK 2006 CSOH 149 (Lord Hodge)

Hughes -v- Grampian Country Food Group Limited 2007 SLT 635

Strange -v- Wincanton Logistics Limited - Livingstone 1st June 2010 (Sheriff Kinloch)

McDonald -v- Wood Group Engineering (NS)Limited [2010]CSOH 165

INTRODUCTION

- **This is an action for damages for personal injuries sustained in the course of employment. The Pursuer was represented by Mr.Armstrong, Solicitor Advocate whilst Counsel for the defender was Mr.McConnell.**
- **The pursuer pleaded a case of both common law and statutory breach of duty of care but, at Proof, Mr. Armstrong confirmed that he accepted that the tests in relation to his common law case were such that he would present a conjoined analysis which would focus upon Regulation 4 of the Manual Handling Operations Regulations 1992 as amended ("the 1992 Regulations") more fully quoted above. It is still perhaps convenient to rehearse the main provisions:**

"Each employer shall -

(a) so far as is reasonably practicable, avoid the need for his employees to undertake any manual handling operations at work which involve a risk of their being injured; or

(b) where it is not reasonably practicable to avoid the need for his employees to undertake any manual operations at work which involve a risk of their being injured -

..(ii) take appropriate steps to reduce the risk of injury to those employees arising out of their undertaking any such manual handling operations to the lowest level reasonably practicable ....."

3. Mr. Armstrong also accepted that the defenders were not in breach of regulation 4 (1) (a) as the manual elements of the task undertaken by the pursuer could not, reasonably or practicably, be

eliminated . The issue for determination was whether the defenders were in breach of their statutory duties under Regulation 4 (1) (b) of the 1992 Regulations and if so, whether that breach caused the pursuer the injuries for which he claims damages. The defenders, in the same spirit, conceded that there was no basis in fact for their plea of contributory negligence and did not insist upon it. The measure of any award of damages falls be determined as *quantum* could not be agreed by the parties.

THE FACTS

4. The facts, which were largely uncontroversial, can be summed up as follows. The pursuer had worked for the Royal Mail since around 1986. He held several posts over the years, including a spell in management. In 2004 he was a delivery driver in the defender's Dundee East depot. He was nearly 56 years old. His duties were simple enough. Mail is sorted into geographic areas and then individual postmen load their own bags to be taken on their rounds. In addition to mail bags there were also "insert pouches": smaller bags that fit inside the larger mailbag. These loaded sacks and insert pouches are placed in wheeled cage like receptacles called York containers. The average number of bags per container appears to have been in the region of thirty. It was the pursuer's job to transfer the bags and insert pouches from the York container into his van. He would then drive around delivering these bags and pouches either to postmen out on rounds or to pick up points which were described to me as grey metal boxes in strategic locations in the City. He transferred these bags by hand. The parties were agreed that there was no feasible way to mechanise this process. Mr. McCabe, who is of slight and smallish build, appears to have undertaken this task without apparent difficulty, for a considerable number of years.

5. In June 2004 he had become aware of tenderness in the area of his left groin accompanied by a sensation of heat. He was, like many men, making little of this but his wife packed him off to his doctor. On 18th August 2004 he went to his General Practitioner who diagnosed a left inguinal hernia and an early weakness in the right groin. He was referred to a surgeon for an operation to repair the hernia. He was not signed off work by his GP nor was he recommended to request light duties from his employer.

6. It is, perhaps, convenient to explain, at this point, what an inguinal hernia is. I had the benefit of reading reports and listening to evidence from two eminent medical experts, Mr Buck for the Pursuer and Mr de Beaux for the defender, both Surgeons to whom I will refer in greater detail later. My understanding, based upon their evidence, is that the general term is used to describe a bulge or protrusion of an organ through the membrane or muscle that usually contains it. An indirect inguinal hernia protrudes through the groin via an inherent weak spot. Human testicles form, during gestation, near the kidneys. Each testicle must descend down into the groin and pass through the different layers that make up the abdominal wall to its eventual resting place in the scrotum. The passage that facilitates the testicles' movement is called the Inguinal Canal. A piece of abdominal membrane, (which is called *peritoneum*) must close off when each of the testicles pass through and in so doing one or both may create a small fluid filled sac or pouch, referred to as a hernial sac. This creates a weak spot or spots in the membrane of the abdomen. The doctors both referred to this process as a kind of design defect in humans. Mr Buck observed that this is the price we pay for being bipeds as such a system of descending testicles is not needed in quadrupeds. Mr.de Beaux agreed and offered this analogy: a concrete dam is built but some cables that need to pass through have been forgotten. A hole is drilled through but the cables leave gaps so that the hole needs to be patched up with concrete filler. The filled hole is simply not as strong as the rest of the dam, which is cast of solid concrete. It is the protrusion of the small sac or pouch through the abdominal wall that causes the hernia to present as a bulge or swelling in the groin area. The swelling commonly disappears on lying down. The bulge or swelling may also be reduced by hand pressure which dislodges the contents of the hernial sac. It is the inability to "reduce", or manipulate the bulge back into the abdomen which requires surgery to correct. I will

add, for the sake of completeness that a "direct inguinal hernia" is one which does not exploit an inherent weakness but rather pushes directly through an otherwise intact membrane.

7. The pursuer returned to work with no change to his basic routine. He told his manager that he had been diagnosed with a double hernia. I pause here to observe that this statement was not strictly accurate, as he only had a left inguinal hernia, but I think it quite understandable that Mr McCabe, using layman's terms, was seeking to convey that his doctor had made reference to a left side hernia and a weakness on the right. As it happens the pursuer was, ultimately to be diagnosed with a right inguinal hernia in 2008. His manager indicated to him that he would make a referral to the Royal Mail occupational health advisors. . He conveyed this information to his own GP to update his case notes.

8. On 27th August 2004 the pursuer started a fairly routine day. He was loading mail bags from a york container into his van. He was lifting one bag when he was suddenly struck by a serious pain in his groin. The pain did not swiftly pass and Mr.McCabe felt unable to continue with his shift. He reported the incident to his manager and went home to rest. He knew that he had a pre-existing left groin hernia and thought that rest would settle things down. He self certified his absence through ill health for seven days but as he was still suffering discomfort he made an appointment to see his G.P on 2nd September 2004. The pursuer was told that he should now remain off work until his surgical repair was completed. He had a surgical repair to his left inguinal hernia on 7th December 2004. The surgeon, Mr Aitchison, was pleased with the procedure and wrote to the pursuer's GP to confirm this and to advise that Mr McCabe could now resume his former work.

9. The pursuer returned to work on 7th February 2005. He was put on light duties. On or around August 2005 he resumed his full former duties as a delivery postal driver. He continued to lift mail bags from york containers into vans until June 2008. The pursuer, by that time, had taken advice on the events of the 27th August 2004 with a view to seeking some form of redress. He had been referred to a consultant, Mr.Colin Buck, who examined him on 28th May 2008. Mr. Buck identified that, unbeknown to the pursuer, he had now developed a right inguinal hernia which should be repaired. He underwent an elective procedure at Ninewells Hospital Dundee, on 19th November 2008 and this was deemed to have been a complete success. On 11th December 2008 the pursuer saw his GP and reported that he was making a good recovery from the right hernia operation but that he may look to retire next year. The pursuer went to Ninewells for a review on 6th January 2009 when all seemed well. He was not in pain nor did he report any other adverse symptoms from the repair.

10. However, by August 2009 matters were different. On 4th August the pursuer went to his GP and reported that he was struggling at work. He was suffering pain in his left groin area when lifting weights in the course of his employment. He felt exhausted at the end of a normal working day. The defenders had been monitoring the pursuer's ongoing health through their occupational health providers. The pursuer had a consultation with an occupational consultant, on behalf of the defenders, Dr. Andrew Colvin. He recommended that the Royal Mail should offer the pursuer early retirement with a lump sum payment by letter dated 11th August 2009. The defenders accepted this advice and made an offer to the pursuer. The pursuer accepted the package offered to him and retired from the Royal Mail on 15th August 2009. He subsequently raised the present proceedings seeking reparation for alleged loss injury and damage caused to him on the 27th August 2004 as a result of the defenders breach of duty towards him either at common law or statute.

<u>THE EVIDENCE OF WITNESSES</u>

11. I heard evidence from a number of witnesses. No issues of credibility and only a few aspects of reliability, were raised by either side. I will address the reliabilty points as appropriate. The Pursuer

gave evidence and also lead evidence from : Anne Grogan his partner ; Hamish Menzies a Heath and Safety Representative of the pursuer's Trade Union; Alistair Raeburn a Health and Safety expert; Mr Colin Buck, Surgeon, as mentioned above; Dr Andrew Colvin Consultant Occupational Physician to the Royal Mail and Stephen Thomson a Dundee Postman. The pursuer lodged Nine Inventories of Productions comprised in 5/1 to 5/9 of Process and a Joint Minute agreeing formal evidence. The Defender's witnesses were: Mr Andrew de Beaux, Surgeon, as mentioned above; Harry Corrigan another Health and Safety expert; Richard Turner and Nicola Sawyers both Royal Mail Depot managers. A further manager, Mr Craig Dorward, gave evidence on commission.

THE PURSUER'S WITNESSES (non medical)

12. The general evidence of the pursuer has been set out above. He, however, also gave evidence about the defender's system of work. He accepted that the defenders system seemed theoretically sound. He agreed that it was focused upon limiting the maximum weight of mailbags. He accepted that bags passed to him for van delivery should not exceed 16kgs and that the insert pouches should not weigh more than 11kgs. He also agreed that some bags would be even lighter. However, he was equally adamant that regularly bags would be presented to him, which were overweight. He thought in excess of 20kgs. He also accepted in discussion that he was the ultimate "gatekeeper" of this part of the defender's system. He had the absolute right to decline to lift a bag that he suspected was overweight. A line manager would then check the weight and where appropriate, it would be split down. He also accepted that the bag he lifted on 27th August 2004 immediately prior to the severe pain event was not overweight. He believed that it was one of the heaviest bags he would lift i.e. 16 kgs but conceded that it was no more than that. He explained that he had lifted mailbags for many years and did so using a technique, which he believed was safe. He would bend down and take the base of the strap of the bag in one hand and put his other hand under the bag to control it whilst he lifted it. He had received specific manual handling training in 1998. He also accepted that he had completed a questionnaire for the defenders, which suggested he had received manual handling training in 2000 but he had no recollection of that training session. He also accepted that his employers operated a system of regular " Work-time Listening and Learning" sessions. These were, however, collective events, often focussed on watching a DVD film, held during gaps in a normal work shift. The sessions covered a broad swathe of topics but he could not recall any such session on manual handling. He did receive manual handling refresher training in 2005 but this was, of course, after the event.

13. He described the system the defenders had to confirm the weight of mailbags. The depot had a large set of industrial scales. Postmen were instructed to weigh each bag and record it's weight on a signing in and out sheet. The defenders had notices drawing employee's attention to this system and the maximum permitted weights. He, as the ultimate gatekeeper, could and did reject potentially overweight bags. Management would check these bags and the postman responsible would be made to repack. This was to reinforce to postmen that over packing bags would only waste their time. He accepted that one postman had been disciplined for refusing to repack a patently overweight bag. His evidence was that he had never seen a postman weigh a bag and he believed that they relied entirely on judgment and experience. He was unaware of any settled practice of postmen completing the weighing record sheets. He believed that the failure to actually weigh bags was why overweight bags were being presented to him. He also spoke to a general culture where management, under pressure to meet delivery targets, made workflow their priority and that operating a safe system of work was always a secondary consideration. He testified that postmen would sometimes carry multiple mailbags within the Dundee East depot, in breach of the manual handling system, in open view of management who took little or no notice. The faster the various jobs were done the more likely targets would be met. He also told me that he was, all in all, content at work and whilst, like anyone, he speculated on early retirement this did not seem economically viable. He also described his ongoing symptoms and I will return to this when considering the issue of quantum.

14. Anne Grogan spoke only to her circumstantial knowledge of the alleged events. Her direct testimony related to the pursuers symptoms of ill health and she was not cross-examined.

15. Hamish Menzies described what he had observed, over time, at Dundee East Delivery Office as a health and safety representative for the Communication Workers Union. He had undertaken a number of health and safety inspections and had relayed his findings to the management at Dundee East. He confirmed that the Royal Mail health and safety systems were, theoretically, quite sound. He was, in contrast, trenchantly critical of implementation of aspects of these systems in practice. His evidence confirmed the Pursuers description of managers who prioritised workflow over operating a safe system of work and who failed to action deficiencies in the system, which he had highlighted in various written memoranda. He supported the Pursuer in a number of material respects, including the method used by the Pursuer to lift mail bags; the fact that complaints about mail bags not being weighed by the postmen and consequently being presented to the pursuer overweight were made to management; the failure of employees to use weighing scales and complete sign-in sign-out sheets; and the fact that he had himself spoken to the pursuers line manager, Mr Turner about the Pursuer's accident on 27 August 2004.

16. Alistair Raeburn, Health and Safety expert, gave evidence for the Pursuer. He asserted that all work related tasks that involved the interaction of muscles and weight was manual handling. This would include lifting a pen from a desk. There was, however, in my estimation a fair degree of agreement between this witness and the defenders Health and Safety expert. Mr. Corrigan. They both accepted that the Health and Safety Executive provides good guidance on manual handling. They both relied upon a diagram (contained within the Defenders' Fourth Inventory of Productions) derived from the Manual Handling Operations Regulations (1992) (as amended): Guidance and Regulations 3rd Edition. This provided a matrix which, put simply, indicates the maximum safe weight for lifting going from ground level to shoulder height and depending on how far the hands move from the body in transit. The further the hands travelled away from the body the lower the safe weight would be. The experts were sharply divided on the question of the correct method of lifting a mailbag from a York trolley to a van. Mr.Raeburn was critical of the defenders contention that bags should be lifted by the straps, with little or no bending, held close to the body and raised to waist height. He did not accept that this was a realistic technique but conceded that if this method were adopted then 16kgs would be a very safe weight limit. He explained this, in very helpful detail, with reference to the HSE diagram. He argued that the forces in play when lifting an unsupported bag weighing 16ks in this manner would put the workers back at risk. There would also require to be a twisting manoeuvre of which he was, equally, critical. Further in his evidence, he offered a number of suggestions that could have been introduced by the Defenders to reduce (but not eliminate) the risk of injury to employees when lifting mailbags. These were, in my judgment, highly speculative, but the most tenable appeared to be a York Trolley fitted with a spring loaded base that would rise up as the bags were lifted off thereby reducing the distance of each lift as the work progressed. No evidence was offered to suggest that any of the lifting "aids" suggested by Mr Raeburn were reasonable or practicable.

17. He was also critical of the defenders risk management assessment process. He accepted that the defenders had undertaken a risk management assessment with regard to general manual handling within depots but he was of the opinion that they should have carried out a specific risk assessment for the actual task performed by the pursuer loading bags from a York trolley into a van. He argued that the height and build of the pursuer might indicate, on specific assessment that he should be assessed using a lower set of guidelines within the matrix e.g. those for a woman. In summation Mr Raeburn was of the opinion that the defenders were, squarely, in breach of Regulation 4(b).

18. Mr. Stephen Thompson is a colleague of the pursuer who has worked as a postman in Dundee for many years. His evidence confirmed that, from the perspective of postmen, getting the job done in due time was management's first priority. He confirmed that postmen did not weigh every bag but he did not support the pursuers assertion that they *never* weighed them. Postmen would carry overweight

bags (or double them up) if they thought it was to their advantage. He was also clear that he understood the method of lifting bags from York Trolleys to delivery vans described by the pursuer and he did not accept that this was contrary to any training he had received. It seemed perfectly normal to him as an experienced postal worker. Finally this witness was very sceptical of the efficacy of the "Work Time Listening and Learning" sessions. He painted an unattractive picture of a rather perfunctory system. He asserted that they were largely a matter of form over substance. In his opinion management had no real interest in whether anyone was learning anything.

19. I intend to review the evidence of the two principal medical witnesses in a separate chapter but the final witness for the pursuer, aside from Mr.Buck, was Dr.Andrew Colvin. He is a consultant physician specialising in occupational medicine and is employed by a company called Atos Origin who, in turn, provide services to the Royal Mail. Mr Armstrong neatly sums up his evidence in his full Submission annexed and it will suffice to say that he did not seek to debate the opinions of Messrs. Buck and de Beaux. He had to judge, from an employers standpoint, whether the risk of further problems from a given employee whether through absence or the cost of managing emerging employment law issues merited making an offer of a package to induce the employee to voluntarily terminate their employment. He described this as not a clinically informed judgment but rather one born from being a "slave to experience". He accepted that by 2008, whether from a physical or psychological perspective, the pursuer found working for the Royal Mail too challenging. He considered that his decision to recommend an early retirement package was the correct course for an employer to take with an employee of the pursuers age and length of service.

<u>The DEFENDER'S WITNESSES (non medical)</u>

20. Counsel for the defenders, Mr.McConnell, quite understandably devoted the largest tranche of his time examining the various expert witnesses. He, otherwise, led evidence from his Health and Safety expert, Mr Harry Corrigan and from two working depot managers of Royal Mail who were or had been in post at Dundee East. The evidence of a third manager, Mr Craig Dorward, had been taken on commission. I am bound to say that Mr Dorwards recollection of events seemed very poor and I did not find his evidence particularly helpful. Mr Armstrong and Mr McConnell provide a detailed analysis of what they say should be taken from these witnesses in their full submissions annexed hereto, so I will try to sum up the essence of what they said to continue my narrative thread.

21. Mr. Corrigan presented his expert evidence and I have touched upon it with reference to the opinion of his fellow expert, Mr Raeburn. In his opinion the defenders operated a safe system of work. The risk analysis they carried out was sufficient in the circumstances. He disputed Mr.Raeburn's assertion that the defenders should have carried out a specific risk assessment of the loading from York trolleys to van phase of the pursuer's daily tasks. The procedure was very simple and routine. The system was really the same for all employees within the depot. Bags were limited in weight and should only be lifted by hand if within the safe limits. A weigh scale was available and notices reminded workers of the importance of weight limits. York Trolleys were available and used to move multiple bags around the depot. Mr.Corrigan considered the weights set by the Royal Mail to be well within safe limits by a margin of around 10 kgs. The pursuer was not being asked to stand and lift bags all day, say at the end of a conveyor belt system. He also agreed with evidence from Mr.Raeburn that once in the van manipulation of the bags would involve negligible effort, as the force of gravity was not fully engaged.

22. The defenders were not in breach of Regulation 4(b). He was very clear that the upper weight limits selected by the defenders were very safe and in accord with the HSE guidance. He referred to the same chart as Mr Raeburn. He accepted that he based his analysis of the lifting method he understood the defenders workers had been trained to use. This was by grasping the handles of the bag and lifting up close to the body. The bag would then he held at roughly waist height and placed on the bed of the van. In this method the workers hands were kept close to the body and did not pass through the "arc"

suggested by Mr. Raeburn. A bag as heavy as 25kgs could be safely lifted in this way. He also accepted that if one applied the HSE guidance to the lifting method described by the pursuer then a 16kg bag would be too heavy for safe lifting. He did not demur from the suggestion that if a bag was being lifted from just above ground level by reaching down and cradling it before pulling upwards then a safe weight might be as little as 3 kgs. Mr.Corrigan had not, of course, seen the pursuer (or indeed I gather any other postman at Dundee East) actually lift bags. I was, indeed, a little surprised to note that he had not observed a work shift of someone doing the pursuer's job when he visited the premises. He had rather focussed (I concede very helpfully) in making a visual record of the premises. His photographs were the only record of what the defender's mail bags, York trolleys, weigh scales and work place notices looked like available to the court. I, however, accept that he did at least visit the premises. Mr.Raeburn did not make a site visit before preparing his report.

