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

[2024] SC EDIN 43

PIC-PN1481-23

JUDGMENT OF SHERIFF K J CAMPBELL KC

in the cause

AGNIESZKA SWIERZKO

Pursuer

against

MATHIESONS BAKERY LIMITED

Defender

Pursuer: Calderwood; Thompsons, solicitors, Edinburgh
Defender: Hennessey; Keoghs Scotland LLP, solicitors

EDINBURGH, 11 October 2024

Findings in fact

1. The pursuer commenced employment with the defender on about 23 August 2019. She was employed as the production operative at the defender's factory at 2 Central Park Avenue, Larbert, Stirlingshire.

2. The outset of her employment, the pursuer received training from the defender on 23 August 2019. This included training in manual handling and lifting procedures. The training material included instructions to assess the weight of a load, and to seek assistance of the load was too heavy for one person. The training material also included instructions to bend from the knees and lift the load from the knees to a carrying position, and to hold the load close to the body and to avoid twisting the body. The pursuer signed a summary of the advice and instruction on 23 August 2019 (6/1 of process).

3. At the end of the training on 23 August 2019, the pursuer completed a questionnaire testing knowledge of the content of the manual handling training (6/2 process).

4. On 31 May 2020, the pursuer was working in the course of her employment with the defender as a production operative. She was primarily engaged in work on the production line.

5. On that day, the pursuer was instructed to collect twelve trays of cream for use on the production line. The trays were to be collected from a window next to the production line, which formed part of the sanitiser tunnel within the defender's production plant. Each tray contained a ten litre bag of cream. Each tray was plastic and a little wider than the pursuer's body.

6. The pursuer picked up each tray at about hip or waist height and lifted it to almost level with her shoulders. Her arms were slightly extended in front of her. The trolley was to the pursuer's left hand side at 90 degrees to the window from which she was collecting the trays.

7. The purser lifted around eight or nine trays and stacked them in turn on a flat trolley. The pursuer immediately felt pain in her back after lifting the ninth or tenth tray from the window. The pursuer contained to work and took all twelve trays to the production line.

8. The following day when the pursuer got up for work she was unable to get out of bed immediately and fell to the floor when she tried to do so. She contacted the defender and left a voice mail stating that she would be unable to come to work. She was called back by one of the defender's employees between 9am-10am. The pursuer stated in the course of that call that she suffered back pain following picking up the cream bags the previous day.

9. The pursuer was absent from work for three months.

10. On 30 October 2020, the pursuer attended a return to work interview at the defender's factory. 6/11 of processes of the record of that interview made by a member of the defender's staff. On 30 October 2020, the pursuer reported to the defender's staff she believed the bags of cream each weighed around 10 kilograms.

11. On 29 November 2020, the pursuer left her employment of the defender following the expiry of her contact with the defender.

12. The pursuer suffered an acute back strain as a result of lifting the bags of cream, from a relatively low height to a relatively high height. The pursuer's symptoms resolved within six months.

13. Prior to 23 August 2019, the defender carried out a risk assessment in relation to the risk of injury in carrying out manual handling operations.

14. The pursuer suffered back pain following the birth of her two children by caesarean section in about 2005 and 2006. The pursuer received treatment from a physiotherapist, including massage, and stretching and strengthening exercises for her stomach muscles.

15. The pursuer received physiotherapy on subsequent visits to Poland.

Findings in fact and law

1. The pursuer did not suffer loss injury or damage as a result of the defender's fault and negligence.

Introductory

[1] This action of damages for personal injuries arises out of an accident which befell the pursuer in the course of her employment with the defender on 30 May 2020. The defender

denies liability. However, parties have been able to agree a number of matters relating to the evidence, and they have also helpfully agreed quantum of damages in the event the court finds in the pursuer's favour. These matters are recorded in a Joint Minute, 23 of process. Parties produced a joint bundle of documents, and I refer to documents by the process number or JB page. I heard proof on 16 and 18 July 2024. The pursuer gave evidence through a Polish interpreter, and led evidence from Mr Andrew Brooksbank, consultant orthopaedic surgeon. The defender did not lead evidence from any witnesses.