23. The evidence of the defenders depot managers was that they carried out regular assessments of health and safety issues affecting their premises. They were provided with a Manual and assessment forms to assist them to achieve this. Two assessment forms were lodged in process to assist the court. Mr. Turner and Miss Nicola Sawyers both rejected the suggestion that these forms were just pro-forma "tick box" exercises. They were both equally, adamant that full and effective training in manual handling was provided as part of an overall commitment by Royal Mail to staff safety. They, however, could not assist the Court with any detail or description of what that training would consist of or how, in specific terms it was delivered. They were unable to provide a copy of the training manual. They could not say or describe in any way the likely content of the course that the pursuer admitted he attended in 1998. They pointed to the fact that the pursuer had ticked a box in a work questionnaire, which confirmed that he had had manual handling training in 2000. They could not, however, say what such training would have been; it's content or duration.

24. Ms. Sawyers emphasised the significant role of the regular "Work Time Listening and Learning" sessions that the pursuer would have attended. She was not, however, able to say when and how often the pursuer would actually attend such sessions and when manual handling would be covered. In particular she made reference to a film on DVD but not only could she not describe it's content in any way, but the defenders could not produce a copy for the court to examine. Mr. Armstrong was particularly exercised upon this point and I am bound to say that I found the absence of this evidence most unhelpful. Mr. Turner was of no more assistance on training issues than his colleague. He was, equally, uncertain about the mailbag weighing system and seemed to be unaware that there were notices informing workers of weight limits or record sheets for noting weights. He did speak to a system of random inspections by management of post bags but seemed to suggest that this was done by informing specific postmen that their bags would checked the next day. Ms Sawyer, who had been a delivery postal worker earlier in her career, said there was no management culture of work flow trumps health and safety. Notices concerning bag weights were displayed and the system enforced. She did not give advance notice of random checks on postbags. She was particularly clear that she did not recognise the method of lifting bags described by the pursuer. So far as she was concerned the only safe way to lift a mailbag from a York trolley to a van was by both handles, holding the bag close into the body as described by Mr Corrigan, the defender's expert.

<u>The EXPERT MEDICAL EVIDENCE</u>

<u>Mr Colin Buck</u>

25. Mr Colin Buck is a retired consultant surgeon aged 72. He retired from clinical practice in 2002. He holds the medical degrees of M.B. and B.S. In addition he has a Ph.D. He is a Fellow of the Royal College of Surgeons. He had a long and distinguished career as a surgeon specialising in Neurology. He has undertaken hernia operations although he freely conceded that, as his career progressed, developments within surgery led to that area becoming a specialism in it's own right. He has regularly

appeared in court as an expert. He estimated that he would do so at an average of two to three times a year. This was in the general areas of NHS grievance or negligence cases.

26. He had examined Mr McCabe on 29th May 2008. In his opinion the repair to the pursuer's left inguinal hernia was well executed, entirely sound and the surgical wound well healed. He, however, detected that the suspected weakness referred to earlier by his GP had, in fact, developed into a right inguinal hernia. He recommended that the pursuer have the new hernia surgically repaired. This, of course, we know was successfully achieved.

27. Mr. Buck accepted that, hernias are congenital and in any event, as the pursuer's left inguinal hernia had been diagnosed some time before, it could not be said that the events of 27th August 2004 had caused that hernia. He, however, went on to explain what, in his opinion, had happened that day. He had already described the inherent weaknesses, which are the inguinal canal and the fluid filled sac referred to above. The sac was not causing the pursuer any real discomfort at this point. Pain is symptomatic of the protrusion through or stretching of the hernial sac because the abdominal membrane (peritoneum) is highly sensitive. Mr.Bucks position is that when lifting a heavy weight your abdominal muscles are engaged under force that increases intra-abdominal pressure. The increased intra abdominal pressure provokes the hernial sac. He agreed that this could be likened to a weak spot in a car tyre wall having a "blow out". He explained that his opinion on the connection between raised intra-abdominal pressure and herniation was based upon his own 40 years of experience. He also explained that artificially increasing intra -abdominal pressure had been used to diagnose susceptibility to inguinal hernia for over a century. This was the basis for exemption of men from military combat service, from the First World War onwards, by manipulating the scrotum and testing the response to a sharp cough.

28. He also referred to a text book Aird's Companion in Surgical Studies (3rd Edition 2005). This text was, so far as Mr.Buck was concerned, one of the most authoritative in the world. Originally the work of one eminent surgeon the text was now, in the way of such academic works in modern times, multi-authored. The two co-authors on the section on Hernia are the current Professors of Surgery at Glasgow and Plymouth Universities. The learned authors, as quoted by Mr Buck, opine that: *" indirect hernias may occasionally develop as a complication of increased intra abdominal pressure*". They go on to state: " *... caused by a weakening of the transversalis fascia as a result of increased intra-abdominal pressure.....presumably a pre-existing processus vaginalis is opened up by the increased intra-abdominal pressure*." Mr. Buck, helpfully, summed this up by suggesting that what the authors were saying was that the "weak spot" in the membrane (fascia) caused by descent of the testicles (as described earlier) can be opened up by the increase in abdominal pressure.

29. Mr. Buck then went on to explain the ongoing symptoms suffered by the pursuer after his successful operations. He explained that pain was a very complex field and some patients would require to be referred to specialist pain clinics because the root cause was not clear from patient pathology. Mr.Buck could find no pathological reason for the pursuers apparent incapacity. The repair to the left hernia was very sound and there was nothing in this respect that should prevent him from carrying out any normal activity. Mr.Buck, however, explained that what, in his opinion, was inhibiting the pursuer was his fear that he would precipitate the same kind of pain that he experienced on 27th August 2004. Lack of confidence was the root cause. This was, however, still a symptom flowing from the herniation. It was common for hernia patients to lose confidence and believe that their former strength and durability had been compromised.

30. He was asked by Mr Armstrong for his opinion on the defenders actions upon learning that the pursuer had been diagnosed with an inguinal hernia. They did not put him on light duties. Mr.Buck said the generally accepted advice is always to avoid lifting heavy weights and to rest. He was also asked to comment on the pursuers eventual return to full duties after the first hernia repair standing

that he later developed a right inguinal hernia. He was asked if the pursuer should have continued to avoid lifting heavy loads. Mr.Buck did not support that contention. In his words " *you have to give somebody the benefit of the doubt, because they were not aware that he had a hernia on that side. So having had the condition that he did, the problem that resolved- they were not to say -right you have to continue (Sheriff's note : on light duties) because they didn't know he had a risk of herniation on the opposite side- so you can't lay the blame"*

31. Mr.Buck explored the causal link between the lifting activities of the pursuer on 27th August 2004 and the increase in intra abdominal pressure, which he believed resulted in the herniation. He was asked to comment on the opinion of Mr.de Beaux. He was directed to a section of a report lodged in process where Mr de Beaux states *" the role of heavy work, either continued heavy work or a single strenuous event, as a cause or aetiological factor for groin hernias has been controversial for many years. However, current thinking is that that either prolonged heavy work or a sudden strenuous event is unlikely to be the cause of a groin hernia, although such events may speed up the development of the hernia"* Mr.Buck's response to this was that his approach would be to consider the incident must be related to the activity and in that sense, cause and effect cannot be separated. An action so temporally connected to a pain response must indicate conjunction. He could not accept that the lifting and the sudden pain were two separate issues. In his opinion having established that there was a predisposition (in this case the existing hernia) it was logical that if there were situations and circumstances that provoke it (in this case an increase in abdominal pressure opening up the "weak spot" in the abdominal membrane) then whatever is the source of the provocation of the condition is the cause. This was a matter of clinical judgment. Mr.Buck freely accepted that in that context causation, as lawyers would have it, is an elusive thing. He went on to state: " *it does not matter whether we are talking about why it is someone developed cancer, we don't yet know the cause, things happen... what we know is that anatomy is the formula and pathology is based upon the way we are built. Now if we are made in a certain way, which predisposes us to something happening, then all it knows is the initiating factor and that's what we have got to establish. .... and that's where we have to face our clinical judgment on what we do. That is taken from textbook and surgery.... You cannot get raised intra-abdominal pressure unless you do something to raise that intra abdominal pressure. One of the ways is tensing up the muscles in lifting something in a strenuous way."*

32. Mr. Buck had considered the academic evidence, proffered by Mr.de Beaux, based upon clinical studies that seemed to contradict his views on the role played by intra abdominal pressure in the provocation of hernias. Mr.Buck rejected that research as it relied upon a hypothesis based upon what he described as a "meta-analysis" and not original work. He stood by the authoritative texts, to which he had referred which were, in his opinion, to be preferred. His final point was that even on the basis of Mr.de Beaux's report he could not accept that increased intra abdominal pressure could be entirely excluded. If there remained, as his reading of the report suggested, only 1% of patients who seemed to have suffered herniation after exposure to a sharp increase of intra abdominal pressure then an individual patient could be that one in a hundred.

33. Mr.Buck was cross examined by counsel for the defender. He confirmed that the lifetime risk of hernia was between 25-30%. He accepted counsel's proposition that 27% was about right. Mr.McConnell then explored intra abdominal pressure in greater detail. Mr Buck confirmed that the peritoneum is essentially the sac, which contains the contents of the abdomen and intra abdominal pressure was the pressure within the abdominal cavity. Counsel then pressed him upon the assertion that increased intra abdominal pressure caused hernias and suggested that more accurately he was referring to the effect of pressure on weak spots. Mr.Buck explained that the abdominal muscles, the diaphragm and the pelvic muscles all go to form the boundaries of the abdominal cavity and when they contract during strenuous activity be believed this must increase intra abdominal pressure. He accepted that it was the conjunction of his two propositions that, firstly, inguinal herniation can be caused by increased intra abdominal pressure and that, secondly, intra abdominal pressure is raised by

physical exertion that drove him to his conclusion that there was a direct causal link in this case between lifting the mail bag and the episode of pain experienced by the pursuer on 27th August 2004.

34. Counsel then took Mr Buck to Mr. de Beaux's report and supporting documents (Defenders Third Inventory) and in particular a table of levels of intra abdominal pressure recorded in a variety of activities that came from a study by a Professor Cobb and colleagues. The table covered a whole range of activities from lying in a supine position through standing, sitting, climbing stairs, bending at waist, bending at the knees, gym based activities such as bench presses and arm curls with weights, jumping, coughing (standing and when seated) and finally performing a valsava. The last mentioned is the artificial act of holding the nose and blowing out against the blocked airway. Mr.Buck considered the results listed. Counsel put to him that these results seemed to demonstrate that lifting produced a minimum figure for intra abdominal pressure of 6 rising to a maximum of 30; a bench abdominal curl 2 rising to 34 ; a bicep curl 17 rising to 37; climbing stairs 40 rising to 110; valsava 20 rising to 64 ; coughing 40 rising to 127 and jumping 43 rising to 252.

35. Counsel then suggested to Mr.Buck that if he examined the table of activities, those which resulted from controlled exertion (as might occur in the workplace) such as bicep or abdominal curls seemed to produce very modest increases in intra abdominal pressure whilst jumping, sneezing and coughing seemed to produce a very large increase in pressure. Mr. Buck accepted that this appeared to be what the results showed. From this counsel developed a line of questioning designed to elicit from this witness his opinion on the proposition - how do we distinguish between increased intra abdominal pressure from the simple incidence of day to day life from that related to work activities. Mr.Buck appeared to accept the general thrust of counsel's thesis and helpfully suggested that much would depend upon the individual in question: age; build; were they obese?; had they other health conditions to be considered? Mr.Buck also confirmed that the amount of energy an individual would expend upon the same elements of work would vary from day to day and as they grew older. He did not demur from counsel's proposition that there were so many things to be taken into consideration for any given individual that it is difficult to parcel out, in any given time frame, one part of intra abdominal pressure as work related and another as something else: the pursuer lifting a mail bag or the pursuer bending or coughing at work. He was, however, adamant that the temporal nexus between the lifting of the bag and the pain experienced by the pursuer led him to conclude that there must be a correlation between the two.

36. Counsel then explored Mr.Bucks opinion on the symptoms experienced by the pursuer after the successful hernia repair. Mr.Buck stated that he believed that the repairs were both successful, sound and healed. He, however, explained that it was not uncommon for hernia patients, particularly where they had experienced pain, to fear recurrence and thereby lose confidence in their ability to perform physical activities as they had before. This was, in his opinion, as real a symptom as actual pain, lack of strength or stamina. The pursuer went back to work after the first hernia repair and seemed to cope well enough for a number of years. Mr.Buck was not, however, surprised that, upon learning he had developed another inguinal hernia in his right groin, he suffered a growing loss of confidence and ultimately, took early retirement. The pursuer would see his condition as degenerative and fear that continuing to do manual work could result in greater harm to him in the long run.

37. Mr. Buck was re-examined by Mr.Armstrong but no new evidence emerged. He did, however, confirm that the symptoms experienced by the pursuer on 27th August 2004 could have followed from coughing or any other day-to-day physical activity. His opinion was that the pursuers description of the pain event associated with the specific activity must lead to the logical conclusion that there was a direct correlation between the two events. In discussion with me he considered whether this could just be the pursuer's bad luck as I had noted him saying : "*the body reacts to the exercise rather than the exercise being what lawyers call "a cause*" He remained, however, of the opinion that the physical activity described by the pursuer meant that the chances of an adverse reaction to increased intra abdominal pressure were high. He also confirmed to me that, in modern practice, once the GP had

diagnosed the left inguinal hernia and referred the pursuer to a surgeon it was highly unlikely that the pursuer would not have been advised to have a surgical repair whether he had experienced the pain event or not. In that sense the surgical repair to the left inguinal hernia was inevitable. The surgical repair to the right inguinal hernia was elective. Finally he confirmed that the nature and the extent of the surgical repair operations would not have been affected in any way by the events of the 27th August 2004.

Mr. Andrew de Beaux

38. Mr de Beaux is a Consultant Surgeon who specialises in hernia repair. He holds the degrees of M.B.Ch.B and an MD. He is a Fellow of the Royal College of Surgeons of Edinburgh. He has very substantial clinical and academic experience in relation to hernias. He told the court that his most recent hernia repair operation had been the week before he gave evidence. He is the senior author, along with a number of colleagues (some of whom are specialists in their own right) of a paper on the causes of groin hernias. He has appointments as general surgeon and as groin surgeon to a number of sporting bodies including the Scottish Rugby Union. He teaches Master Classes at the Royal Infirmary of Edinburgh, in conjunction with the Royal College, for other consultant surgeons on the subject of hernia.

39. Mr.de Beaux reviewed the general aetiology of hernias and largely agreed with Mr.Buck. The areas in which he differed were in relation to the role of increased intra abdominal pressure and on post-operative repair recuperative techniques. I will, accordingly, focus on that evidence. He explained that, as with many aspects of medicine, clinical diagnosis of well-known conditions changed as the state of scientific knowledge increased. Hernias had, traditionally been described as a weakness in the abdominal muscles. Now it was generally accepted that they were a disease of collagen. Collagen is a protein molecule, which makes up supporting structures. It is the main constituent of tendon, which is the organic matter that joins muscle to bone or to another muscle. It also surrounds the muscle as a fascia and holds it in place. He explained that hernias exploited anatomical weakness in the collagen based fascia. The most common weakness was the inguinal canal in the groin area. He used the analogy of drilling a hole in an existing dam to which I have already referred. He explained that although defective collagen was accepted to be the cause of hernia no effective screening tests had yet been developed to predict who might be more at risk of herniation. Screening would be an expensive and at present, fruitless task as it was not clear what could be done to prevent men, whose collagen was deemed to put them at risk developing hernias

40. Mr. de Beaux set out his analysis of what happened to the pursuer on 27th August 2004. It was clear that the pursuer's left inguinal hernia had been developing over a period of time. It had progressed to the stage where he had become aware of it. He had described a "hot" sensation which had precipitated a visit to his GP who made a clear diagnosis of hernia. Mr.de Beaux explained that the precise cause of pain in a hernia was not clear but a hot or burning sensation was probably what he would describe as peritoneal pain. Peritoneum has nerve endings which are particularly sensitive to being stretched. A surgeon can cut it and there is no pain but if you stretch the peritoneum, even a patient under general anaesthetic will react by way increased heart rate. The hot sensation experienced by Mr.McCabe before going to his GP was the hernia getting a little larger and the burning pain he described on 27th August 2004 was it stretching or pushing out. This was largely in line with the evidence of Mr.Buck. However Mr.de Beaux disagreed with the proposition that the stretching or "provocation" of the hernia could be ascribed to an increase in intra abdominal pressure caused by heavy lifting. In his opinion there was no empirical evidence to support what he categorised as now " an old wives tale". He explained that his opinion was based upon clinical and academic research. He had produced to the court his own published paper on this point, which was supported by a review of the relevant modern literature. This was not what Mr.Buck described as a "meta analysis" but his study (along with his co authors Paterson-Brown and Henry) of all the available published data on the subject. He also

explained that the textbook referred to by Mr.Buck, Airds Surgical Companion, was a general reference work that dealt with all subjects on a broad brushstroke basis. It addressed inguinal hernias in three pages. Mr.de Beaux had just completed a chapter (for publication) on one aspect of inguinal hernias that runs to over thirty pages. There was simply no comparison between Airds Companion and the medical research and clinical studies to which he had made reference.

41. He went on to explain that the reason that traditional medical theory accepted that any lifting action, which causes a person to strain, will result in a rise in intra abdominal pressure and thereby may lead to herniation was the assumption that the contraction of muscle significantly increased pressure. It, therefore, followed that exertion of the muscle must cause the intra abdominal pressure to shoot up and subject the abdominal wall to large forces. Common sense dictated that this would cause the weak point to fail. Hernias were common in the workplace and it therefore seemed logical that what the workmen were doing ie physical exertion must be the trigger. The incidence of hernia is, of course, very wide spread and such assumptions failed to take account of the more than one in four chance that a hernia would develop whatever the patients occupation.

42.. In time some medical opinion began to challenge this orthodoxy. In 1996 a paper by G.D. Smith and Colleagues [Smith GD and others Ann. R.Coll.Surg England 78] was published which sought to objectively and prospectively assess the relationship between the development of a hernia and a single strenuous event. This study specifically examined the possible causal role of a single traumatic event in the development of inguinal hernia, and concluded that there was a possible association in 7% of cases. These authors examined a consecutive series of 129 patients, with a total of 145 inguinal herniae, and concluded that for there to be a possible association the following conditions must be met:

- **An officially reported incident of muscle strain.**
- **Documented severe groin pain at the time of the strain.**
- **Diagnosis of an inguinal hernia by a doctor, preferably within 3 days of the muscle strain, and certainly within 30 days.**
- **No previous history of an inguinal hernia.**

On the basis of what Mr.de Beaux called the "Smith Test" the fact that the pursuer's left inguinal hernia was already diagnosed ruled out the possibility that herniation was caused by the single act of exertion on 27th August 2004. This line of research was still ongoing but nothing Mr.de Beaux had read dissauaded him from his opinion that the role of increased intra abdominal pressure caused by lifting weights especially in the workplace was now discredited. He pointed to a letter from a Professor Bendavid, who directs a major international hernia centre in Toronto who wrote :" no-one would quibble with the possibility that a strenuous effort may *reveal* (sic) a hernia, but to cause it? That would go against the grain of all our progress and teachings of the last 40 years".

43. Modern research had also challenged the anatomical assumptions regarding raised intra abdominal pressure. Indeed the studies now show that it appears that the body is designed to keep the pressure in the abdominal and chest cavities low on planned muscular exertion so that we can breathe easily and yet apply strong pressure on our muscles to stand up on two legs. Intermittent or sustained raised abdominal pressure has been associated with conditions such as varicose veins and prostatic haemorrhoids but the incidence of abdominal wall hernia was low in the presence of morbid obsesity, chronic cough, constipation or work related activities which were all said to be conditions likely to be associated with high intra abdominal pressures. This seemed counter intuitive but the simple answer was that no -one had actually measured the intra abdominal pressure in clinical tests. Mr.de Beaux's evidence was that once data was available based upon actual scientific measurement of intra abdominal pressure it became clear that the conjecture that activities such as heavy lifting significantly increased intra abdominal pressure was wrong. Indeed the evidence strongly pointed towards day-to-day activities such as coughing or sneezing as a more likely source of sudden increased intra abdominal pressure. Mr.Buck had, of course, referred to induced coughing as a test for weakness that might lead

to herniation used by Army physicians since the First World War. Mr.de Beaux referred to the table of results derived from the studies of Professor Cobb and colleagues that had already been put to Mr Buck (see above). He explained that these results were achieved by measuring intra abdominal pressure through the bladder (few test subjects would be willing to have their abdomens pierced for the sake of advancing science) but he considered the results to be quite robust evidence. He was, accordingly, of the opinion that controlled muscular exertion such as lifting mail bags on a daily basis, did not give rise to a significant increase in intra abdominal pressure and hence did not cause of herniation.

44. He continued his theme that the weakness in the abdominal fascia or wall of the inguinal canal was not provoked by the level of increase in intra abdominal pressure attributed to controlled muscular exertion by reference to his work with elite athletes. He referred both to his own work with professional football and rugby players and to academic works which formed part of his report and productions. The incidence of indirect inguinal hernias in weight lifters, as a class, was low. Many elite athletes reported herniation but, in fact, these were often abnormalities relating to tears and other damage inflicted upon the groin area and not hernias at all. There was no evidence that elite athletes suffered a higher incidence of inguinal hernias than the rest of the more sedentary population.

45. Finally, Mr de Beaux addressed the post-operative recovery of the pursuer. He was very clear that here we had another myth: patients recovering from hernia repairs need to rest and avoid lifting for months on end. He explained that this advice was, in fact, counterproductive. He accepted that rest was necessary in the immediate post-operative phase of recovery. This he would suggest should not exceed around four weeks. This was in line with the advice given by the pursuer's GP. The concept that hernia sufferers should be put on light duties for say three months or more after the post operative phase was one that would actually cause them to lose fitness. Muscle wastage, especially for those who lead active lives or whose jobs involve regular exertion such as the pursuer, occurs quite rapidly and is difficult to reverse. The only way to rebuild wasted muscle is to put it under greater stress than before. This requires a training regime preferably under the supervision of a physical therapist or sports trainer. The longer the patient avoids exertion, after the surgical recovery phase, the harder it will be for them to regain their former fitness.

46. This, in Mr de Beaux's opinion, was what happened to the pursuer. The defenders, acting of course, on the advice of their occupational health consultants, placed the pursuer on light duties for three months after his return to work after the surgical repair of his left hernia. He would, inevitably, find returning to full duties challenging because of his decline in fitness. This would contribute to his sense that all was not well and increase his loss of confidence. Mr.de Beaux accepted that this was not uncommon. It was an irrational fear that, as they do not feel fully recovered after some months, if they lift something heavy their repair will break down or they will have another hernia somewhere else. He accepted this was understandable because patients who have had a problem requiring surgery don't want it to recur. They are misled by the misconception that heavy lifting causes hernias. Doctors could offer reassurance (as he did) that this perception was false but for the patient to just accept that and as he put it :" throw away the stick and walk!" was a different matter. He addressed issues relating the pursuers right inguinal hernia but as the pursuer no longer insists upon that leg of his case I will pass over that evidence. There was, however, in his opinion no medical reason for the pursuer retiring early based upon his hernias. However, Mr.de Beaux accepted that clearly the pursuer had found working for Royal Mail as delivery driver increasingly challenging and he did not quibble with Dr. Colvin's pragmatic decision to advise the defenders to seek to induce the pursuer to voluntarily terminate his employment.

47. Mr. Armstrong cross-examined Mr de Beaux at some length. I am bound to say, however, that he did not elicit any significant shift in his stance. He did, however, explore with him his opinion on the possible aggravation or acceleration of herniation by physical exertion. Mr.de Beaux agreed that the pain event on 27th August 2004 was a hernia related symptom. He agreed with Mr.Buck that it was the

hernia getting larger or stretching and that causes pain. He described this as a speeding up of symptoms. He was of the view that what happened in the pursuer's groin that day was likely to have happened within say six months to two years no matter what. This was based on the fact that his hernia had already become symptomatic which is why the pursuer had gone to his GP in June 2004. He had been diagnosed with a hernia and referred to a surgeon. Irrespective of what happened on 27th August he would still have seen that surgeon and he would have been advised to have a repair. This was normal practice. The operation would be no more complex and the repair just as effective. All the event on 27th August had done was ensure that the pursuer's hospital referral was given more priority. I pause here to observe that both medical experts were at one on this point. Mr. Buck confirmed that once a surgeon was involved it was unlikely a hernia patient would not be recommended to have a repair (as was the case with the pursuer's second asymptomatic right side hernia) and that the events of 27th August would not alter the nature, extent or prognosis of the surgery performed on the pursuer at Stracathro Hospital. Mr de Beaux was firmly of the opinion that the pursuer's work related activities played no part in the inevitable progress of the herniation towards inevitable surgical repair and that the pain event just "occurred on their [the defender's] Watch".

SUBMISSIONS

48. At the conclusion of the Proof parties agreed to make submissions in writing. They had already lodged a Joint Minute which had agreed much of the formal evidence and that the Productions were what they bore to be. The evidence of Mr Craig Dorward on commission was available in process. The Notes of Evidence of Messrs. Buck and de Beaux would be extended. They undertook to seek to agree or at least narrow the issues relating to *quantum.* We agreed a procedure whereby I would adjourn to a date when final oral submissions could be made and meantime the pursuers would lodge written submissions and, having considered those, the defenders would lodge theirs. A little time was built in to allow parties to reflect on their respective submissions and adjust them if so advised. I am indebted to both Mr.Armstrong and Mr. Mc Connell for the throughness of their preparation and. I have appended the full written submissions and the calculations relating to quantum as an Appendix to this judgment and they must be read into this text, for the sake of brevity, for the full force of their respective arguments. That said, it is necessary for me to sum up the submissions in order to continue the narrative flow of my opinion.

The Pursuer's Submissions

49. The pursuers submissions , in essence, were that Mr.McCabe suffered an injury to his pre-existing left inguinal hernia causing him loss and damage when he lifted a mail bag on the 27th August 2004 in the course of his employment. The injury was caused through the fault of the defenders either at common law or in breach of the Manual Handling Regulations. The pursuer accepted that the hernia itself was not caused by any fault on the defenders part: it is a congenital condition which will affect 27% of adult males no matter what their occupation. The pursuer, however, argued that his hernia had been relatively quiescent up to that day. The pain he experienced that day and the other debilitating symptoms he then continued to suffer, stemmed from the protrusion or stretching of his left inguinal hernial sac which was an aggravation to, or, at least an acceleration of the deterioration of his pre-existing condition. This led, ultimately, to his early retirement. The hernial trauma was caused by an increase of intra abdominal pressure (hereafter referred to as IAP) that the pursuer experienced when he lifted the mail bag. The increase in IAP was caused by the pursuer carrying out a manual handling task. The risk associated with this task was reasonably forseeable or had not been reduced to the lowest level reasonably practicable through the fault of the defenders in breach of common law or statutory duty.

50. Mr Armstrong argued that the defenders owed a duty to the pursuer to devise, institute and maintain a safe system of work and to adopt measures to avoid, or at least reduce the risk of injury. The pursuer required to lift mail bags and any safe system for manual lifting must address the issue of weight. Mailbags loaded by others must carry with them the potential that bags could be overloaded. He pointed out that the Defenders not only admit these duties but also aver that they fulfilled them. They say they carried out a suitable and effective assessment of the operation of mail sorting and delivery. They devised a safe system of work in light of their assessment. Mr. Armstrong submitted that the evidence did not support any of the defenders assertions. They had not carried out proper risk assessments. The general assessments produced by the defenders were of the whole depot and at best, perfunctory; a tick box exercise. Indeed there was a suspicion that the second assessment produced by the defenders was merely the first assessment with the date changed. The manual handling operation undertaken by the pursuer was one which forseeably, applying the HSE diagrammatic matrix as a guide, should have been seen as one carrying a risk of harm and a specific assessment undertaken. This was the expert opinion of Mr.Raeburn. No account was taken of the pursuers actual height and build. Mr.Raeburn was clear that, if the pursuer were lifting mail bags in the manner he described, the HSE guidelines would suggest that the maximum weight for an individual bag could be as low as 3 kgs not 16 kgs.

51. Mr.Armstrong was particularly critical of the defender's training regime. The pursuer's evidence was that he did received formal manual handling training in 1998. This was the only training on this subject he could recall until 2005 which is after the events we are considering. He was not aware of any manual handling training delivered by watching a film on DVD. The pursuers evidence on this should be preferred. The evidence led by the defenders was wholly inconsistent. None of the Royal Mail witnesses could describe their own training on manual handling techniques nor explain to the court how, as managers, they were tasked to deliver this to subordinate employees. The mysterious DVD training film was not produced to the court. Moreover, not one of the defender's witnesses could describe this film in any way. I should discount this evidence. Mr.Armstrong argued that if the pursuer had received practical training then why would he lift mailbags using a technique so roundly criticised by Mr Corrigan? If the pursuer was in error why did no-one correct him? He suggested that one of the main functions of refresher training was, as he put it : "to stop employees reverting to old ways". He referred me to the judgment of Lord Hodge in James Walsh v TNT UK Ltd [2006] CSOH 149.

52. He submitted that the defenders were in breach of their common law duty of care but, in any event, there were clear breaches of Regulation 4 (2) (i) and (ii). He referred to authorities. The operation undertaken by the pursuer was a manual handling operation it was not a mere incidence of daily life. [cf. Hughes v Grampian Food Group Ltd 2007 SLT 635] The experts for both sides agreed on this. It was one which involved a foreseeable risk of harm to the pursuer [cf.Taylor v Glasgow City Council 2002 SC 364]. I should prefer the pursuer's expert Mr Raeburn on this point. In any event I should accept the evidence of the Pursuer, his fellow postman Mr Stephen and his Trade Union representative, that lifting some thirty or so mail bags at a time from a York trolley into a van was capable of causing harm to a worker.

53. The defenders failed to produce an adequate and sufficient risk assessment. In so far as they did assess risk the system they devised relied upon limiting weights. This was in accord with Regulation 4(b)(iii)(aa) which requires employers to provide employees undertaking manual handling operations with general indications of and, where it is reasonably practicable to do so, precise information on, the weight of each load (see Regulations above). The defenders provided weigh scales and posted Notices on maximum permitted weights. They had a system of recording the weight of bags being taken out by postmen. They, however, did little or nothing to enforce their own system. The onus is on the defenders to prove that they have taken appropriate steps to reduce risk to the lowest level reasonably practicable. [cf. Taylor v City of Glasgow Council 2002 Rep.LR70.] There was no evidence to suggest that carrying out a specific assessment on the manual tasks undertaken by the pursuer taking into account his height and build was reasonably impracticable. It was not reasonably impracticable to

properly instruct postman not to: overfill bags; to check by weighing them; to record weights so that management could properly oversee the safety of the system. It was not reasonably impracticable for management to properly monitor the system by; enforcing the safe weight limits imposed; checking that the weigh scales were being used; checking that the weight record sheets were being completed; checking the accuracy of the record keeping by carrying out unscheduled spot checks; ensuring that their own training and that of their subordinates was regularly refreshed and effective to deliver practical information on safe techniques; and to monitor that safe techniques were, in fact, being adopted by those under their supervision and control. For all these reasons I should hold that the defenders were in breach of their statutory duties in terms of Regulation 4(1)(b).

54. The defender's breach of common law or statutory duty was the cause of the pursuer's injury and thereby his loss and damage. Mr.Armstrong accepted that to establish this required an analysis of the medical evidence, which had been extensive. The principal expert medical evidence had come from Messrs. Buck and de Beaux but there were other players on the scene. The pursuer's General Practitioner, Dr.SB Galbraith; Mr.Aitchison, the surgeon who repaired the left inguinal hernia; Mr.Kulli the surgeon who repaired the right inguinal hernia; and Dr.Andrew Colvin, consultant occupation physician to the defenders.

55. Mr.Armstrong invited me to accept that the manual handling task the pursuer was undertaking on 27th August 2004 was the main, significant and potent cause of the injury sustained by the pursuer. He submitted that the medical evidence bears out that there is a sufficiently close and direct link between the pursuer lifting a 16 kgs mail bag and the symptomatic provocation to his existing hernia (communicated in the form of sudden severe pain) to establish that one caused the other. He accepted that the issue for me was not whether the lifting incident caused the hernia but whether or not it resulted in a rapid acceleration of it's symptoms or put another way, a significant exacerbation of the original injury. He summed up by posing the following propositions.

- **The pursuer would not have developed the symptoms he suffered from at or around the time had the incident of 27th August not occurred.**
- **He would not have suffered the pain that he did on 27th August and disability thereafter.**
- **The close connection between lifting and injury leads inescapably to the conclusion that the lifting significantly exacerbated the existing left side hernia**
- **The evidence of \Mr Buck should be preferred that the most likely cause of the exacerbation of the left side hernia was the increase in intra abdominal pressure (IAP) resulting from lifting a heavy mailbag.**
- **Had the significant event on 27th August not occurred the pursuer could have continued to work.**
- **The degree of disability suffered by the pursuer for three and a half months after his injury and prior to the surgical repair of his left side hernia was a direct result of the injury sustained on 27th August.**
- **The continuing symptoms the pursuer suffered after the repair of his left side hernia resulted from the defenders returning him to full duties lifting mailbags and insert pouches in August 2005.**
- **The continued symptoms he experienced in the site of his left side hernia was the main and significant reason for the pursuer's early retiral from the Royal Mail in August 2008.**
- **The parties had agreed that the figure for loss of earnings between 27th August 2005 and 5th February 2005 is £1,569.38.**
- **The pursuer offers four calculations for *quantum* (with calculations set out in an Appendix) in the written submissions. I should prefer and accept Pursuer's Scenario Four failing which I should accept the highest yielding alternative and award damages accordingly with expenses.**

<u>The Defender's submissions.</u>

56. Mr.McConnell invited me to reject the pursuers submissions. He argued that the pursuer's common law case was not made out but, in any event, it added nothing to the statutory case. The case law, since the introduction of the Regulations, showed that no pursuer had succeeded at common law having failed to establish a breach of regulations. He would, therefore, focus upon the alleged breach of the Regulations. The task undertaken by the pursuer was a manual handling operation. He accepted the tests set out in *Hughes* (cit.above). That was not enough, however, to engage the regulations. The risk must be foreseeable. He referred to *Taylor v Glasgow City Council* (cit,above). An element of realism must be brought to bear as a full assessment of every manual handling task could be a major undertaking and might involve wasted effort : *Koonjul v ThamesLink Healthcare Services* (cit,above) and Manual Handling Regulations Appendix 1(para 3).

57. The assessments carried out by the defenders were sufficient for a straightforward task such as that undertaken by the pursuer. The assessments of Mr.Turner and Ms.Sawyers were suitable and duly recorded. In any event a breach of Regulation 4(1)(b)(i) does not of itself lead to liability : *Logan v Strathclyde Fire Board* (cit,above). Lord Eassie, in that case stated : " *I am not satisfied that a breach of the duty to make an assessment in itself gives rise to liability in damages.....if an employer has, in fact, done all that could be required of him by reducing the risk to the lowest level reasonably practicable then it seems to me to be immaterial that he may have achieved that result without having gone through the formal stage of carrying out an assessment."* This theme was echoed in the opinion of Lord Mcfadyen in *McBeath v Halliday* (cit,above).

58. The obligation to reduce the risk of injury must also be tempered by common sense as stated in *Hughes* (cit,above). The employer is not obliged to resort to extreme measures. Reducing the weight of mail bags, say to a negligible level as low as 3 kgs, would be extreme: *Strange v Wincanton Logistics Ltd* (cit,above). The duty is not one of insurance.

59. The defenders, therefore, believed that no breach of statutory duty existed. However, even if the court considered that there was a breach of statutory duty, the remaining and essential question to be answered was did that breach cause the alleged injury loss and damage which the pursuer avers? Mr McConnell invited me to answer that question in the negative. He urged me to prefer the evidence on causation given by Mr.de Beaux. He had a wealth of contemporary clinical experience specialising in hernias. He referred to scientific studies, tabulated results of clinical trials and recent published papers. Mr.Buck relied upon experience and general textbooks. He was simply out of date and his science was grounded in assumptions from as long ago as the Great War. His evidence did not reflect current medical thought. However, both were agreed that exertion did not *per se* cause hernias. They also agreed that what the pursuer experienced on 27th August 2004 was the existing hernial sac stretching or protruding through the abdominal fascia. They also agreed that whilst this was a symptom of hernias becoming more patently symptomatic the fact that it happened did not affect the prognosis for surgical repair. Indeed it was Mr.Buck who said that it would be unlikely that any surgeon, to whom a patient has been referred by his GP, would not recommend surgery. It was a routine and extremely successful procedure. The pursuer had already been diagnosed with a left inguinal hernia and referred for repair. The events of 27th August merely advanced the timetabling of surgery. Mr.Buck, again, confirmed that the nature extent and prognosis for success of the surgical procedure would be unaffected by the incident on 27th August: a hernia repair was a hernia repair. The pursuer had abandoned his case based upon the emergence of the later right inguinal hernia and that aspect of the evidence could be ignored.

60. Mr McConnell before addressing the role of IAP in causation touched upon the other medical evidence. The pursuer had argued that the defenders initial response to his intimation that he had been diagnosed with a left inguinal hernia and a weakness on his right side, had materially contributed to his condition. He should have been put on light duties there and then. Counsel challenged that proposition. The pursuer's GP had not signed him off as unfit for work nor had he recommended light

duties. The defender's manager sought advice from the defenders occupational health consultants. Mr.de Beaux was very clear that he had diagnosed many patients with herniation but who, for one reason, or another did not want to undergo surgery at that time. He did not recommend that they do anything other than go about their ordinary daily lives. He was equally clear (although more relevant perhaps to questions of quantum) that advice to rest after a successful hernia repair beyond a necessary period of post-surgical recuperation was counter productive. Muscle wastage through inactivity was extremely difficult to redress and the sooner the patient started rebuilding muscle tissue through proper exercise the better. The suggestion that as soon as an employee mentioned hernia he should be put on light duties or suspended from work altogether, until a surgical repair had been effected , was an extreme response without foundation in medical science.

61. Mr.McConnell submitted that I should accept the evidence of Mr.de Beaux in relation to IAP. He suggested this analysis. Firstly, a pursuer must identify what the alleged breach of statutory duty is. Secondly (assuming for the moment that IAP has some sort of role in relation to hernias) he must identify what the consequences of that alleged breach of statutory duty are in terms of IAP. What is the increase in IAP produced by the breach, and how does that differ from regular IAP? What effect has the IAP produced by the alleged breach of statutory duty had, beyond the IAP, which would have been present in any event even if there had not been a breach of statutory duty? If it were to be considered that the defenders had, somehow, failed to reduce the risk of injury to the pursuer to as low as reasonably practicable, then the lifting operation on 27 August 2004 would be a breach of statutory duty. Identifying that breach is step one. Step two is to assess what the consequences of that breach are in terms of IAP. There is no evidence available in this case to allow step two to be taken. No evidence was led regarding what amount of IAP is produced by any particular manoeuvre. As a result of that step three is impossible. Even if the defenders had specifically assessed the manual tasks undertaken by the pursuer; had reduced the weights he handled because he was of slight build etc; had thoroughly trained him in safe lifting techniques and had monitored all aspects of the system to enforce compliance, how would they know what impact any of this had on IAP which the pursuer says caused his hernial sac to stretch or protrude that day? There is simply no evidence available which would allow the pursuer to establish a case based on raised levels of IAP and as that is his contention the claim must fail.

62. Finally, Mr McConnell addressed me on quantum. He did so by reference to the pursuers four different scenarios. In his submission the pursuer underwent surgery which he would have endured in any event even on the evidence of his own expert, Mr.Buck. All the evidence, including that of his GP and attending surgeon was that the repair to the left inguinal hernia was perfect and the pursuer made a full recovery. Messrs. De Beaux and Buck had both examined him and agreed that the surgery appeared perfectly sound. I should, therefore, only have regard to Scenario Four which was full recovery on 5th February 2005. Loss of wages to that date was agreed at £1,569.38. Solatium should be within the range of £2,200.00 to £4850.00 with interest at the judicial rate of 8% per annum. Mr.McConnell suggested a figure of £2200.00 for solatium was appropriate for a uncomplicated indirect inguinal hernia with no associated abdominal injury or damage.