[2] At the outset of the proof, the pursuer made a motion to allow a fourth inventory of productions to be lodged, although late. The inventory contained one document, namely the HSE Guidance on Manual Handling (2016). Mr Calderwood submitted this guidance was relevant because the common law duties of reasonable care on an employer were informed by the Manual Handling Operations Regulations, and the HSE Guidance was designed to assist in giving content to that. The guidance would be well known to the defender and to the court. The pursuer's witness Mr Brooksbank was to be led in evidence inter alia about the risk of injury and the document might assist in that context. The motion came at this stage because Mr Calderwood had been instructed at the stage of the pre-trial meeting and had advised the guidance should be lodged for the proof.

[3] The motion was opposed both on the utility of the document and the timing of the motion. Although the pursuer made averments about the regulations, there was no averment about the weight of the bags of cream nor about weights which might be consistent with the HSE Guidance. The guidance is not self-proving; see *Goodwillie* v *B&Q* [2020] SC EDIN 2, paragraph 119. Mr Brooksbank might be able to speak to risk due to weight at a certain level of generality, but not at the level of detail required. As to timing, if the guidance was allowed to be lodged and referred to, the defender would be prejudiced

because the line the pursuer might take in reliance on the guidance would not be evident from the case on record. Nor has the pursuer included a report from a more appropriate expert (eg an ergonomist) to indicate the direction of her case.

[4] I refused the pursuer's motion. I consider it came too late. While the guidance is a public document, it is not akin to case law or statute, nor is it self-proving and requires to be spoken to in evidence (see *Goodwillie*, paragraphs 118-119). I was not persuaded that Mr Brooksbank, a consultant orthopaedic surgeon, would be an appropriate witness to speak to the guidance. I also considered there was force in the defender's submission that the precise direction of the pursuer's case in reliance on the guidance was not clear from the Record or from the other documentary evidence, and there was a real risk of prejudice to the defender, with the possibility of a delay for evidence in replication, in what is, on the face of it, a fairly straightforward case.

The evidence

The pursuer

[5] Agnieska Swierzko (41), was employed as a production operative at the defender's factory at Larbert and had a range of duties in relation to the preparation of cakes and cookies. On 30 May 2020, the pursuer was engaged in cutting fruit and was asked by her team leader, Sherry Anne, to collect containers of cream from an area with a window adjacent to the production line. This was the first occasion the pursuer had been asked to do this task. The containers were heavy and were generally collected by male operatives. The cream was packaged in plastic bags contained within plastic containers or cages. There was 10 litres of cream in each bag. The pursuer was initially uncertain how much each bag weighed, but agreed that she had told someone within her employer that each bag

weighed 10kg, that would be correct (under reference to 6/10, JB136). Each container was approximately 300mm high and at least 600mm wide, it was certainly wider than the pursuer's body. The pursuer picked up each tray at about hip or waist height and lifted it to almost level with her shoulders, and her arms were slightly extended in front of her. The pursuer placed the trays on a trolley to her left-hand side at 90°. When she picked up one of the trays and lifted it to shoulder height she felt discomfort and pain in her back. That was after she had stacked back eight or nine trays. The pursuer thought it was probably the ninth tray she was stacking at the time but was not absolutely certain. The pursuer did not seek assistance with the task because it was during the pandemic and she was the only person on the line who was less busy than others. The pursuer told her supervisor, Sherry Anne, that she felt pain, and was put on different work, which in fact the pursuer was unable to do because of the discomfort she felt. The pursuer initially felt pain similar to standing on the line for a number of hours, but the pain was getting stronger and stronger and when she finished work she had difficulty getting into her car. The following day when the pursuer got up for work she was unable to get up and fell to the floor. She felt her legs were paralysed. She phoned the defender and said she would not be able to come to work. She initially left a voicemail. She was called back between 9.00am and 10.00am. She could not recall to whom she spoke but had explained that she was picking up cream and suffered back pain.