DISCUSSION AND OPINION

63. I have carefully considered all the evidence in this case, together with the Productions and Joint Minute. The Solicitor Advocate for the pursuer and Counsel for the defenders both made helpful and principled concessions to which I have already referred. The pursuer's case based on the common law stands or falls with his statutory case and I will not discuss them separately. The pursuer no longer insists upon any element of his case predicated upon the emergence of the later right inguinal hernia. He, equally, accepts that the defender's are not in breach of Regulation 4(1)(a). The defender no longer insists that there was contributory negligence. The effective issues before me have truncated down to breach of Regulation 4(1)(b) and causation. I shall address quantum in due course.

64. I am persuaded that there is some force in the pursuer's criticism of the defenders system of work. That said I accept that the system they devised was, in essence sound. This seems to be accepted by the pursuer, his Trade Union Representative and the Health and Safety experts. The experts could not agree on the question of the need for a specific manual handling assessment of the pursuers tasks or on the safe method of lifting mailbags. The pursuer's expert, Mr Rae burn, also suggested that additional equipment could have helped reduce the risk to the pursuer from manual handling, such as the York container with a spring loaded base. I consider his evidence on that matter wholly speculative and I have disregarded it.

65. I have, however, concluded that I prefer the defender's submissions on the question of the need for a specific risk assessment. The task performed by the pursuer was very mundane. He was lifting bags from a York trolley into a van. There were no complications such as the bags coming at speed or in a volume that the pursuer could not control, say down a conveyor belt. He controlled the basic workflow and general level of exertion. The main and obvious risk from lifting mailbags is weight. The defenders recognise this and have set reasonable and safe limits. This accords with the spirit of the Appendix to the Regulations regarding information on weight to be given to employees. They have a system, which not only limits weight but also, theoretically, ensures that employees are aware of this. Notices are posted in the workplace. Weigh scales are provided and record sheets are provided. Depot Managers are charged with enforcing the weight limit system by spot checks. Postmen are subject to disciplinary action if they fail to comply. Training in manual handling forms part of the system to ensure that employees know the rules and employ safe physical techniques. The pursuer was the ultimate gatekeeper of the weight limit system. He had the absolute right to reject any mailbag he believed was overweight. I accept his evidence that he understood this and that he would never, knowingly attempt to lift an overweight bag.

66. I, therefore, accept that the defenders had a theoretically safe system of work in place and that a specific risk assessment was not necessary. I also accept that, as a matter of law, even if I were persuaded that a specific risk assessment was required, a breach of this part of the Manual Handling Regulations does not lead inevitably to liability: *Logan v Strathclyde Fire Board* (cit,above). I am not persuaded that such an assessment would have resulted in any other system of work being adopted. I reject the pursuer's submission on that ground. The pursuer may have been of slight build but the number of bags to be handled at any one given time coupled with the maximum weight imposed of 16 kgs is clearly modest. No evidence was led before me of any other claims of this nature made against the defenders. There was, certainly, nothing to suggest that the defender's workforce was collapsing under the strain of lifting 16kgs mail bags.

67. I, however, am entirely with the pursuer on the question of proper implementation of the system. In my opinion proper implementation, maintenance and review are important factors in any Health and Safety system. This is clear from the opinion of Lady Justice Hale (now Baroness Hale of the Supreme Court of the UK) in *Koonjul* (cit.above) where she states : " *....the employer is not entitled to assume that all his employees will on all occasions behave with full and proper concern for their own safety. I accept that the purpose of regulations such as these is indeed to place upon the employer obligations to look after their employees safety which they themselves might not otherwise have"*

68. I am equally fortified in my opinion that failure to properly implement a system of work is a breach of the regulations having regard to the judgment of Lord Hodge in *James Walsh v TNT UK Ltd* (cit.above). *who said : " I accept that, as the defenders' operations manager in Glasgow, Mr Brian Grierson, explained in evidence, the defenders have a good record for health and safety, have achieved a five-star accreditation from the Health and Safety Executive in their Glasgow depot and other depots, and have instituted training courses which include training in manual handling.....although [the pursuers] job involved lifting packages on a daily basis, he had not received training on safe lifting techniques since 1997. While I accept that the operation, which the pursuer carried out, was a straightforward one, many injuries from lifting operations occur in straightforward operations. It was and is important that employers should remind their employees of safe lifting techniques and discourage casual practices that cause injury. The defenders, recognising this, had introduced a system of courses. Unfortunately in the pursuer's case the system broke down and so put the defenders in breach of Regulation 4(1)(b)(ii)."* I, respectfully, concur with his Lordship.

69. It seems to me that the facts in this case are on all fours with those in *Walsh*. The Health and safety experts could not agree on the safe method of lifting bags. This suggests to me that there is not one obvious and accepted safe method of doing so. The defenders claimed that they had given the pursuer training and that there was an approved method of lifting bags within the Royal Mail. It was not clear to me what that approved method was but, more importantly; no one could explain why the pursuer lifted bags as he did. Mr.Raeburn, the pursuer's expert, thought the technique used by the pursuer was sensible but such a method would mean that much lower weight limits would be indicated by the HSE Guidelines. The defenders expert was clear that the Royal Mail accepted and worked within these Guidelines but he rejected the technique for lifting bags described by the pursuer as compliant with these guidelines. The pursuer had either received poor training in the first place or as Mr Armstrong observed [with reference to cases such as *Taylor*] he had, over the years, fallen into bad practices which his employers had failed to correct.

70. I had, during the course of the proof, been troubled by that part of the pursuer's attack upon the defender's implementation of their system that focused upon the failure to properly enforce and monitor the bag weight limits. I accept that there were clear systemic failures: the lack of consistent use of the weigh scales; the failure to maintain accurate records and the poor monitoring practices. I was, however, exercised by the fact that for all these faults the pursuer was the ultimate gatekeeper. He would not (and he told me quite robustly that he did not) lift overweight bags. He would reject them and others would reduce them in weight. He was sceptical about the attitude of his managers describing a culture of "targets trump safety" but conceded that at least one postman had been disciplined and ultimately dismissed for his attitude towards the weight limits. I have, however, come to the conclusion that it is unnecessary for me to resolve this dichotomy as I am satisfied that the defenders are in breach of Regulation 4(1)(b) through their failure to maintain a proper training regime at least so far as this pursuer is concerned. The evidence of the defender's witnesses on this point far from impressed me. Mr.Turner seemed to know little about his employers systems and nothing about manual handling training. He could not describe his own level of training in anything but the most perfunctory terms. He, and Ms Sawyer, who I accept was doing her level best to be candid and assist the court, could tell me nothing about specific training course content. They could not even a hazard a guess as to why the pursuer lifted bags as he described nor, to their knowledge, had anyone seen him lift bags. The final blow came when not only could neither of the witnesses tell me anything about the Work Time and Listening DVD they said would cover manual handling they could not produce a copy of it to the court. There was not even an attempt by the defenders to lead evidence of a generic training film of the type in use. I was left entirely in the dark on this vital issue.

71. I have therefore concluded that the only reliable evidence before me indicates that the pursuer had manual handling training in 1998. There was nothing before me to suggest that he had any refresher courses or if he did what the effective content of those courses would have been. I, therefore, accept the pursuer's evidence that the way he lifted mailbags was, as he thought, in line with the only training he had. All the witnesses, expert and postal, were agreed that the pursuer's lifting technique was either wrong or alternatively inappropriate for the weight limits that the defenders considered safe. I can only conclude that responsibility for this lies with the defenders. They have either failed to train the pursuer in safe lifting techniques or they have allowed the pursuer to slip into bad habits which, as Lady Hale observed in *Koonjul* , they had the responsibility to detect and correct. I, therefore, find the defenders in breach of Regulation 4(1)(b) (ii) of the Manual Handling Regulations.

72. I regret, however, that I agree with counsel for the defenders that matters do not rest there. I have considerable sympathy for the pursuer. I have no doubt that if he had suffered a back injury on 27th August 2004 then I would be awarding him damages today. He did not, however, suffer a back injury but rather an incident relating to his pre-existing left inguinal hernia. I am not persuaded that this incident was caused by the defenders breach of Regulation 4(1)(b)(ii). I prefer the defender's submissions on causation.

73. I accept, without reservation, Mr.de Beaux's opinion that there was nothing about the pursuers work activities on the day in question, which can be said to have caused the protrusion, or stretching of the hernia sac and thereby the pain he suffered. In Mr de Beaux's opinion (and I accept that Mr.Armstrong was critical

of him for usurping the adjudicative functions of the court) the incident simply happened on the defender's watch. Indeed Mr.Buck, when giving his evidence, was very careful to stress that although he believed there was a clear *correlation* between the work activities of the pursuer that day he shied away from any positive assertion that this was the same as legal causation. I also accept the evidence of Mr.de Beaux that even if the stretching of the peritoneum was, in some way, associated with lifting a mailbag this was not an aggravation or acceleration of the *degeneration* of the pre-existing hernia but rather the emergence on a certain day of symptoms which would have most likely come about in any event. Symptoms which *both* experts agreed did not affect the nature or prognosis of success for the surgical repair of a hernia in any way. The pursuer had already been referred to a surgeon by his GP for hernia repair *before* the events 27th August 2004.

74. I considered Mr Buck to be a clear and careful witness, and it is no reflection on him that I have decided to prefer the evidence of Mr de Beaux. It is no fault of his that Mr de Beaux has the benefit of access to more recent research and extensive specialist clinical experience so as to enable him to develop his views on causation in considerable detail, and in a manner that favourably impressed me as notably clear, cogent, balanced and persuasive.

75. Indeed it was the evidence of Mr.Buck, which helped me understand that inguinal hernias lurk undetected in large swathes of the male population. Something must bring this congenital condition to the attention of the medical profession. A patient may be being examined for something else and the doctor detect an inguinal weakness. The Army medical exam was one example. Indeed in this case the pursuer was quite unaware of his right inguinal hernia until Mr.Buck diagnosed it when he was examining his groin area to prepare his expert report for this case. However, for the patient to consult his physician about something going on in the groin area (in the pursuer's case a slightly "hot" sensation) it was likely that the hernia had began to stretch or protrude to a degree. Once the hernia was diagnosed it was Mr.Buck's opinion that modern practice would indicate that the GP would refer on to a surgeon and that he or she would recommend a repair. I have already observed that Mr.Buck could see no reason why this would not be so as the procedure is so routine and successful. It was also his evidence that nothing, which occurred on 27th August, would have had any impact on the extent of the surgery or its likely success. He explained that a hernia repair was a hernia repair.

76. The fatal flaw in the pursuers case is that he must rely for a casual link on the proposition that, by lifting the mail bag in an inappropriate manner for it's weight he caused his IAP to rise to a level which pushed through or stretched his hernial sac. This requires him to prove, on the balance of probabilities that lifting that specific mailbag caused an increase in IAP above his normal IAP. I am not persuaded that he has done so. Moreover I am not persuaded by Mr Bucks evidence that lifting heavy weights necessarily raised IAP above the norm. I prefer the evidence of Mr. de Beaux and I fail to see how the defenders could be expected to devise a safe system of work around the concept of reducing the risk of raising IAP. The regulations are, in my judgment, generally aimed reducing at the risk of injury by muscle or ligament damage or distress.

77. In reaching this conclusion I have had regard to the underlying policy derivation of the Manual Handling regulations. This is very helpfully addressed, in some detail, by Lords Carloway and Reed, in the case of *Taylor v Glasgow City Council* (cit.above). The decision itself is important for the debate between Lord Carloway and Lord Reed on the role of forseeability within the Regulations but for present purposes Lord Carloway explains that the Regulations are "daughters" of the EU Council Directive 89/391 of 1989. The framework makes it clear that the drafters were concerned with manual handling by workers of a load which:" *by reason of it's characteristics or unfavourable ergonomic conditions, involves a risk, particularly of back injury* (my emphasis) *to workers*". Lord Reed, whilst he did not accept Lord Carloway's opinion on the role of foreseeability, accepted his narrative of the genesis of the regulations. He does, however, make one observation which is directly in point here (at page 368 C-D): " *Unless giving the word "risk" its ordinary meaning were to lead to some difficulty in the context of the regulation, I would incline to the view that it ought to be given it's ordinary meaning without reading in the word "foreseeable"..... Following that approach, if an employee were actually injured in the course of undertaking an operation, then that very fact would usually demonstrate that there was indeed a risk of injury involved in the operation, unless the injury were not due to a risk involved in the operation itself but to some extraneous circumstance* (my emphasis)."

78. I take from this decision that the purser cannot pass either test : either the defenders could not reasonably be expected to foresee and accordingly assess manual handling tasks to reduce the risk of increased IAP as it might affect a pre existing hernia, or the injury itself was not caused by a risk inherent in the workplace operation but by an "extraneous circumstance" i.e. the level of the pursuer's IAP which would be unknown to the defenders. I cannot accept that the regulations were designed to place an obligation on employers to guard against every possible, but as yet unknown, medical risk which might impact on the myriad of pre-existing conditions which could affect their employees

79. In any event the evidence on IAP leads me to the conclusion that there was nothing the defenders could do to assess a manual-handling task against this standard. The clinical tests appear to support the contention that controlled muscular exertion does not raise IAP significantly above the norm . The evidence is rather that activities such as arm curls or bench presses produce little discernible increase in IAP as opposed to the substantial rise associated with day-to-day occurrences such as coughing and sneezing. Even if we accept the evidence of Mr.Raeburn that the defenders should have specifically risk assessed the pursuer and had they done so they would have significantly lowered the weights he lifted; there was no evidence before me that reduction to even, say, 3 kg bags would have protected the pursuer from the risk that some element of the manoeuvre (bending, stretching etc) might raise his IAP above the norm and provoke an unwelcome response from his hernia.

80. In summation, then, it seems to me that the preponderance of the authorities, to which I have been referred, indicates that the question I must answer is: has the pursuer proved that it is more probable than not that the manual handling operation upon which he was engaged on 27th August 2004 caused or materially contributed to his condition?" I answer that question in the negative. The Manual Handling (Operations) Regulations 1992 are not obviously intended to protect employees from the risk of an unknown or unforeseeable risk of increased intra abdominal pressure. They are, more reasonably, directed towards prevention of lumbar and limb injuries. The defenders had no way to measure the risk from elevated IAP or to devise effective systems to guard against it occurring. The only way to do this would be to have removed all manual handling elements from the pursuers job. The pursuer has conceded that this cannot reasonably or practicably be achieved. To require the defenders to give up handling mailbags would be an extreme measure indeed. I, also, reject the pursuers criticism of the defenders for not assigning the pursuer light duties when they learned that he had been diagnosed with a hernia. His GP did not sign him off or recommend light duties. Mr.de Beaux gave convincing evidence that some patients will decide to soldier on as surgery is not convenient for them at the time. He does not recommend rest but rather that they go about their normal business. He was also roundly critical of the role of rest even after surgery. I do not accept that the defenders could be expected to assign employees to light duties or suspend them altogether in such circumstances this is would be an unwarranted over reaction. I am, accordingly satisfied that no inference of causation arises. It follows that the pursuer's claim fails and that the defenders are entitled to decree of absolvitor with expenses. In the event that I am wrong on the question of causation, standing my findings on breach of Regulation 4(1)(b)(ii) I will indicate my opinion on quantum.

QUANTUM

81. I am, again, indebted to Mr.Armstrong and Mr McConnell for setting out their respective submissions on quantum with such care. The full submissions and calculations are, again, appended hereto and referred to for the sake of brevity. In assessing quantum I refer, once more, to the very helpful and instructive evidence of Messrs Buck and de Beaux. They both accepted that the incident on 24th August 2004 was indicative of a stretching of the hernial sac into or its protrusion through the abdominal fascia. This was a painful experience. The peritoneum is particularly hostile to being pulled or stretched and reacts badly. There was, however, no evidence that this severe pain would continue, at the same level, once the hernial trauma was reduced. The pursuer self certified his ill health for the first seven days after the incident. His symptoms must have subsided, at least to a degree, or he would have been forced to attend his doctor far earlier. Mr.Buck, who was the pursuer's own expert, explained that the operation to repair the hernia would not be protracted or the prognosis for recovery affected in any material way by the stretching of the sac. The repair is the same

and the results appeared to have an extremely sound repair. The experts were at one on this. The other medical opinions, those of the pursuers GP and the attending surgeon were equally favourable. I am persuaded on the evidence available to me that the pursuer only had to endure the discomfort of his symptomatic hernia until the surgery and the postoperative recovery period. He returned to work on 5th February 2005. Loss of earnings to that date is agreed at £1,569.38.

82. The pursuer did not insist upon his case on Record founding upon his emergent right side hernia. I do not think, however, that he excluded it in his decision-making. The pursuer was able to return to work after his left hernia repair and functioned normally enough until June 2008. The second hernia was clearly asymptomatic as it was only detected by Mr.Buck when he carrying out a clinical examination of the pursuer's groin. The operation he then underwent was elective. Mr.Buck and Mr.de Beaux agreed that a loss of confidence was a common occurrence in hernia suffers who have manual occupations. They have suffered an unpleasant experience that they do not want to repeat. They are influenced by the theory that lifting causes or exacerbates herniation that has admittedly been prevalent for over 100 years. Never the less I do not accept that such fears flowed from the pursuer's incident on 27th August. Mr.Armstrong argued that a delinquent employer must take his victim as he finds him. The pursuer being of slight build and less physically robust than many postmen, having lost confidence post trauma, struggled with the daunting task of lifting heavy mail bags. I would be more impressed with this submission had the pursuer not returned to work in February 2005 and after a period of six months on light duties, resumed his normal tasks and shift duties through to June 2008.

83. The evidence from the GP records and of the occupational health consultants speaks of the pursuer getting on pretty well until the right hernia diagnosis The loss of confidence which precipated his early retiral seems to me to relate to the emergence of the second right side hernia and not the left side one associated with the defenders breach of duty..

84. The pursuer's decision to accept the defender's offer to retire early was made on the basis that he was offered a package with benefits. The defenders sought to mitigate the potential cost to them of managing future, possibly prolonged, absence from work or expensive employment tribunal grievances. The pursuer accepted a "packaged" offer with a lump sum and I am not persuaded that he did so for any reason other than that, since he discovered the second right side hernia, he found work increasingly challenging. I also accept the evidence that the pursuer had mentioned early retirement to his GP. He explained to me that this was mere speculation and that he did not really think it would be financially viable. I am not persuaded this is so and in any event, I consider this indicative of the pursuer's underlying aspirations which influenced his decision to accept the defender's offer.

85. I, accordingly, would have awarded damages on the basis of what the defenders solicitor advocate designated as Scenario One i.e. full recovery by 5th February 2005. I would have assessed Solatium on a rather more generous basis than counsel for the defenders. It seems to me that the pursuer would be entitled to £4,500.00 with interest on that sum at 8% from February 2005. Past wage loss is agreed at £1,569.38.

SCHEDULE ANNEXED to SHERIFF'S NOTE in MCABE V ROYAL MAIL

THE FULL WRITTEN SUBMISSIONS FOR THE PURSUER AND DEFENDERS

PURSUERS SUBMISSIONS

INTRODUCTION

21.1. This is a Personal Injuries Action in which the pursuer claims damages in respect of injuries sustained firstly on his left hernia whilst lifting a mail bag on 27 August 2004 and aggravated subsequently thereafter whilst undertaking tasks at work and thereafter to his right hernia which was

diagnosed in June 2008. The Pursuer claims the accident was caused through the fault of the Defenders at common law and in breach of their duties under the Manual Handling Operations Regulations 1992 (hereinafter "the Regulations"). The Defenders have denied liability.