[6] The pursuer was familiar with the phrase "manual handling", and understood it to mean assessing the height and weight of a particular item, the ground one is moving on, and if the item is heavy asking for someone to assist with moving it. The pursuer had received two sets of training at the start of her employment with the defender. The first related to fire; and the second was regarding health and safety. The pursuer recalled seeing

6/1 (JB116) Manual Handling Guidance; she could not recall exactly what part of her training this had formed but thought it likely to be part of the health and safety training. The pursuer and a number of others had been taken to a room and shown a video in relation to health and safety. The pursuer could not recall whether further training had been delivered. She had seen the video and the group had then been given a number of forms to read and fill in. No-one had demonstrated lifting techniques, and no-one had watched the pursuer or other participants practicing lifting techniques.

[7] The pursuer had never had any previous problems with her back. The pursuer had not had physiotherapy prior to the accident. The pursuer agreed that 6/5 is a copy of a note of a meeting which she had with two members of the defender's staff on 13 November 2020. On JB125, it is recorded that the pursuer had gone to Poland for physiotherapy. The pursuer recalled the meeting and had asked the defender to provide someone to translate for her, but no-one had been provided. The pursuer speaks some English but felt that she had not understood everything and that the defender's staff had misunderstood what she was telling them. The pursuer had had physiotherapy after the accident and that was provided in Scotland.

[8] In cross-examination, the pursuer denied that she had said that the note 6/5 was not accurate; her position was that she did not understand all of the questions and that not all of her answers had been understood. The pursuer accuracy of the words written in JB125 except "attended physiotherapy". The pursuer explained that the sentence "he said my stomach muscles were not strong and caused back pain" referred to her being told after having a C-section that her belly muscles were weaker. Initially the pursuer said she had been told this by a doctor and then corrected herself to say it was by the physiotherapist.

The pursuer said she did not suffer back pain after having had a C-section, she suffered back pain after the accident. The pursuer agreed with the record:

> "We did massages and stretching my back, one hour went two times. Continue to do the exercises to strengthen muscles in tummy - push on the muscle - when push tummy it relieves back pain."

The pursuer understood what the words mean in English, but did not accept it was accurate. The pursuer visited a physiotherapist in Poland in August 2020, which was during the period she was on sick leave after the accident. The pursuer denied attending a physiotherapist prior to the accident. With reference to the meeting note on JB125, the pursuer agreed that she had had a C-section in 2006, but did not attend physiotherapy at that time. That part of the note was not accurate. The pursuer thought the two employees of the defender had misunderstood what she meant and recorded it wrongly. 6/6 of process (page 127) is a return to work form dated 19 September 2020. The reason for absence is stated to be sciatica. The pursuer understood what that word meant. She had never had a diagnosis of sciatica. It was a word which she knew from her doctor and was what her doctor had told her at the time. The form had been filled in by Sherry Anne. The doctor had told her that because it related to lower back pain.

[9] The pursuer agreed that 6/1 (JB116) signed by her and dated her first day at work with the defender. It formed part of her induction training. The pursuer agreed that 6/2 (JB117) is a Manual Handling Questionnaire completed by her and signed on the same occasion. That document was the test to see that she understood concepts to do with manual handling. The pursuer had not understood all the questions and had filled in the answers the same as the person next to her. The pursuer denied that her knowledge of manual handling as involving amongst other things assessing an object before lifting it had come from her training. 6/3 (JB118) is a medical screening form signed by the pursuer on

23 August 2019. The pursuer agreed that she had not declared any medical issues to the defender at that time. 6/4 (JB120) is a medical screening form completed by the pursuer on 30 September 2020, after the incident and was completed she thought on her first day back. On JB121, there was a question "do you suffer from rheumatism, arthritis, back trouble, or upper limb trouble?" and the pursuer had answered "no". The pursuer said that in September 2020 she had not fully understood that question. She was afraid if she answered otherwise that she would be fired.

Andrew Brooksbank

[10] Andrew Brooksbank is a Consultant Orthopaedic Surgeon at Glasgow Royal Infirmary and has been a consultant for 19 years. When dealing with emergency admissions he deals with all types of orthopaedic and trauma presentation, and in relation to planned cases, deals with upper torso injuries. Mr Brooksbank adopted his report number 5/2 of process (JB40-45). If the court accepted the pursuer's evidence of lifting trays approximately 10kg in weight from waist height to shoulder height on a trolley to her left resulting in pain in her back, Mr Brooksbank considered that to be a mechanism could cause the pursuer to suffer injury. Namely an acute back strain as a result of lifting from low height to high height. Mr Brooksbank's view, as recorded in his report, is that the pursuer's symptoms resolved within six months which in his opinion was a reasonable amount of time for the injury and mechanism described. There had been a further incident in 2021, which appears unrelated, and any symptoms thereafter arose from the subsequent incident.

[11] Whilst undertaking emergency care, Mr Brooksbank estimated he would see three or four people a day with back injury. Planned care covered a wider range of work. Taking the patient's history was a fundamental principle of medical practice and would include

asking the immediate cause of injury. Mr Brooksbank estimated that perhaps 10-20% of injuries he sees resulted from lifting. In the course of studying for the FRCS examinations, there were a number of modules on basic sciences including biomechanics dealing with the operation of the spine, lower limbs, hands, knees and arms. Mr Brooksbank agreed that there was a risk of injury if a female lifted a weight of 10kg from a low height to shoulder height with her arms partly outstretched. This was evident from basic mechanics and how a load is applied. If a load is at close distance to the spine, if the arms are outstretched the load is further from the spine and the greater the loading on the spine as a result. Risk of injury could be reduced by reducing the load, the height, or the distance away from the spine. That would include not lifting as high or as heavy a load.

[12] In cross-examination, Mr Brooksbank considered it might be an over-simplification to describe an acute back strain as involving a muscle going into spasm, because it was necessary to define what happened to all of the supporting structures: muscle, ligament, and joint, as it was from this combination that pain is generated. The higher the load, the higher the relative chance of injury. Mr Brooksbank was not immediately in a position to provide references to a study showing a correlation between load and back injury, however there were health and safety regulations which were very clear about load and risk. While Mr Brooksbank's review of the records disclosed no evidence the pursuer had had physiotherapy, he agreed that if someone had had physiotherapy for back pain previously, they might be more susceptible to back pain thereafter. On the pursuer's account in evidence of the incident occurring when she lifted the eighth or ninth tray from waist height relatively close to her body with partly outstretched arms, Mr Brooksbank's view remained that the cause was acute back strain. The pursuer did not have a diagnosis of sciatica. That is a term which is widely and poorly used in the general population. The medical

understanding of sciatica is predominantly leg pain shooting down the leg and resulting from nerve root compression. Physiotherapy would be the first line of treatment for sciatica. Acute back strain is synonymous with soft tissue injury.

Pursuer's submissions

[13] For the pursuer, Mr Calderwood adopted his written submission, and submitted that the Manual Handling Regulations informed the operation of the common law, and in particular the employer's duties. The Enterprise and Regulatory Reform Act 2013 ("the 2013 Act") did not change the burden of proof in manual handling cases. To succeed, the pursuer required to prove that she was engaged in a manual handling operation, that there was a foreseeable risk of injury, and that she was injured by the operation. The relationship between the regulations and the common law, in light of the 2013 Act has been considered in a number of cases (*Gilchrist, Rose, Wright, Dehanes, Goodwillie* and *Denny*). The issue for the court was how health and safety regulations operate to inform the common law in light of the 2013 Act. Whilst the regulations no longer carried with them civil liability, they continued to import criminal liability and it followed that no reasonable employer could act so as to breach the regulations. Mr Calderwood submitted that the 2013 Act affected some regulations but not others. The Act affected different regulations in different ways. Sheriff McGowan in *Goodwillie* and my own decision in *Denny* demonstrated a three part classification of cases where health and safety regulations were invoked:

1 Cases where the duty in the regulations falls within the duty of reasonable care at common law.

2 Cases where there were specific steps to be taken in the implement of the regulation.

3 Cases where one or more elements of the regulation was subsumed in the common law and a duty expressed in terms of strict or absolute liability in the regulations would be moderated to common law reasonable care. Reference was made to Sheriff Fife's decision in this court in *King* v *Common Thread* [2019] SC EDIN 76, paragraphs 67-71.