21.2. Evidence was heard on 3, 6, 10 and 11 August and 25 and 26 October all in 2010. The Pursuer's Proof comprised of (i) the Pursuer (ii) Anne Grogan (iii) Hamish Menzies (iv) Alistair Raeburn (v) Mr Colin Buck (vi) Dr Andrew Colvin (vii) Stephen Thomson together with Nine Inventories of Productions comprised in 5/1 to 5/9 of Process. The Defender's Proof comprised of (i) Mr Andrew de Beaux (ii) Harry Corrigan (iii) Richard Turner and (iv) Nicola Sawyers together with 9 Inventories of Productions comprising 6/1 to 6/9 of Process.

21.3. A Joint Minute was entered into between the parties, which have been lodged in process.

21.4. The Defenders' preliminary pleas 1 and 2 have been repelled.

21.5. Motions

§ **The Pursuer moves the Court to uphold his First and Second Pleas in Law and to grant Decree for payment in the sums set out hereafter.**

§ **To repel the remaining pleas 3, 4 and 5 for the Defender.**

21.6. In support of these motions the Pursuer makes a number of submissions set out as follows:

§ **Part 2 sets out preliminary submissions on the evidence presented to the court together with conclusions and inferences that may be drawn from it.**

§ **Part 3 sets out proposed findings in fact that the court is invited to make.**

§ **Part 4 contains the Pursuer's submissions on his case at common law**

§ **Part 5 contains the Pursuer's submissions on his case in terms of the Regulations.**

§ **Part 6 contains the Pursuer's submissions on contributory negligence.**

§ **Part 7 contains the Pursuer's submissions on causation.**

§ **Part 8 sets out the Pursuer's position on the quantum of damages**

PRELIMINARY SUBMISSIONS ON EVIDENCE

21.7. It is submitted that the Pursuer was a credible witness who gave his evidence in an honest and straightforward manner. He did not try to embellish his account and give it honestly and to the best of his recollection. He came across as an intelligent and precise individual who was prepared to admit on occasions if he could not remember a particular detail, as one would expect from an accident occurring over 6 years before. Importantly, on all aspects of his evidence, in particular the method of lifting, the number and weight of bags he required to lift, the complaints made to the Defenders' management, the extent of training he was given and the injury he sustained and ongoing problems, he was quite clear and, indeed, was supported on all these points by his witnesses presenting evidence to the court. On cross-examination, he maintained the consistency of his evidence throughout and provided a good explanation for those issues raised by the Defenders, such as the delay in completing the accident report form and the alleged failure on the Pursuer's part to report the accident to his manager, Mr Richard Turner, immediately after it occurred. He was clear in his evidence that he loved his job and had every intention of working until aged 65 years and saw no reason why he could not have done so.

21.8. The evidence of Anne Grogan, the partner of the Pursuer, was again candid, straightforward and consistent with that of the Pursuer in respect of her understanding of the events leading up to and after the incident on 27 August 2004. She was also candid and honest on the level of disability suffered by the Pursuer both immediately after the accident and in the period up to his first operation and thereafter up to the date of the Proof. So much so that the Defenders' Counsel saw no reason to test any of her evidence in cross-examination.

21.9. The evidence of Hamish Menzies was of considerable assistance to the Court in assessing the extent to which the management at Dundee East Delivery Office complied with and followed a safe system of work. As a health and safety representative for the Communication Workers Union, it was clear that Mr Menzies had visited the Dundee East Delivery Office on a number of occasions over the years to undertake health and safety inspections and had clearly spent some time documenting his findings and following his inspection up with detailed memos to the management at Dundee East. He is clearly someone with considerable experience in what requires to be done to operate a safe system of work in handling mailbags.

21.10. His evidence painted a picture of management who appeared to have little interest in operating a safe system of work and who failed to action the deficiencies in the system that he highlighted in his various memos. Importantly, he supported the Pursuer on a number of material respects, including the method used by the Pursuer to lift mail bags; the fact that complaints about mail bags being overweight and not being weighed by the postmen were made to management; the failure of employees to use weighing scales and complete sign-in sign-out sheets; and the fact that he had himself spoken to Mr Turner about the Pursuer's accident on 27 August 2004. He was open and candid when he admitted in cross-examination that he believed the Defenders' system of work, if it had been operated properly, was a good one. Having been in touch with Mr McCabe after he started sick leave on 27 August 2004, he was able to present evidence to the court of the on-going problems the Pursuer continued to suffer from. Importantly, he confirmed that he had spoken to management at Dundee East about the Pursuer's accident sometime in the autumn of 2004. They therefore must have been aware of the circumstances that led to the Pursuer's absence from work. The fact that they were advised of the accident has been denied by the management throughout this litigation.

21.11. Alistair Raeburn was the Health and Safety Expert giving evidence on behalf of the Pursuer. He was an impressive witness with relevant qualifications and experience. He did not undertake a site inspection before completing his report and presenting his evidence to the court. It is submitted that he did not require to do so as it was legitimate for him to rely upon the information provided by the Pursuer in his statements and those of his witnesses as well as the information in the Closed Record. In contrast, Mr Corrigan appears to have simply relied upon what he saw on the day he attended Dundee East, which was a matter of five and half years after the accident. What Mr Corrigan saw there that day does not accord at all with what appears to have been the position back in August 2004.

21.12. Mr Raeburn was clear and concise in his evidence that he gave without any exaggeration. In particular the evidence he gave to the court concerning the appropriate method for lifting mailbags was very helpful and he was quite clear in his evidence that the method of lifting the mailbag by use of the strap as advocated by Mr Corrigan was incorrect and dangerous. His explanation to the court of the correct weight that can safely be lifted from floor level was clear and concise with reference to the diagram contained within the Defenders' Fourth Inventory of Productions, comprising of the Manual Handling Operations Regulations (1992) (as amended): Guidance and Regulations 3rd Edition. Further in his evidence, he was able to offer a number of suggestions that could have been introduced by the Defenders to reduce the risk of injury to employees when lifting mailbags. He was also clear in his view that, as and when the Defenders found out that the Pursuer was suffering from a hernia injury, after being diagnosed on 19 August 2004, steps ought to have been taken at that time to find alternative light duties for the Pursuer until his condition improved or, at least, stabilised.

21.13. Mr Colin Buck gave evidence for the Pursuer. Mr de Beaux for the Defender. Both surgeons are clearly eminent in their field with relevant qualifications and experience. Both have given evidence in court in hernia cases previously. Whilst the evidence and reports lodged in process differed in certain respects, it is submitted that in a number of key respects they were similar, particularly with regard to the evidence both surgeons presented to the court. Mr Buck was clear in his evidence that the act of lifting the mail bag and the Pursuer experiencing severe pain immediately thereafter were so closely connected that he was able to conclude that the lifting had caused the pain which he described as a protrusion of the hernia. Mr de Beaux, on the other hand, was clear in his evidence that the lift had not "caused" the hernia which had been diagnosed the week previously on 19 August 2004, but he was prepared to accept that the rapid progression of the hernia i.e. its protrusion, had happened as a result of the lifting incident and had that event not happened then Mr de Beaux was prepared to accept that his condition as noted on 19 August 2004 may well have continued in that state indefinitely and that had his duties been changed to light duties he could have continued in the employment of the Royal Mail with little trouble. He did, however, consider that the Pursuer would have required an operation at some point in the future, but was candid enough to admit that the event on 27 August may have accelerated the need for that operation by as much as two years.

21.14. The Pursuer, having returned to work and continued with his duties which had, in fact, increased compared with his duties prior to his injury in August 2004, Mr de Beaux was again prepared to concede that the Pursuer in continuing to do these heavy duties which included lifting heavy mail bags, could have exacerbated his condition and had he undertaken light duties he would not have suffered the level of discomfort which he, in fact, did during the period after his return to work in February 2005 up to his absence again in June 2008. Where the evidence of both doctors diverges most is in relation to the connection between the Pursuer's tasks and the onset of the right hernia. Mr Buck considered that the continual lifting of heavy weights contributed to the problems of the right hernia and, in contrast, Mr de Beaux is not aware of there being any evidence which connects the two.

21.15. Dr Colvin, the Occupational Physician, who worked for the Royal Mail, gave his evidence in a straightforward and candid fashion. He accepted that he did not have the same level of expertise of the two consultants presenting evidence, but he described himself as being a "slave to his own experience" by which he meant that he had come across a number of Royal Mail employees who, for whatever reason, continue to suffer pain at the site of their hernia wound after having had an operation and returning to work. He considered himself to be in a better position to provide an opinion about whether or not the Pursuer was able to continue to work with the Defenders having considered the full factual circumstances. He believed that the Pursuer was struggling to cope, both from a physical and psychological point of view and it was as a result of this ongoing pain in his left hernia and the psychological aspects, which enabled him to come to the firm view that the Pursuer ought to be medically retired from the Defenders.

21.16. In marked contrast to the Pursuer's witnesses, it is submitted that the evidence of the factual witnesses presenting evidence on the behalf of the Defenders was inconsistent and, at best, lacking clarify and, at worst, factually incorrect. Firstly Mr Turner, the Delivery Office Manager at Dundee East appeared to have forgotten quite a number of important events. Prior to Mr Turner giving evidence, it had been the Defender's position that Mr McCabe had not told Mr Turner or any of the management about going to the doctors on 19 August 2004. Mr Durward who had given evidence previously on Commission had expressly denied any knowledge whatsoever of Mr McCabe being diagnosed with a hernia on 18 August 2004. Reference is made to page 43 and 44 of the notes of that Commission. The manner in which Mr Durward has given his evidence clearly suggests that the first time he knew of the diagnosis of the hernia on 18 August 2004 was when Counsel for the Defender at the Commission questioned him. We now know that clearly the Pursuer had advised the management on 19 August 2004 as they had completed documentation to forward on to Occupational Health immediately after being advised by the Pursuer.

21.17. Further, Mr Turner doesn't appear to remember being told about the accident either at the time it occurred or, indeed, thereafter, until the form was completed in May 2006. This seems incredible given that Mr Menzies, in his evidence, spoke about the fact that he had spoken to Mr Turner as, indeed, had the Pursuer at the time of the accident and later in October 2004 when he was discussing the possibility of a private referral for a hernia operation. The Pursuer also came in to see Mr Turner in his office on or around the end of October 2004. Despite all these times when it appears that Mr Turner was told he maintained throughout the litigation and in his evidence that he was not advised of the accident. Further, despite Mr Turner being the Delivery Office Manager he maintained that he knew nothing of the content of the training given to the postmen and postmen drivers. Further, the Defenders have produced no documentation as to what the content of the training was and despite the fact they relied so heavily upon a video allegedly shown to the Pursuer and his colleagues every six months, they were not able to produce a copy of it as part of the litigation.

21.18. Further, Mr Turner in his evidence said that he could not remember receiving any complaints about overweight bags or the fact that the postmen were not using the weighing scales. This is despite the fact the Pursuer and Mr Thomson both said in their evidence that they had made regular complaints. His evidence on the safe system of work and weighing of bags was wholly unsatisfactory. It was inconsistent with the evidence of Nicola Sawyers, the other manager who gave evidence. He didn't seem to be able to recall the signs advising postmen to weigh all their bags and had no real explanation for the fact that the assessment which he allegedly had carried out in August 2005 was documented using the exact same document as the assessment for November 2003. He also couldn't explain why the sign-in/sign-out sheets had not been used and his evidence in relation to the spot-checking of postmen was entirely inconsistent with Nicola Sawyers and indeed was not a matter raised in the Defenders' pleadings. Nicola Sawyers, in contrast, gave her evidence in a more straightforward and candid manner. She did try her best to assist the court. That said, her evidence in relation to the proper method for lifting bags was at odds with the evidence of the Pursuer, Mr Thomson, Mr Menzies and Alistair Raeburn. It seemed a most unlikely way to lift a bag for someone who is 5ft 3in tall with a bag sitting in a platform raise 15 cms above the ground.

21.19. Mr Harry Corrigan, the health and safety expert for the defender had visited the site and appeared to have seen a number of bags being weighed and lifted by means of using the straps. With respect to Mr Corrigan, it does appear that his report is based on what he saw in March 2010, almost five and a half years after the accident. He appears to have taken no cognisance of the method the Pursuer says he used to lift the bags and seems to have relied upon what he saw on the day he attended the Dundee East Delivery Office. It is clearly at odds with the evidence given by the Pursuer and his witnesses. He was, however, prepared to accept that if it was the case that the Pursuer was lifting the mail bags in the manner he described to the court, that the diagram contained within the Guideline to the Regulations was one which suggested that the upper limit of the recommended weight for men would be 5kg, particularly if it was established that the Pursuer's tasks involved him stretching in to pick a bag out of a yorkie. Further, his assessment of the correct method of lifting the mail bags by use of the straps was entirely inconsistent with that of Mr Raeburn, who considered this method to be dangerous, particularly taking into account the stature of the Pursuer. The court is invited to accept and prefer the evidence of Mr Raeburn over that of Mr Corrigan in this respect.

21.20.

PURSUER'S CASE UNDER MANUAL HANDLING OPERATIONS REGULATIONS 1992

21.21. The case under the above Regulations is made out in Condescendence 4. The case is made in terms of Regulation 4(1)(a) and Regulation 4(1)(b)(i) and (ii). In relation to Regulation 4(1)(a), the Pursuer pleads that it was not reasonably practicable to avoid the need for their employees to handle mail and for the Defenders to automate their entire system. The Pursuer accepts this and does not seek to rely on Regulation 4(1)(a).

21.22. It is submitted that the tasks being carried out by the Pursuer at the time of his injury on 27 August 2004 was a "Manual Handling Operation" and that the operation posed a risk of injury. The definition of a manual handling operation is set out in Regulation 2. Given the weights being lifted, the type of bags, the bulk of them and the fact they are being lifted from the yorkie container, it is submitted that the operation is a manual handling operation. Both Health & Safety Experts agreed with this in their evidence. Furthermore, the various tasks the Pursuer undertook involving the lifting and handling of mail bags and pouches after he returned to work in February 2005 until he went off on sick leave in June 2008 can also be classed as manual handling operations. The Defenders have denied that the operations are manual handling operations in their Answer 4 with little further explanation as to why that is the case.

21.23. Turning to the case under Regulations 4(1)(b)(i), the issue is whether the Defenders carried out a "suitable and sufficient assessment" of all such manual handling operations to be undertaken. The Defenders produced at 5/1/5 a number of Assessments. A number of these proved to be irrelevant to this litigation. Comments on these assessments have been made under the common law case above and equally apply to the current Regulation being discussed.

21.24. Despite being the delivery office manager, Mr Turner seemed to know little about the form or the process involved in doing assessments. Whilst Nicola Sawyers described that the assessments took some time and that she would do them with Paul Smith, the area health and safety representative for the Defenders, there is no evidence before the Court documenting the detail of the assessments. The fact that the assessment has not changed at all during the 18-month period from November 2003 until August 2005 is indicative of the fact that there was little or no work put into this assessment. There was no evidence presented by the Defenders that any of the risk controls highlighted in the form were performed. To have no planned action in either assessment suggests, in itself, without taking account of the other issues raised, that it was not a suitable and sufficient assessment. Had a proper risk assessment been carried out in relation to the operation of lifting mailbags from the yorkie, it is submitted that a number of action points would have been identified to reduce the risk of injury, most notably to reduce the maximum weight of bags to an acceptable level given the number of bags involved, the stature and weight of the Pursuer and the fact that clearly a number of the mail bags were awkward to carry. It is submitted that the guideline weights as set out in Defender's Production 6/4/2 are ones that ought to have been introduced by the Defenders for all employees handling mail bags and pouches from floor or just above floor level as it would be of taking one from a yorkie container. The fact that such action has not been taken has directly led to the Pursuer's injury.

21.25. Further, it is submitted that the Defender did not complete a specific assessment for this task. If they had done so and given consideration to the issues raised in Schedule 1 to the Regulations and, in particular the question "does the job create a hazard to those who might be considered to have a health problem" any sufficient risk assessment would have identified the health problem of the Pursuer as an additional risk and necessitated additional steps to minimise that risk which ought to have included reducing the maximum weight of bags he was required to handle. Had they done so, it would have in all likelihood avoided the injury on 27 August 2004 and after the Pursuer returned to work in February 2005.

21.26. Under Regulation 4(1)(b)(ii), the Defenders are under a statutory duty to reduce the risk of injury to the lowest level reasonably practicable. The onus is on the Defenders and not the Pursuers to prove they have taken appropriate steps to reduce the risk to the lowest level reasonably practicable - *Taylor v City of Glasgow Council* - Opinion of Lord *Carloway dated 20 April 2002*.

21.27. It is submitted that the Defenders have failed to take appropriate steps to reduce the risk of injury to the lowest reasonable practical level for the following reasons:

§ No consideration has been given to the weight any particular employee is able to handle when picking a bag up from floor level. Both Health & Safety Experts agreed that the appropriate weight should be 5kg, particularly if stretching into a York container. Further, no account was taken of the height and size of the Pursuer, which, if this had been taken into account, may have reduced the upper limit to one comparable with a woman as opposed to a man. Mr Raeburn had suggested it should be as low as 3kg. In the circumstances, the weight set by the Defenders is at least 3 times greater than it ought to be.

§ There was little or no evidence of a proper system for checking the weight of all mailbags in Dundee East Delivery Office. The evidence established that postmen habitually did not weigh all their mailbags. Management, whilst appearing to operate some kind of sample check, it is difficult to establish exactly what that check was. At best, they were only checking a small proportion of the bags filled by the postmen. Indeed, it appears that the delivery office management would advise the particular employee that his bags were going to be sample checks that day. See case of *Anderson v Lothian Health Board 1996 RepLR 88*.

§ There was no proper or sufficient assessment done in relation to the particular activity of postmen lifting mailbags and mail pouches.

§ There was no instruction given to the postmen not to overfill their bags.

§ The evidence clearly showed there was no adherence to the procedure of weighing all mailbags and filling out the sign in/sign out sheets with the appropriate weight of the bags.

§ There was no evidence offered that it was impractical to weigh all mailbags and complete all sheets. Indeed, when the Defenders attempted to establish during the litigation that the sign out/sign in sheets were completed, it was clear that those lodged had not been properly completed. Whatever safe system of work their ought to have been at Dundee East Delivery Office, it is submitted that it is very clear from all the evidence presented to the court that the system was not adhered to in practice either by the postmen or by their managers.

21.28. The evidence in relation to training was inconsistent. The Pursuer's evidence was that he had been trained in manual handling in 1998 and thereafter received some refresher training from Hamish Menzies and John Burns in 2005 i.e. after his accident. Nicola Sawyers, who gave evidence on behalf of the Defenders, on the other hand, said that a video was shown once every six months and this video contained refresher training in relation to manual handling. The Defenders were not able to produce the video in court or even describe what was in it. The Pursuer and Mr Thomson denied receiving any such training. Even if the Pursuer had seen the video such training would not have been sufficient. The Defenders and their witnesses did not appear to know if a video contained any instruction on how to lift mail bags. Even if it had, it would have been important to also have had practical training as without the practical training, employees such as the Pursuer would have continued in their old ways. Mr Turner was clear in his evidence that he knew very little, if anything, of the content of the training given to the employees. Had the manager been aware and properly trained himself, he would have been able to reduce the risk by identifying where employees were going wrong. There was no evidence from Mr Turner or any of the witnesses that they did - T*ravers Walsh v TNT UK Limited 2006 CSOH 149*.

21.29. In summary, it is submitted that the evidence before the court clearly establishes that the Defenders took very little, if any, effective steps to reduce the risk of injury to an employee such as the Pursuer involved in a manual handling task to the lowest level reasonably practicable. Almost none of the procedures as set out in the Defender's pleadings were, in fact, followed in practice. Accordingly, it is submitted that there is a clear breach of duty on the part of the Defenders in terms of the Regulations and it will be shown that this breach led to the Pursuer's injury.

CONTRIBUTORY NEGLIGENCE

21.30. The Defenders have pled an *esto* case that if the accident was caused by their negligence, it was also materially contributed to by the fault and negligence of the Pursuer. They have narrated various duties incumbent upon the Pursuer at pages 5 and 6 of the Closed Record. It is submitted that in all the circumstances of this case there should be no finding of contributory negligence against the Pursuer.