[14] The pursuer submitted that the 2013 Act had no practical effect on the first two categories identified by Sheriff McGowan, and echoed by Lord Sandison in *Ros*e. The Manual Handling Regulations, Noise at Work and Working at Height Regulations were examples of duties to avoid particular activities, which duties were moderated by reasonable practicability. The duty to take reasonable care to avoid manual handling operations carrying a risk of injury was not an unqualified duty thus fell out with scope of the limitation introduced by the 2013 Act. It was for a defender to prove they could not have avoided a manual handling operation and that they took all appropriate measures. That the burden was on the defender had not changed and it would be illogical otherwise for the pursuer to have to prove to the contrary. Mr Calderwood submitted under reference to *Dehanes* that if the court accepted the pursuer's formulation of a failure to take care at common law by establishing breach of the manual handling regulations that was an end of the matter. In this case the defender did not plead that it could not have avoided the manual handling operation. Reference was also made to *Goldscheider* v *Royal Opera House* [2019] EWCA civ 711, at paragraph 36. The duties under the Manual Handling Regulations had not disappeared and they were evidence of the standard of reasonable care incumbent upon the employer. The third category is different, and the pursuer submitted the intention of Parliament was to take away the unqualified duties where those appeared. The effect of the 2013 Act was not to sweep away all duties, otherwise there would be a wholesale backward

step in the law. Rather the intention of paramount was to moderate the third category, whereas the first and second categories were incorporated in the common law.

[15] Turning to the application of this classification in the present case, it was submitted the pursuer's evidence should be accepted. The court should focus not on the possible unreliability of the pursuer's evidence about the depth of the tray, and focus instead on the evidence about the height to which she was lifting the tray. What was important was the weight of the tray and how it was being lifted. The pursuer's evidence that she was lifting a load of around 10kg had not been challenged, nor had any contrary evidence been led, and her evidence should therefore be accepted.

[16] Mr Brooksbank had identified a number of features being relevant to the mechanisms of the injury: the weight of the load, the height to which it was lifted, and the fact that the pursuer's arms were outstretched. Some of Mr Brooksbank's evidence about risk of injury had been heard under reservation. That evidence should be admitted. It was accepted that he was not an ergonomist, but he was suitably qualified nonetheless, because he had significant experience as an orthopaedic surgeon over a period of 19 years. On emergency shifts he would see three or four people a day with back injuries and 10-20% of injuries were the result of lifting. Mr Brooksbank described the importance of taking a history from every patient as to how matters had occurred. Further, Mr Brooksbank studied biomechanics as part of his training to be a consultant and accordingly, it was submitted, he understood the causes and therefore the risk factors pointed towards injury. The pursuer required to prove foreseeable risk. It was agreed on record that there was a risk of injury and accordingly the pursuer did not require to lead evidence. The defender's averment that there was a "low risk" was an acceptance that there was in fact a risk. Reference was made to *Cullen* v *North Lanarkshire Council* 1998 SC 451, at page 453. The pursuer was able to prove

that she had suffered injury as a result of carrying out a manual handling operation. If the court accepted Mr Brooksbank's evidence, that was evidence of the mechanism and of the nature of the injury. Mr Brooksbank's evidence was clear about the mechanism of injury and there was no serious challenge to the credibility and reliability of the pursuer's account except in relation to the document 6/5. The note of the meeting (6/5) was inaccurate and that there had been a misunderstanding in relation to physiotherapy in Poland, which she had had after the accident. It was submitted it was possible to see how such a misunderstanding could have arisen as a result of the language barrier. The note taker had not been called to give evidence.

[17] In relation to the defender's breach of duty, the starting point was the risk arising as a result of the carrying out of this manual handling operation, and an assessment of the risk for the specific task should have been carried out. There had been no risk assessment here. The risk assessment ought to address the relevance of weight and the height it was being lifted to. Schedule 1 of the Manual Handling Regulations also required reference to be made to individual capability. While there was a duty to carry out a risk assessment under the Management Regulations, there was a common law duty on an employer as well. Reference was made to *Kennedy* v *Cordia Services* 2016 SC (UKSC) 59, paragraphs 91 and 110 and to *Dehanes* at paragraph 25. There was in this case no generic risk assessment, nor was there a specific risk assessment for the transferring of cream. Nothing lodged by the defender was a risk assessment. In particular, 6/8 is not a risk assessment; it did not address the nature, cause, extent, likelihood of occurrence, nor control measures to eliminate the risk of injury. Accordingly, there was a breach of duty at common law. The pleadings set out control measures, however this was inadequate. Reference was made to *General Cleaning Contractors* v *Christmas* [1953] AC 180. There was an obligation on the defender to devise a

system and to instruct its employees in its operation. There was no evidence of such a system. The defender led no evidence in support of the existence of a safe system beyond the document 6/8, which the pursuer said in evidence she had never seen prior to the litigation. Even if contrary to that submission, the document 6/8 was held to be a risk assessment, the defender had failed to address the hierarchy of risk management and to eliminate the risk rather than relying on controls.