21.31. The Defenders have narrated that it was the Pursuer's duty to follow the system of work put in place by the Defenders. It is submitted that whatever the Defenders consider they have in place, as a safe system of work is one that is inadequate as has been set out previously in this submission. Further, it is submitted that the evidence establishes that the Pursuer was constantly thinking about his own safety and, indeed, on numerous occasions complained to the management about the excessive weight of the bags as well as the fact that the postmen were not weighing their bags and signing the sign in/sign out sheets as instructed to do. The Pursuer in his evidence also established that he would, wherever possible, attempt to test the weight of a bag and would bring any excessive weight bag to the attention of management. It is clear that management did very little about the fact that bags were of an excessive weight and, in all these circumstances, the Pursuer cannot be held responsible for his injury.

THE CAUSE OF THE PURSUER'S ACCIDENT

21.32. The Pursuer's position on Record is that the injury sustained on 27 August 2004 to his left hernia and the ongoing symptoms he suffered around the site of his left hernia after he returned to work, were injuries caused as a direct result of undertaking the particular manual handling operation on 27 August 2004 and further, the activities he required to undertake after he returned to work in February 2005. His position is that had he been working as part of a safe system of work, which included proper risk assessments of all procedures and an individual risk assessment of himself, and the Defenders had taken all appropriate steps to reduce the risk of injury as required by the Regulations, then it is likely that his injury would not have occurred.

21.33. It is appreciated that in considering the cause of the Pursuer's injury there required to be an analysis of the medical evidence. There is clearly a dispute between the parties as to whether the injuries sustained by the Pursuer on 27 August 2008 and thereafter are ones associated with the lifting activities he was undertaking as part of his tasks. Evidence was presented to the court by 3 doctors, namely Mr Colin Buck, a consultant urological surgeon, Mr Andrew de Beaux a Consultant General and Upper Gastro Intestinal Surgeon and Dr Andrew Colvin, a Consultant Occupational Physician.

21.34. The issues the court requires to consider with regards to causation is whether the main significant and most potent cause of the injury sustained by the Pursuer was as a result of the manual handling task he was undertaking at the time. It is submitted that the medical evidence bears out that there is a sufficiently close and direct link between the action being undertaken by the Pursuer and the injury caused to establish that one caused the other.

21.35. It is accepted that the Pursuer had been to his General Practitioner eight days prior to the incident on 27 August 2004 and that at that time his GP, having examined him, made a putative diagnosis of a left inguinal hernia. The medical records also state "an early weakness on the right". This is the first date that the Pursuer had consulted his General Practitioner with regard to these symptoms. 8 days later, whilst lifting a heavy mailbag weighing in excess of 16kg, the Pursuer experienced a sudden sharp excruciating pain in his left groin.

21.36. It is submitted that there is a sufficiently close a connection or correlation between the lifting action and the sudden onset of the above symptoms to enable the court to conclude that the lifting of the bag caused the injury at the time. It is accepted that the issue before the Court is not whether the lifting incident on 27 August 2004 caused the hernia, but whether or not it resulted in its rapid

acceleration of its symptoms or, put another way, a significant exacerbation of the original injury. Had that incident not occurred the question is whether the Pursuer would have developed the symptoms he suffered from at or around that time. Further, would he have suffered from the level of pain that he did, in fact, experience on 27 August and thereafter whilst off work?

21.37. It is submitted that medical evidence of both consultant surgeons and the consultant occupational physician support the following propositions:

§ There is such a close connection between the lifting and the injury that the two are inexplicably linked such that the court can conclude that the lifting significantly exacerbated the existing hernia injury previously diagnosed.

§ The most likely cause of the exacerbation of the left sided hernia in August 2004 was the rise in intra-abdominal pressure in the abdominal cavity, such pressure being brought on as a result of the Pursuer lifting a heavy bag.

§ Had the significant event on 27 August 2004 not occurred, there is no reason why the Pursuer could not have continued to work and his hernia remained in the state it was at the time it was diagnosed on 18 August 2004.

§ The degree of disability the Pursuer described in his evidence in the three and half months after his injury and prior to his operation was a direct result of the injury sustained on 27 August 2004.

§ The Pursuer's continuing symptoms as described in his evidence from the date of his return to work up to the date of the Proof were as a result of the tasks he required to undertake, including lifting heavy mail bags and pouches after returning to full time duties in August 2005.

§ The continued symptoms he experienced in the site of his left hernia was the main and significant reason for the decision taken by Dr Andrew Colvin acting on behalf of the Royal Mail to medically retire the Pursuer in August 2008.

21.38. The evidence supporting each proposition is as follows:

§ Proposition 7.6.1

· Reference is made to the evidence of Mr Colin Buck in examination in chief (page 18 of notes):

"A - Well here we have a situation where there is an acute episode of severe pain in conjunction with a defined activity so the two can't be separated. They are so closely related, it is not something the pain happened a week after the event but a particular action or particular activity resulted in an acute episode or something happened and the two can't be separated."

· Further (at page 19 of notes) Mr Buck says:

"Q - What we do know is that there was a fairly severe incident on [23] August which burst it through and that is what is causing the problem?

A - One has to assume that because the two are so closely linked, a relationship which cannot be ignored"

· Further, Mr de Beaux in his cross examination (page 222 of note) supports this proposition.

"Q - Are you prepared to agree that the particular activity that Mr McCabe was involved in at that point, which I have just described to you, was a contributing factor to that speeding up process?

A - It would be hard to argue against it because of its timeliness"

· Further (at page 246), Mr de Beaux states:

"A - I think it would be fair to say that Mr McCabe probably would not have developed the discomfort in his hernia around that time had he not lifted the heavy bag.

· Further, at page 254 of notes:

"Q - There is just far too close a connection between the two for them not to be connected?

A - I think they are connected in the sense that there was an event, a lifting event happened and there was pain in the hernia and I agree with that..."

§ Proposition 7.6.2

· Reference is made to the evidence of Mr Colin Buck in examination in chief (page 18 of notes):

"Q - Again with that sort of scenario what is actually happening vis-à-vis his hernia groin at this point?

A - Well I think the lifting of a heavy weight, clearly you have got to use all your muscles including abdominal muscles to do that, that really increases intra-abdominal pressure and the intra-abdominal pressure provokes herniation. It is as simple as that.

Q - This is a precluded hernia at this point?

A - It had obviously burst through, it wasn't still being contained within the anatomical vice, it had gone into the groin. "

· Further, at page 92 and 93 Mr Buck states

"Q - Yes, one has to accept however that it is the abdominal... the rise in abdominal pressure as well that has been, has come about as a result of the exertion at that time?

A - Well that is the only thing that would push or cause a protrusion."

§ Proposition 7.6.3

· In support of this proposition reference is made to the evidence of Mr de Beaux in cross examination on 11 August as follows

At page 208

"Q - Could Mr McCabe have lived with it for a period thereafter without there being any more symptoms or hot sensation?

A - He could do, yes."

· Further at page 209

"Q - Is it possible that he could have continued to work with that sort of hernia? As at 18 August is it possible he could continue to work?

A - If he saw me, yes."

· **Further at page 210**

"Q - ...if the evidence is accepted in this court it began at the beginning of August and moved through to 18 August, it could have remained pretty much as it was to allow him to continue to work. Is that what you are saying?

A - Yes."

· **Further at page 247 of notes**

"Q - ...I asked you whether or not the state of play as it was on 19 August would have continued and in your evidence you said very difficult to say in terms of timescale when it would have got worse, but I recall you saying that it would be anything from say 6 months to 2 years and so the state of play as at 19 August would have remained for 6 months to 2 years. Is that accurate?

A - yes, that would be a general statement. It is very hard to predict on an individual basis because natural history is weeks to many years, but that is not very helpful to the court. So 6 months to 2 years would be a realistic average target, yes."

§ Proposition 7.6.4

· **Mr Buck in examination in chief (page 22 of notes):**

"Q - Mr McCabe has given evidence to the court about his level of ability, wasn't able to walk long distances, gardening, continuing to suffer pain in his groin area throughout this period from the time of the accident to the time of his operation. Would you consider looking at the event as it happened and from what you know about the event, that that would be consistent with the original event?

A - Yes, I think if he had - if his symptoms would have persisted he would have had that degree of disability which would have interfered with his normal activities or things he felt were normal.

Q - Are those symptoms also connected with this excruciating pain he had on 27 August?

A - I think they would have been related until the time of his operation in December.

· **Mr de Beaux in cross examination (page 246 of notes) states:**

"A - I think it would be fair to say that Mr McCabe probably would not have developed the discomfort in his hernia around that time had he not lifted the heavy bag.

§ Proposition 7.6.5

· **Mr Buck in his examination in chief (page 26 of the notes):**

"A - ...the presence of the mesh which the body is reacting to in this way or an entrapped nerve in scar tissue, then any muscular activity that will impact or impinge on that local situation by pulling or displacement which muscular activity will do if you do anything strenuous could make the symptoms worse"

· **Further, Mr de Beaux (at page 273) states:**

"Q - Are you prepared to accept that the exacerbation of that chronic pain at the site can be further exacerbated by his activities?

A - It can be.

· **Further, Mr de Beaux (at page 272/273 of notes) states:**

"A - So, yes, I agree that we come to a point where Mr McCabe is retired due to persisting symptoms at the site of a previous hernia repair which does appear to be exacerbated by his activity that the Royal Mail could give him and therefore retirement was not unreasonable."

§ Proposition 7.6.6

· **Mr de Beaux supports this proposition when he states (at page 272 of notes):**

"A - The only validity in terms of retirement is ongoing pain in his groin, which appears to be exacerbated by a degree of activity, and he also mentioned that it was because of a persisting left hernia. There is no evidence that he has a persisting hernia. It was a chronic pain, for lack of a better word, that persisted at the site of a previous hernia repair and thus retirement on the basis of ill-health if his symptoms were such that he couldn't do his work was reasonable.

· **Further, Mr Buck in his evidence (page 24 of notes) states:**

"A - It is not unknown and not uncommon there are patients who will persist in having symptoms of discomfort and, again, it is a question to some extent of their health and sometimes there is a genuine cause for it and in my experience - and I have had patients who fall into that category, persistent discomfort and pain in the operation site, that holds for any operational scar, sensitive and tender for a long, long time, and likewise not just a hernia repair but any other operation at that time.

21.39. There was quite a lot of evidence presented to the court about what activities the Pursuer *could* have done which *may* have led to the acceleration or significant exacerbation of the hernia injury previous diagnosed on 19 August 2004. It is submitted that such evidence is no more than speculation and there is no evidence before this court that the type of injury the Pursuer sustained on 27 August 2004 was one that definitely would have happened. This is not a case about an accident that would have definitely happened at sometime in the future. Both consultants agreed that there are other activities which raise intra abdominal pressure and which may have been ones as innocuous as coughing or sneezing and these may have resulted in the injury which the Pursuer, in fact, sustained as a result of lifting a heavy item. This case is about a specific event leading to an injury. It is submitted that the fact something may or may not have happened is, in the absence of evidence that it definitely would have, entirely irrelevant to this case. In the words of Mr de Beaux (at page 288 of notes) "They generally say in medicine that lightening doesn't strike twice". Further, (he states at page 288) "...but I agree with you, there was some coincidence between the lifting, the pain and exacerbation, and would that happen again its conjecture".

21.40. Taking all the medical evidence into account, it is submitted that the court cannot be concerned with what may have happened but only with what did, in fact, happen. Both consultants agree that there is a clear connection between the lifting incident and the exacerbation of the hernia and that this has led to a Pursuer's ongoing disability. It is submitted that both consultants also agree that the Pursuer continued to suffer physical symptoms on his return to work and that those symptoms were experienced at the site of his hernia and that they were exacerbated by the tasks that he required to undertake at work. Reference is made to paragraph 7.7.5 above.

21.41. With respect to Mr de Beaux, he appeared, at times in his evidence, to be suggesting that, given there was a possibility that the Pursuer's injury could have been sustained by undertaking another activity whilst at home or perhaps during recreation, that it was simply unlucky for the Defenders that the Pursuer's injury happened on their watch. It was therefore bad luck on the part of the Defenders that they had to take responsibility for the Pursuer's injury and the losses flowing therefrom. It is submitted that Mr de Beaux is going a little beyond his remit by taking such a view which is entirely in the hands of the court to decide not the medical experts. This is a case of taking the victim as you find

him and looking at the circumstances which led to this injury and, having done so, it is clear that if the court finds there to be a breach of common law or statutory duty on the part of the Royal Mail that the court is entitled to award the Pursuer damages as a result of the injuries sustained. It is further submitted that those damages would extend to the losses flowing out of the Pursuer's medical retirement. It is submitted that taking the evidence of the consultants and that of Dr Andrew Colvin, this proposition can be supported. Further, the evidence of Dr Andrew Colvin, as referred to in Clause 2.9 above is relevant when considering the reasons for the Pursuer's medical retirement, which it is submitted is a decision taken by Dr Colvin having considered all the medical evidence as well as interviewing the Pursuer and consulting with his managers. It was a reasonable decision for Dr Colvin to medical retire the Pursuer on the grounds of his ongoing problems with his left hernia. Mr de Beaux clearly supports this position - see paragraph 7.7.6.1 above.

QUANTUM OF DAMAGES

21.42. If the Court finds in favour of the Pursuer in that the Defenders have breached their duty of care to him, it is accepted that, when considering of the medical evidence before the court, there are a number of different scenarios which may apply when calculating the damages to be awarded to the Pursuer.

21.43. Parties have agreed the relevant figures to be used to calculate past and future wage loss. The attached Schedule 1 details the income the Pursuer received in each tax year and what he would have received had he not had time off work. The past loss of earnings to 5 April 2010 are as set out in the schedule and are agreed between the parties. The appropriate multiplicand figure for any future loss has also been agreed as per the attached schedule. The court will also note that the loss sustained by the Pursuer in terms of earnings for the period from the date of the accident to his return to work on 5 February 2005 has been agreed in the sum of £1,569.38.

21.44. The 4 scenarios which appear to apply are as follows:

§ Damages based on the Pursuer's initial injury to his return to work on 5 February 2005.

· Value of Solatium (inclusive of interest) - £6,500

· Loss of Earnings - £1,569.38 (agreed)

§ Damages for 8.3.1 above, but also to include his ongoing symptoms in his left hernia together with loss of earnings up to June 2008, when he was signed off for work and was awaiting an operation for his right hernia.

· Value of Solatium (inclusive of interest) - £8,750

· Loss of Earnings using the figures as per Schedule 1 (inclusive of interest) - £3,365

§ Damages calculated in accordance with 8.3.1 and 8.3.2 above, plus his time off work up to his medical retirement on 15 August 2009.

· Value of Solatium (inclusive of interest) - £10,150

· Loss of earnings using the figures as per Schedule 1 (inclusive of interest) - £9,754

§ 8.3.1, 8.3.2, 8.3.3 above plus his losses to the date of his retirement or projected retirement at the age of 65 on 28 February 2013.

· Value of Solatium (inclusive of interest) - £10,715 (per the attached Schedule 2)

· Loss of Earnings using the figures as per Schedule 1(inclusive of interest) - £63,955

21.45. Attached as Schedule 2 is the Pursuer's calculation of the solatium element of the claim together with interest and supporting cases assuming scenario 4 applies.

SCHEDULE 2

HEAD OF CLAIM	COMPONENTS	VALUATION
Solatium	**<u>John McCabe's (JM) injury - brief details:</u>**	**£9,250.00**

<u>First Hernia:</u>

· Pursuer attended GP on 18th August 2004 with a suspected hernia, pursuer advised manager of this, manager did not change pursuers duties;

· Groin injury on left hand side due to accident on 27 August 2004, attended GP 2 Sep 2004;

· Operation to repair left inguinal hernia 7 December 2004;

· Initial period of absence from work 27 August 2004 until 7 February 2005;

· Certified 10% disabled for life on 7 January 2005 as a result of accident on 27 August 2004.

<u>Second Hernia:</u>

· Developed hernia on right hand side June 2008;

· Second hernia operation November 2008;

· Medically retired 15 August 2009.

<u>Cowan v Allis-Chalmers (Great Britain) Ltd 1998 SLT 903:</u> Permanent physical disability with effect on personality. 39 year old packer sustained an inguinal hernia when he tripped which carrying a load. Disabled from returning to work. Solatium £9,000 - 50% past, 50% future solatium.

<u>Rowland v North Durham Healthcare NHS Trust [2003] CLY 3243</u>: "R" 50 at time of accident, 55 at trial; Persisting, permanent, irritating symptoms - general damages £7,500

- **Recurring symptoms - "aggravated by sitting, walking, lifting and sexual relations";**
- **"R" suffered a second hernia injury in the same location as the first;**
- **Both have persisting, permanent, irritating symptoms;**
- **"R" has not been diagnosed as permanently disabled for life.**

Forsyth v Lothian Regional Council 1994 GWD 5-286 (no Case Analysis available): Male, incisional hernia due to heavy lifting - solatium £6,000

- **Pre-accident history and problems with abdomen - this was an aggravation of an existing problem**
- **Left with continuing disability**
- **Unable to return to work**

Anderson v DD Glover Construction [2004] 2 QR 10: "A" 36 at time of accident, 39 at trial. Operation within 2 months to repair hernia, pain for further 6 months, 11cm scar on left groin, 9cm scar on right groin, otherwise complete recovery - damages £6,000:

- **Chance of recurrence no greater than 1%**
- **No permanent problems**
- **6 months on light duties at work, thereafter able to return to normal duties**

Calderbank v Lancashire CC [1992] CLY 1667: Fireman, 46 date of accident, 48 date of hearing. Right inguinal hernia of the direct type. Off work following injuries for 25 weeks, 5 weeks on light duties. Prognosis - discomfort would probably disappear in due course - damages £6,000

Interest at 4% per annum on two-thirds	**£1,465.00**

THE SUBMISSIONS FOR THE DEFENDER

BACKGROUND

1. In this action the pursuer claims damages from the defenders. He contends that the defenders breached certain statutory and common law duties which they owed to him, and that as a result of those breaches he has suffered harm. The dates on which evidence was heard, the identities of the witnesses for the parties and the matters already agreed are set out in the Submissions for the Pursuer at paragraphs 1.2 and 1.3. The evidence of one of the defenders' witnesses, Craig Dorward, was taken on Commission in Edinburgh on 8 July 2010.

2. At the conclusion of submissions in this case the defenders will move the court to repel the pleas in law for the pursuer, to sustain the third plea in law for the defenders, and to grant decree of absolvitor.

3. The submissions for the defenders fall into the following chapters:

3.1. Approach to witnesses; and

3.2. Relevant law; and

3.3. The critical facts; and

3.4. The application of the facts to the law; and

3.5. Causation; and

3.6. Quantum

APPROACH TO WITNESSES

4. As a preliminary remark on reliability, the circumstances giving rise to the litigation took place around six years ago. The defenders' position regarding reliability is that all of the factual witnesses were doing their best to remember the events. It is inevitable that memories fade over time.

5. A number of expert witnesses gave evidence. It is accepted that they were all qualified to give expert evidence. No issues of credibility or reliability arise regarding any expert witness.

<u>John McCabe</u>

6. In common with some of the other witnesses, there were issues regarding the pursuer's reliability. That is to be expected after the passage of time. However there are some matters which one might have expected him to remember. In particular the pursuer accepted that he made a telephone call to his general practitioner on 26 August 2004, the day before he went off work, asking for a note to be made in his medical records. In cross examination his position was that he had no memory of doing that, despite accepting that it was an unusual thing to do. It is perhaps surprising that the pursuer has no memory of what must have been an unusual event for him, particularly when his evidence was that he had clear memory of events which took place on 18 and 19 August (namely his attendance at the GP, and his discussions with Richard Turner) and again good memory of the events of 27 August.

7. There are reasons to be concerned about the pursuer's credibility. It is suggested that the pursuer is a keen advocate of his own case, and tended to give evidence that he felt supported his case, even if that evidence was not accurate. Two passages of his evidence are of particular relevance:

7.1. The pursuer gave evidence in chief that he loved his job and intended to work on until he was 65 years old. In fact the pursuer had been discussing retirement with his GP for many years. Ultimately in cross examination, when taken to the relevant records, the pursuer quickly accepted that he did not in fact want to work to 65: "I would have liked to have retired at 63, but it's not affordable". His position came to be that he would have wanted to retire at 55 but continued to work for financial reasons. He expressed the view that "We all want to retire early". There is certainly no criticism of the pursuer for working for financial reasons, and wanting to retire at as early an age as possible. However it was wrong for him to seek to portray himself as loving his job and wanting to work to the age of 65. Had contemporaneous documentation not been available to challenge the pursuer in this respect it seems likely that he would have continued to insist on the position he had adopted in his evidence in chief.

7.2. The pursuer gave evidence in chief that he had never seen the scales in the Dundee East Delivery Office being used. He was pressed about whether he was certain about that. He confirmed that he was one hundred per cent certain. That evidence does not accord with the evidence of any other witness in this case. Mr Menzies was an infrequent visitor to the delivery office, yet he had seen the scales being used. Nicola Sawers spoke to having weighed bags in front of the pursuer, in particular bags having been packed by Derek Clark. Stephen Thomson was a delivery postman. Accordingly he would be less likely to see bags being weighed: there would be no logical reason for a delivery postman to complain to a manager about the weight of a bag which he had packed. Yet he saw bags being weighed on a daily basis. The pursuer worked in the Dundee East Delivery Office for around twenty years. On the evidence many thousands of bags were weighed in that time. On Nicola Sawers' evidence the pursuer witnessed bags being weighed. In the circumstances it is suggested that the pursuer was not correct to say that he never saw a bag being weighed. Given that he was pressed on this issue and insisted that he never saw a bag being weighed it is difficult to consider that his evidence in that regard was credible.

8. It is not suggested that the pursuer is a wholly incredible witness. Rather, he is a witness who will give inaccurate information at times when it suits him to do so. His evidence should accordingly be treated with a degree of caution, particularly where it conflicts with the evidence of other witnesses or with documentary evidence.

Anne Grogan

9. Mrs Grogan gave straightforward evidence. Her evidence was very substantially hearsay.

Hamish Menzies

10. Mr Menzies was a straightforward witness.

Alistair Raeburn

11. While it is accepted that Mr Raeburn has experience, some aspects of his evidence were somewhat unsatisfactory.

12. Mr Raeburn does not appear to have an entirely accurate understanding of the way in which the civil courts apply the 1992 Regulations. His position was that every lifting operation, regardless of how light the weight was, and was a manual handling operation. He contended that lifting a pen was a manual handling operation. That is incorrect as a matter of law[1]. He contended that one ought not to use common sense when applying the Regulations. Arguing that common sense ought not to be used is often difficult, particularly where the dicta of eminent judges suggests that the Regulations should be construed in a realistic and common sense manner[2].

13. In his report he misquoted the HSE Guidance on the 1992 Regulations[3]. He sought to explain away that error as having relied on the previous edition of the Guidance. He undertook to check the position and revert to the pursuer's agents. So far as the defenders are aware that has not been done.

14. In relation to the risk assessment filter, Mr Raeburn's evidence appeared to be that the numerical figures identified in that filter were units of force rather than units of weight. If that was his evidence, it is a bizarre approach. The filter is intended to be applied quickly and easily[4] - that could not be done if someone seeking to apply it had to perform some calculation to translate weight into force. No reported cases that the defenders are aware of suggest that the Guidance is concerned with any measurement of force. All of the reported decisions consider weight.

Mr Colin Buck, Consultant Urologist

15. The court had the benefit of hearing evidence from Mr Buck, who gave his evidence in a straightforward and fair manner, and made a number of fair and relevant concessions. As an experienced medical expert Mr Buck's views are obviously entitled to substantial respect. However Mr Buck retired in 2002. There is no evidence before the court that he has been involved in medical practice since then, or that he has kept his knowledge up to date since his retirement. If he had done so then one might expect him to have been asked about that. That is particular important in the context of causation of hernias, in respect of which there have been significant advances in medical understanding since Mr Buck's retirement.

16. Mr Buck was not specialised in hernia surgery. In his report he recommended that the pursuer should seek the advice of a specialist surgeon. The day before he was due to give evidence Mr Buck produced a photocopy of an extract from a general medical textbook. He did not bear to have the same familiarity with the area of medicine as the other medical expert involved in the litigation.

17. Mr Buck's views on whether a person with a hernia should continue to work were, with the greatest respect to him, somewhat outdated. He accepted that was advice that had remained constant since World War I. Mr de Beaux did not agree with the advice. If it were necessary to do so it would be submitted that in a contest between those views, Mr de Beaux's view should prevail. However additional support for Mr de Beaux's view is found in the actions of the pursuer's GP: having diagnosed the pursuer with a left inguinal hernia the pursuer's GP took no steps to have the pursuer signed off work or placed on light duties. Allowing the pursuer to continue working is entirely consistent with the advice that Mr de Beaux would have given, and inconsistent with the advice that was given in respect of the right inguinal hernia by Mr Buck.

Dr Andrew Colvin

18. Dr Colvin gave straightforward and candid evidence. He was not called as an expert witness and did not seek to give expert evidence. He accepted, quite properly, that he did not have the expertise possessed by the medical experts.

Craig Dorward

19. Mr Dorward gave reliable and credible evidence.

Mr Andrew de Beaux, Consultant General and Upper Gastro-intestinal Surgeon

20. Mr de Beaux has very substantial experience in relation to hernias. He is the senior author, along with a number of his colleagues (some of whom are experienced experts in their own right) of a paper of the causes of groin hernias. He has appointments as general surgeon and as groin surgeon to a number of sporting bodies. He teaches other consultant surgeons about hernias. With the greatest respect to Mr Buck, in matters relating to the causes of inguinal hernias Mr de Beaux has substantially more relevant recent experience.

Harry Corrigan

21. It is submitted that Mr Corrigan's involvement in the case has substantially assisted the court. Mr Corrigan visited the premises and took photographs that were appended to his report. Those photographs have been of considerable assistance in the course of the litigation.

22. Having taken the time to visit the Dundee East Delivery Office, Mr Corrigan had an advantage over Mr Raeburn. He had seen delivery drivers loading mailbags into vans. He had spoken to employees at the Dundee East Delivery Office and understood the system of work put in place by the defenders.

23. His position contrasted Mr Raeburn's in that he accepted the need to use common sense, and pointed out that the use of the words "so far as is reasonably practicable" in the Regulations supported the application of common sense to the Regulations.

Richard Turner

24. It is submitted that Mr Turner gave straightforward evidence. Where he could not remember something he said so. His position is that he did not remember the pursuer reporting to him that he (the pursuer) had attended his GP and been diagnosed with a hernia. Mr Turner did not alter that position in his evidence, although he was quite content to accept that the conversation with the pursuer must have happened[5].

25. The pursuer is particularly critical of Mr Turner's failure to remember the conversation which must have taken place between the pursuer and Mr Turner on 18 or 19 August. That criticism is

difficult to understand. It is clear that the pursuer has, at some point, forgotten the details of that conversation. In adjustments dated 15 October 2007 the pursuer averred, "On the week before the accident, the pursuer had attended his General Practitioner complaining of pain in his groin area. He had advised his Manager, Mr Dorward of his problem." Evidently the pursuer's memory in October 2007 was incorrect. That remained his position on record until the morning of the first day of the proof when he amended his pleadings by changing "Dorward" to "Turner". In circumstances where the pursuer has, at times, forgotten the details of a conversation with his manager it is difficult to understand how he can fairly criticise the manager in question for forgetting the same details. One might have thought that the conversation ought to have been more memorable to the pursuer: he had never had a groin hernia before, whereas a manager will no doubt receive reports of medical conditions from many employees.

26. The pursuer also appears to be critical of Mr Turner for allowing the pursuer to continue with his duties on 19 August 2004, after the pursuer told Mr Turner about his visit to the GP. There is no force in this criticism. The pursuer had attended his GP and had received a diagnosis. Crucially the pursuer's GP had not signed him off work. In those circumstances is it contended that Mr Turner - with no medical qualification - should second guess the decision of the pursuer's GP and prevent the pursuer continuing to work? In what circumstances is it contended that a Delivery Office Manager should make his own medical judgment about the fitness of an employee - is it simply in the pursuer's case, or is it contended that Mr Turner should make these decisions about every employee and every GP? It is suggested that Mr Turner was in no position to make a medical decision, and did exactly as he should have done by referring the pursuer for occupational health assessment. If the pursuer is dissatisfied with the decision to allow him to continue to work following the diagnosis on 18 August 2004 then that is a matter that he must take up with his GP.

Nicola Sawers

27. The submission for the pursuer fairly accepts that Ms Sawers gave straightforward candid evidence. Where her evidence conflicted with that of the pursuer (in particular regarding the weighing of bags and also the manner in which bags were lifted by delivery drivers) her evidence should be preferred to that of the pursuer.

RELEVANT LAW

28. The case at common law adds nothing to the statutory cases. The case law since the introduction of the 1992 Regulations shows no case where a pursuer has succeeded at common law having failed to establish a breach of the Regulations.

29. The pursuer has withdrawn his claim based on breach of Regulation 4(1)(a).

When is Regulation 4(1)(b) of the 1992 Regulations engaged?

30. Regulation 2(1) provides the following definition:

""manual handling operations" means any transporting or supporting of a load (including the lifting, putting down, pushing, pulling, carrying or moving thereof) by hand or by bodily force"

31. The First Division in Hughes v Grampian Country Food Group Limited gave authoritative guidance regarding what constitutes a manual handling operation[6]. In that case it was contended that a literal approach to Regulation 2(1) should be taken. in relation to deciding what constituted a manual handling operation. The First Division did not accept that that was the correct approach, the Lord President opining[7]:

"It would offend against commonsense to suppose that the framers of the regulations intended to bring within its scope the activities of the seamstress lifting and replacing her needle, the librarian turning the pages of a book or the employee throwing an electrical switch. Indeed, the retrieving by the chicken trusser of the trussing string, which according to counsel would not be a manual handling activity, would on his argument also fall within that class. Accordingly, unless compelled by the absence of any tenable alternative, I am disposed to reject counsel's construction, which would appear to make virtually every human activity, other than the purely cerebral, one of manual handling."

Lord Eassie concurred[8]:

"I fully agree with your Lordship in the chair that commonsense should be brought to bear. In my view, one has to be dealing with a "load" in an ordinary workplace sense, rather than in the technical sense in which the word might be used in a scientific paper or textbook. Understandably, neither the daughter directive nor the regulations stipulate any minimum weight, but in my view that does not mean that the concept of "load" should be deprived of anything of the ordinary notion of a burden of some significance."

32. In the circumstances it is accepted that the weight of a 16kg mailbag would be a load, and lifting a 16kg mailbag would be a manual handling operation.

33. That itself however is not sufficient to engage the Regulations. Regulation 4(1)(b) only becomes engaged in circumstances where employees are undertaking:

"manual handling operations at work *which involve a risk of their being injured*" (Emphasis added).

34. In Taylor v Glasgow City Council[9] the majority of the Extra Division considered that risk must mean "foreseeable risk".

35. An element of realism must be brought to bear in considering whether or not there is a foreseeable risk: Koonjul v Thameslink Healthcare Services [10] where Hale LJ (as she then was) stated:

"For my part, I am quite prepared to accept those statements as to the level of risk which is required to bring the case within the obligations of regulation 4; that there must be a real risk, a foreseeable possibility of injury; certainly nothing approaching a probability. I am also prepared to accept that, in making an assessment of whether there is such a risk of injury, the employer is not entitled to assume that all his employees will on all occasions behave with full and proper concern for their own safety. I accept that the purpose of regulations such as these is indeed to place upon employers' obligations to look after their employees' safety which they might not otherwise have.

However, in making such assessments there has to be an element of realism. As the guidance on the regulations points out, in appendix 1 at paragraph 3:

"... a full assessment of every manual handling operation could be a major undertaking and might involve wasted effort."

It then goes on to give numerical guidelines for the purpose of providing "an initial filter which can help to identify those manual handling operations deserving more detailed examination"."

Regulation 4(1)(b)(i)

36. The obligation on the defenders under this part of the Regulations is to make a suitable and sufficient risk assessment.

37. It is submitted that Ms Sawers and Mr Turner carried out suitable and sufficient risk assessments, and that the results of those assessments were recorded[11].

38. Even if that is incorrect, a breach of Regulation 4(1)(b)(i) does not, of itself, lead to liability to make reparation. In Logan v Strathclyde Fire Board[12], in relation to this part of the Regulations Lord Eassie opined:

"I am not satisfied that a breach of the duty to make an assessment in itself gives rise to liability in damages. One can understand the legislative intention that employers should endeavour to formalise their approach to employees' safety by carrying out assessments. A failure to carry out that statutory obligation may be of evidential significance in deciding whether the employer has fulfilled the substantive duties in relation to working systems imposed by, for example, sub-paragraph (ii) of the Regulations [Reduction of Risk]. However, if an employer shows that he has in fact done all that could be required of him by reduction of risk to the lowest level reasonably practicable it seems to me to be immaterial that he may have achieved that result without having gone through the formal stage of carrying out an assessment. It appears to me that generally it is the failure to fulfil the substantive duty of taking proper precautions to reduce the risk of injury which will give rise to liability rather than the procedural obligation to carry out an assessment."

39. That approach has been followed in subsequent cases[13].

Regulation 4(1)(b)(ii)

40. The obligation under this part of the Regulations is to take appropriate steps to reduce the risk of injury to employees to the lowest level reasonably practicable. It is particularly important when considering this Regulation to bear in mind the need to take a common sense approach to the Regulations (following Hughes).

41. The duty is not one of insurance. An employer is obliged to reduce the risk to the lowest level reasonably practicable. The employer is not obliged to resort to extreme measures: Strange v Wincanton Logistics Limited[14].

THE CRITICAL FACTS

42. A list of proposed draft findings in fact is attached as appendix 1. For convenience, where the proposed draft finding in fact is supported by a production the process number of that production follows the proposed finding. That list is not intended to be exhaustive and the defenders consider that it does not contain controversial proposed findings. Rather it is made up of what the defenders suggest are the uncontroversial aspects of the evidence.

43. There are a number of facts established on the evidence that are of particular importance in this action and merit particular consideration.

The date of commencement of the pursuer's left inguinal hernia

44. The pursuer had been experiencing symptoms in his left groin for a number of weeks (since July 2004 according to the account given by the pursuer to medical staff at Ninewells Hospital)[15]. Mrs Grogan's evidence was that the pursuer had been complaining about a hot sensation in his groin for about three weeks before he went to see his general practitioner. He attended his general practitioner on 18 August 2004 at which appointment the left inguinal hernia was diagnosed and he was referred for surgery[16].

The defenders' system of work

45. It is not controversial that the defenders had in place a system of work. The pursuer was provided with equipment and with training. The training records lodged in process for the pursuer showed that he attended a course on Safe Lifting and Handling in 1998. The pursuer attended a number of other more general courses after that. He accepted that a questionnaire that he had completed in 2003 suggested that he had received manual handling training since 2000[17]. In addition the defenders provided frequent refresher training at the Work Time Listening and Learning sessions. On any view of the evidence those sessions took place very frequently and touched, from time to time, on manual handling.

46. In terms of that system no mailbag was to weigh more than 16kg (and some mailbags required to weigh substantially less than that). It should be noted at this stage that the defenders' system of work was devised in conjunction with the Communication Workers Union. Mr Menzies was and is a CWU Health & Safety Representative. He considers that the defenders' system is theoretically a good one. Stephen Thomson supports him in this. Richard Turner and Nicola Sawers described the system as a good one. The pursuer himself did not complain that he felt that 16kg was an inappropriate weight for a mailbag. Mr Corrigan's view was that the defenders' system was a robust one, and that they had complied with all of their statutory duties. The defenders' system of work is supported by the defenders' expert, and by all of the factual witnesses, including in the case of Mr Menzies the CWU Health & Safety Representative and in the case of Mr Thomson an employee who operates it. The only criticism of the system in principle came from Mr Raeburn.

47. The defenders took steps to ensure that the system was implemented. It is a matter of agreement that signs were in place in the Dundee East Delivery Office at the relevant time[18]. Scales were available to weigh mailbags. If a postman driver such as the pursuer identified a bag that he considered to be overweight then he was to report that to a manager. The manager would then either arrange for the delivery postman who had packed the bag to split it into two bags or alternatively would split the bag down him or herself. The pursuer was aware of this system and put it into action. He would never lift overweight bags - if he discovered an overweight bag he would leave it in the York trolley and would take it to a manager in the York trolley.

48. The defenders took steps to enforce the system. Nicola Sawers spoke to one of the defenders' employees being suspended for refusing to split down an overweight bag. Mr Menzies confirmed that he was aware that delivery postmen were required to split down overweight bags, and that refusing to do so would be a disciplinary matter. Mr Menzies provided letters that he had written to a number of delivery office managers over the years following his inspections of the Dundee East Delivery Office. Nowhere in those letters does Mr Menzies suggest that there is a problem with bags being overweight (as distinct from bag weights not being recorded).

49. It will come to be submitted that the defenders took all reasonably practicable steps to reduce the risk of injury to the pursuer to the lowest level reasonably practicable.

<u>The weight of the mailbag being lifted on 27 August 2004</u>

50. The pursuer's position in evidence was that he would never lift bags that weighed more than 16kg. In examination in chief the pursuer was asked about having written "not overweight" on the form produced at 5/3 of process:

"Q - You say that the bag was not overweight?

A - Yes.

Q - You didn't feel that the bag was overweight?

A - No, it didn't feel overweight."

In cross-examination the pursuer confirmed this a number of times:

"Q - You were never forced to carry overweight bags?

A - It was through my own determination that I never had to carry overweight bags"

51. And later:

"Q - You didn't think that the bag that you were lifting at the time was overweight?

A - Yes.

Q - It was not over 16kg?

A - Yes.

Q - How far underweight was it?

A - I would suggest from the way postmen pack bags that it was light, just on the 16kg target"

Q - In terms of the defenders' system of work - you always followed it, you took overweight bags to be split?

A - Yes.

Q - You would never deliver overweight bags in your van?

A - Yes."

52. The pursuer's evidence was consistent with the position he had adopted when he completed the accident report form[19] where, in response to a question about why the item was not weighed the pursuer wrote, "Not overweight". Craig Dorward confirmed that the pursuer had not given him any indication that the bag had been overweight[20]. Had the pursuer sought to depart from that position in evidence he would have been challenged about having completed the form in the terms in which he did.

53. The examination in chief of the pursuer's medical expert also proceeded on the basis that the maximum weight was 16kg[21].

THE APPLICATION OF THE FACTS TO THE LAW

54. When attempting to ascertain whether any breach of statutory duty has taken place the task involves applying the facts of the case to the relevant law. That exercise is most easily attempted under reference to the relevant parts of the 1992 Regulations.

<u>Is Regulation 4(1)(b) engaged?</u>

55. It is respectfully suggested that Regulation 4(1)(b) is not engaged in this case. It has been noted that the Regulation is only engaged by manual handling operations involving a foreseeable risk of injury. There is no evidence before the court that would allow the court to conclude that any risk of injury was foreseeable. None of the expert witnesses were asked about the foreseeability of injury. No evidence was led of previous accidents. The fact that the pursuer has suffered a hernia does not assist for two critical reasons. The first is that the pursuer's hernia existed before the breach complained of.

The second is that the pursuer, in common with other men, has a twenty seven per cent lifetime risk of developing an inguinal hernia.

56. It is also relevant to note that delivery postmen carry 16kg mailbags on their rounds. Stephen Thomson, a delivery postman, did not complain that a 16kg bag was too heavy. Those rounds will be some considerable distance further than the distance that the pursuer requires to carry bags. The weight limits have been developed in conjunction with the CWU. Mr Menzies did not indicate that he was concerned that there was a risk of injury to CWU members in lifting a 16kg mailbag.

57. It is accepted that at certain levels lifting particularly heavy weights would give rise to a foreseeable risk of injury. 16kg is not such a weight. It is less than the weight of a suitcase packed for air travel. Mr Corrigan observed the defenders employees lifting mailbags and considered that they were able to do so easily. In Strange v Wincanton the learned Sheriff described the risk involved in taking approximately half of the weight of a 23kg pallet as "absolutely negligible"[22]. Mr de Beaux's evidence was that 16kg is not a particularly heavy weight[23], and that is consistent with the lack of evidence about foreseeability of risk of injury. It is relevant to notice that the HSE Guidance would allow a man to lift weights of up to 25kg close to his body without requiring that operation to be specifically risk assessed.

58. In the circumstances it is suggested that there is no evidence before the court that would allow a finding to be made that lifting a 16kg mailbag is an operation that involves a foreseeable risk of injury. In those circumstances Regulation 4(1)(b) is not engaged and the pursuer's case must fail.

59. *Esto* that is not correct and Regulation 4(1)(b) is engaged its component parts are analysed separately.

Regulation 4(1)(b)(i)

60. The defenders carried out risk assessments both before and after the accident. Those risk assessments are produced, and the authors of the assessments spoke in evidence to having made them. The pursuer criticises the defenders' management for using the same form of risk assessment, but even Mr Raeburn did not support that criticism - he saw no purpose in creating pointless paperwork.

61. In any event, a breach of this part of the Regulations does not, of itself, give rise to liability to make reparation. In the circumstances no further consideration of this part of the Regulations is required.

Regulation 4(1)(b)(ii)

62. The pursuer contends that this Regulation has been breached for a number of reasons: the defenders' alleged failure to reduce the weight of the mailbags to 5 (or perhaps 3) kilograms; the alleged failure to institute a proper system for checking the weight of all of the bags; the alleged lack of sufficient assessment of the activity of lifting bags; the alleged failure to instruct postmen not to overfill bags; and the failure to have all mailbags weighed and the weights recorded. It is accepted that the onus of establishing that risk was reduced to the lowest level reasonably practicable lies with the defenders.

Failure to reduce the weight of mailbags to 5 or 3 kilograms

63. This is a criticism that the defenders' system of work is flawed in principle in that it allows employees to lift bags weighing up to 16kg.

64. The only evidence, which suggested 16kg was an inappropriate weight limit, came from Mr Raeburn. In that regard his evidence conflicted with all of the other evidence in the case - even the evidence given by Mr Menzies and Mr Thomson on behalf of the pursuer. It is incorrect to say that

both health and safety experts agreed that the weight of a mailbag should be 5kg. That was not Mr Corrigan's position. In any event, the pursuer's argument in this regard appears to proceed on the basis that the weight figures identified in the risk assessment filters are limits above which lifting operations ought not to take place. That is not correct. The purpose of the filter is to filter out operations that are so low risk that no risk assessment is required: see paragraph 2 of page 54 of the HSE Guidance.

65. It is self evident that reducing the maximum weight of mailbags below 16kg would have involved extra costs and inconvenience. Such costs and inconvenience were not justified to attempt to reduce whatever risk is posed by lifting a 16kg mailbag further. To reduce the maximum weight of a mailbag to 5kg would be an inappropriately extreme measure (borrowing the phrase used by Sheriff Kinloch in Strange) and fails to apply the commonsense required by the First Division in Hughes, or the element of realism called for by Hale LJ (as she then was) in Koonjul.

Failure to institute a system of checking all bags

66. It is accepted that not every bag that left the Dundee East Delivery Office was weighed.

67. It is suggested that requiring every bag to be weighed is an inappropriately extreme measure, which fails to apply common sense and lacks realism.

68. In any event, *esto* that is incorrect and the defenders are in breach of duty for failing put in place a system where every single mailbag is weighed, no harm has resulted from that breach. The pursuer was clear in his evidence that he never lifted overweight mailbags. Whether or not all bags were weighed and the weight recorded was immaterial - he implemented the system himself, as the defenders intended.

Lack of sufficient assessment

69. This argument has already been addressed.

Failure to instruct postmen not to overfill bags

70. There is no evidence to support this line of argument. No witnesses spoke to being unaware of the weight limits put in place by the defenders.

Failure to have all mailbags weighed and the weights recorded

71. It is accepted that not every mailbag was weighed and the weight recorded. Requiring every bag to be weighed and the weight recorded would be an extreme measure. To do so would be impractical and unrealistic.

72. It is not clear how failure to weigh a bag constitutes a breach of the Regulations. *Esto* the failure to weigh a bag and record the weight did constitute a breach of the Regulations, it is not clear what harm would flow from failure to weigh and record weight.

Failure to take account of the pursuer's stature

73. The submission appears to be advanced on behalf of the pursuer that he should, by virtue of his height and weight, be treated as if he were a woman: see paragraph 5.7.1 of the written submission. No evidence was led whatsoever about what effect the pursuer's stature might have on his ability to lift loads of up to 16kg. In any event, the defenders' system applies equally to male and female employees. It is not clear what measures the pursuer suggests the defenders ought to have taken as a result of his stature, beyond those already addressed.

Contributory negligence

74. As noted above, the pursuer's evidence was that he never lifted overweight bags. The defenders did not challenge that evidence. Accordingly there is no basis for a finding of contributory negligence. The position appears to be that the pursuer implemented the system of work strictly.

CAUSATION

Right inguinal hernia

75. As a preliminary matter, it appears from the pursuer's written submission that the case regarding the right inguinal hernia has been abandoned. It is appropriate for the pursuer to do so. In relation to the right inguinal hernia there was no index incident which was said to have caused or exacerbated the hernia. The case pleaded appeared to be based on the cumulative effect of lifting bags. The potential cumulative effect of lifting bags was not explored in detail with either medical expert. Mr Buck's report does not suggest a link between work and the right inguinal hernia. The history of the symptoms of the pursuer's right inguinal hernia also suggests that it is unrelated to his employment. His GP identified an early weakness in 2004. That remained asymptomatic, and was asymptomatic on 29 May 2008. Apart from the period from December 2004 to February 2005 the pursuer had worked constantly between April 2004 and May 2008 and, on his pleadings, had worked harder following his return to work. Despite that work, the pursuer's right inguinal hernia remained asymptomatic. However the pursuer went off work in May 2008. By October and November 2008 the pursuer was reporting significant symptoms to Occupational Health personnel. Those symptoms could not have any logical connection to the pursuer's employment, as Mr Buck accepted[24].

Left inguinal hernia

76. It was common ground between the medical experts that inguinal hernias were caused by a congenital defect in a person's collagen. It was a matter of agreement that hernias are sometimes present in children[25].

77. It also appears uncontroversial that the left inguinal hernia could not have been caused by any event on 27 August 2004, as it existed before that date[26].

78. Further, the experts were agreed that the lifetime risk of a man developing an inguinal hernia was twenty seven per cent, regardless of occupation[27].

The role of intra abdominal pressure (IAP)

79. Some time was spent in evidence discussing the causes of hernias with the medical experts, and in particular the relevance of IAP. The experts considered that while the cause of a hernia was a congenital pre-disposition, there might be points in the development of a hernia where a rise in a person's IAP might precipitate a degree of structural failure. The analogy of a tyre with a defect may assist: a tyre that has an inherent weak point is likely to burst at some point.

80. The pursuer's case appears to be based on the assertion that lifting a mailbag produced a rise in IAP. Mr Buck considered that to be a likely explanation. Mr de Beaux referred to the article that he co-authored and which featured a table borrowed from an article by Professor Cobb showing the levels of IAP produced by certain manoeuvres[28]. That table does not support the assertion that lifting causes significant increases in IAP. What that table shows is that significant increases in IAP are caused by jumping, and by engaging the lungs (for example by coughing or performing a valsalva) and not by anaerobic exercise, for example a bench press or arm curl.

The experts' evidence

81. Mr Buck was - correctly - extremely reluctant to suggest that the left inguinal hernia was caused by a lifting manoeuvre. His view in this regard is well summarised in a passage of evidence at the beginning of his cross examination:

"Q - Now, to begin with I just want to make sure that I understand your position. You consider, do you, that both of Mr McCabe's inguinal hernias were caused by his work?

A - Causation is a difficult word to define in this situation because we know that there is a predisposition in that particular anatomical site for a hernia. So when we talk about causation it is more a question of correlation, the appearance of the hernia in relation to the activity. Now, there may have been a predisposing cause for it, but it was initiated, was it produced by that kind of activity, the strenuous activity...

Q - Indeed?

A - ...occurred at the time.

Q - Now, perhaps then rather than say that the hernias were caused by work, you say there is a temporal association certainly between the first, the left inguinal hernia?

A - Yes, the events occurred concurrently.

Q - Yes, but it wasn't really caused by work?

A - I think, if I can sort of generalise, there seems to be a confusion in the medical terminology and the medical understanding of conditions where something that appears is attributed to your cause. Go back, I used to have a slide which I always presented correlation does not mean causation."

82. The pursuer seeks to place emphasis on certain passages from the evidence of Mr de Beaux. However none of those passages contain references to causation. The words used (conjunction, a relationship, timeliness, connection) do not amount to causation. They all hint at the same thing - a temporal association. That is insufficient to constitute causation in law.

<u>The approach to questions of causation</u>

83. The defenders' position is that no breaches of statutory duty have taken place. If however the court considers that any breaches of statutory duty have taken place, then it is respectfully suggested that the following approach should be adopted.

84. First, one must identify what the breach of statutory duty is. Secondly (assuming for the moment that one accepts that IAP has some sort of role in relation to hernias) one must identify what the consequences of that breach of statutory duty are in terms of IAP. Put another way: what is the IAP produced by the breach, and how does that differ from regular IAP. Thirdly one must consider what effect the IAP produced by the breach of statutory duty has had, beyond the IAP which would have been present in any event even if there had not been a breach of statutory duty.

85. An example may assist. If it were to be considered that the defenders ought to have put in place a system of work where a mailbag was to weigh no more than 3kg then the lifting operation on 27 August 2004 would be a breach of statutory duty. Identifying that breach is step one. Step two is to assess what the consequences of that breach are in terms of IAP. There is no evidence available in this case to allow step two to be taken. No evidence was led regarding what amount of IAP is produced by any particular manoeuvre. As a result of that step three is impossible. There is simply no evidence available which would allow the pursuer to establish a case based on raised levels of IAP.

QUANTUM

86. The defenders' position is that, for the various reasons set out above, liability to make reparation does not attach to the defenders. *Esto* that is incorrect the defenders' position on quantum is as follows.

87. The pursuer does not appear to continue to insist in his action regarding the right inguinal hernia. Therefore questions of quantum focus on the left inguinal hernia.

Solatium

88. It is accepted that the pursuer's left inguinal hernia will have caused him discomfort. He underwent surgical repair on 7 December 2004. The treating surgeon wrote to the pursuer's GP on 7 December 2004 advising that the pursuer could return to normal physical activity as soon as he felt fit[29]. By 14 March 2005 his GP Registrar considered that "he has made a full recovery from his operation"[30]. Mr Buck said of the repair operation in his report: "The repair is sound and there is no bulge or weakness whatsoever. The result of the operation is excellent.[31]" He confirmed in his evidence that the pursuer had made a full recovery[32]. Any ongoing symptoms were of the nature of anxiety, and Mr Buck confirmed his view that the operation had dealt with the problem of the hernia, and it was sound, and he could not attribute any persistent symptoms to any pathology[33]. Mr de Beaux agreed with Mr Buck[34]. In September 2008 the pursuer was examined at Ninewells Hospital and it was said of his left groin: "He had a hernia repair of the left side by my colleague, Mr Aitchison a couple of years ago and this repair is perfect. No sign of recurrence."[35] The occupational health records relating to the pursuer noted on 23 January 2009 that "Has previously had the left side done 4 yrs ago. This has been successful."[36] In cross-examination Dr Colvin agreed that the left inguinal hernia repair was a complete success. This is not simply a case where a patient has made an adequate, or even a good, recovery from an operation. The repair has been described as excellent and perfect, and the pursuer has made a full recovery.

89. The pursuer was asked in cross-examination if he agreed with the views expressed by Mr Buck and Dr Chong about the extent of his recovery. He confirmed that he did. That passage of cross examination concluded as follows:

"Q - You were fully recovered?

A - Yes. The wound had healed. The problem was with pain I'd experienced prior to the operation and that had gone."

90. In these circumstances the award of solatium would appropriately compensate the pursuer for a period of suffering from 27 August 2004 until around February 2005. The Guidelines for the Assessment of General Damages in Personal Injury Cases[37] suggest the following range of awards in hernia cases:

"Uncomplicated indirect inguinal hernia, possibly repaired, and with no other associated abdominal injury or damage. £2,200 to £4,850."

91. It is suggested that in circumstances where the pursuer has had a repair operation carried out promptly and has made a full recovery that the award should be at the lowest end of the range. The sum of £2,200 is suggested. The pursuer is entitled to interest on that amount from February 2005 to the date of decree. The present judicial rate of interest is eight per cent per annum and interest at that rate from February 2005 accordingly interest amounts to £1,026[38].

Past wage loss

92. The defenders agree that loss of earnings to 5 February 2005 would amount to £1,569.38. There are no recoverable benefits that require to be taken into account.

<u>The pursuer's scenarios</u>

Scenario 1

93. Scenario 1 appears to cover the situation if it is found that the defenders are responsible for the pursuer's left inguinal hernia, but that the pursuer had made a full recovery by around February 2005 and none of his subsequent difficulties are the defenders' responsibility. The defenders' suggested figures for quantum in that situation are set out above.

Scenario 2

94. The pursuer's Scenario 2 appears to be based on symptoms in relation to the pursuer's left hernia lasting until June 2008 when he was signed off work following the examination by Mr Buck. There is simply no evidence to support this scenario, which is directly contradictory to Mr Buck's report and evidence. Engaging with the scenario though, the defenders suggest that the award ought to be at the top end of the JSB Guidelines range identified above. Interest would require to be added at eight per cent per year from June 2008. It is not clear how the pursuer has calculated the wage loss component for this scenario. The appropriate amount of wage loss appears correct at £3,365.

Scenario 3

95. The pursuer's third scenario appears to seek to add compensation for the right inguinal hernia. It is difficult to understand how compensation could be awarded on this basis in circumstances where the pursuer's written submission appears - quite properly - to have abandoned the claim based on the right inguinal hernia. Nevertheless, attempting to engage with this scenario the defenders suggest that a solatium figure of £5,000 would be appropriate. It is not appropriate to "tot up" injuries - that is to say that it is not the case that bilateral inguinal hernias should attract twice the solatium award that a unilateral hernia would attract.

Scenario 4

96. The pursuer's fourth scenario appears to be based on the premises that (i) the pursuer is suffering ongoing symptoms for which the defenders are liable and (ii) that his medical retirement was caused by those symptoms.

97. The defenders position is that the pursuer's retirement is a matter of choice on his part, and not caused by any medical condition, far less the left inguinal hernia. Neither medical expert supported the pursuer's decision to retire. He was of course retired by Dr Colvin. The pursuer's position in submission is that the retirement was based on Dr Colvin's understanding that the pursuer was struggling to cope both from a physical and psychological point of view. Any psychological aspect to the pursuer's condition is unconnected to this litigation - reference is again made to Mr Buck's views in that regard. As regards the physical aspect, the main complaint to Dr Colvin appears to have been symptoms in his left groin[39]. The pursuer's description to Dr Colvin of suffering from symptoms in his left groin do not sit easily with the substantial body of evidence already referred to that he had made a full recovery from his left inguinal hernia. Dr Colvin referred several times in his evidence to the pursuer suffering from functional problems. Dr Colvin referred in his assessment to the pursuer having been assessed as ten per cent disabled. He had been unaware that the Industrial Injuries Disablement Benefit application form[40] omitted reference to the diagnosis on 18 August 2004 and instead sought to represent that the pursuer's groin "had been a bit numb for a couple of days" before the incident on 27 August 2004 (when of course the true position was that the pursuer had been referred for surgery) and described past medical history as "None of note". Dr Colvin described these

as important omissions. When asked what he made of these omissions he fairly suggested that that question ought to be referred to the author of the document, but that the omissions were important in relation to the medical assessment.

98. So far as retirement is concerned it is suggested that by 2009 the pursuer is simply fed up of working. He wishes to retire as quickly as possible, and to that extent overplays the extent of his symptoms in order to obtain medical retirement. Accordingly no award of loss of earnings should be made for the future.

99. If that is incorrect and an award of loss of earnings for the future should be made then the award should be one year's net earnings: £16,768. The pursuer is presently 62 years old. He has been talking to his GP about retirement since 2005[41] and appears to have had in contemplation at that time retiring at the age of 63.

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[1] See the dicta below of the Lord President and Lord Eassie from Hughes v Grampian Country Food Group Ltd

[2] See below in the Relevant Law part of this submission.

[3] In paragraph 4.2 of his report (5/16 of process) he misquotes paragraph 31 of Appendix 3 to the Guidance (6/6/3 of process, page 59) by inserting the additional sentence "Such operations should come under very close scrutiny".

[4] See the HSE Guidance, paragraph 57 of page 13 and paragraph 2 of page 54.

[5] See the Business Referral Form dated 19 August 2004 which is found at pages 63 and 64 of 5/27 of process.

[6] 2007 SLT 635

[7] At paragraph 15.

[8] At paragraph 34

[9] 2002 SC 364

[10] [2000] PIQR P123

[11] Pages 5 and 6 of 6/1/5 of process.

[12] Lord Eassie, 12 January 1999

[13] See for example paragraph 41 of Strange v Wincanton Logistics Limited, Sheriff Kinloch, Sheriffdom of Lothian and Borders at Livingston, 1 June 2010 and MacDonald v Wood Group Engineering Limited [2010] CSOH 165

[14] Sheriff Kinloch, Sheriffdom of Lothian and Borders at Livingston, 1 June 2010

[15] Page 10 of 5/18 of process under heading "Medical Pre operative Examination" where it is recorded "For left inguinal hernia repair - hernia since July '04"

[16] See entry dated 18 Aug 04 on page 58 of 5/14 of process.

[17] Production 6/4/1, page 2, question 6.

[18] See oaragraph 11 of the Joint Minute of Agreement lodged in process

[19] 5/3 of process

[20] Report of Commission of 8 July 2010, page 54C.

[21] Extract of Evidence, Tuesday 10 August 2010, page 10E-F, in a discussion with Mr Buck about a typographic error in his report: "Q - I think as we now know it was a maximum weight of 16kgs"

[22] Paragraph 27.

[23] Extract of Evidence, Tuesday 26 October 2010, page 275B.

[24] Extract of Evidence, Day Four, page 85C: "Q - Mr McCabe though hasn't worked since you examined him. So, from that we must conclude, must we not, that work did not cause his right inguinal hernia to deteriorate? A - According to the symptoms, that appears to be so. Q - Whatever the symptoms are at this time, work did not cause them as he has not worked since you saw him? A - Yes."

[25] Extract of Evidence, Day Four, page 56F regarding Mr Buck and page 153C-D for Mr de Beaux.

[26] Extract of Evidence, Day Four, page 81C regarding Mr Buck.

[27] Extract of Evidence, Day Four, page 97C Mr Buck in response to a question from the Court; and page 128E in relation to Mr de Beaux's evidence.

[28] Production 6/3/1, page 11.

[29] Production 5/14, page 36

[30] Letter from Dr Y Chong to Ms Carol Blain dated 14 March 2005, page 35 of 5/14

[31] Production 5/2 of process, page 4.

[32] Extract of Evidence, Day Four, page 81E.

[33] Extract of Evidence, Day Four, page 82C

[34] Extract of Evidence, Day Four, page 185B-C

[35] 6/9/1, page 6, letter from Mr C Kulli, Consultant HPB and General Surgeon to Dr SB Galbraith

[36] Production 5/27, page 13.

[37] The Judicial Studies Board, 10th edition, 2010

[38] £2,200 x 0.08 x 5.83 years. Note that this interest calculation is based upon the pursuer's recovery being complete in February 2005. If that is not correct then the interest calculation (and rate) will require to be reconsidered.

[39] Production 5/27, page 2.

[40] Production 6/8/8

[41] See the entry dated 8 February 2005 (the day of the pursuer's return to work following his absence for repair of his left inguinal hernia) on page 57 of 5/14 where the GP notes "Retire maybe in 6 yrs > 57"