[18] The pursuer submitted that contributory negligence could not arise in this case. There was no evidence to any failing on the part of the pursuer and the pursuer's evidence was she could not seek help with the task because no one was available, and in any event she did not know that she would need help and if she lifted the trays would be a danger to herself.

Defender's submissions

[19] For the defender, Mr Hennessey adopted his written submission. The pursuer's position was confused and confusing; it appeared that the pursuer's initial stance was that the regulations informed the standard of care at common law, but that position had shifted to the effect that the regulations are one and the same as the common law. The pursuer's approach misunderstood the operation of the regulations as statutory law is distinct from the common law. That was not a backward step in the law, and all that had happened was an alteration of the right of civil action as a result of the 2013 Act. The reliance by the pursuer on ministerial statements in relation to the 2013 Act was not relevant. There was no ambiguity in section 69 of the 2013 Act, and accordingly reference to parliamentary material was not required. The defender referred to Lord Sandison's judgment in *Rose* at para [35], where his Lordship said there had frequently been no proper analysis of the relationship

between statute and the common law. The relevance of regulations and statute in a health and safety context should be understood as being designed to achieve a particular state of affairs, namely insurance of safety. That is different from the effect of the common law. Where it was being suggested that the regulations informed the common law, a framework for their operation required evidence of what a reasonable and prudent employer would understand. A health and safety expert could give evidence of the regulatory regime, the guidance available to employers, and what employers typically do to comply. That would provide material from which the court could draw conclusions, and there was no such evidence in this case. What the court was not being asked to do was to determine whether there had been a breach of the regulations as such, because that could not be a ground of action and accordingly it was a somewhat academic exercise to ascertain a hypothetical breach of the regulations. Rather, the pursuer must demonstrate negligence. The defender referred to *Dehanes* where expert evidence had been led.

[20] Turning to the pursuer's evidence, the defender submitted that her evidence was that she had been injured at the point of lifting the tray. The pursuer was not reliable, and on some matters not credible. She had given evidence through a Polish interpreter, and there did not appear to be any difficulty with that as she had not asked for clarification of any questions as the examination was proceeding. The defender's position was that taken as a whole, the pursuer's evidence was unreliable, and that was important because the court required a clear understanding of how the event had happened, together with the weights and dimensions of the items the pursuer was lifting. In fact there had been no evidence of (a) what the tray looked like; (b) what the window looked like; (c) what the bag of cream or the bags of cream looked like; and (d) what the trolley looked like. The pursuer's evidence about the depth of the tray could not correspond to her description of the rest of the activity

because the height of the stack of trays would have been at least 8 or 9ft by the time the pursuer was lifting the eighth or ninth tray. That undermined the pursuer's reliability. Further, the accident report stated a weight of 10kg for each tray but there was no explanation of that evidence. The pursuer's submission said nothing about the object being heavy nor did the pursuer's case on record say it posed a material risk if lifted at hip height. The pursuer demonstrated an impressive description of manual handling, which she later said was post-accident knowledge. However, that was not consistent with the training records 6/1 and 6/2, and the court should prefer those documents. The pursuer's evidence about physiotherapy was confused and confusing. The pursuer had said in both that she did and that she did not have physiotherapy in Poland. The defender accepted that language might have played a part here. However, the pursuer said in the witness box she did attend physiotherapy after having a C-section and that was difficult to square with her later evidence.

[21] In relation to Mr Brooksbank, his report had been agreed in the Joint Minute, but he was led in oral evidence on the risk of injury. Mr Brooksbank's report 5/2 of process contained nothing about the mechanism of the accident, which was described in fairly general terms. Mr Brooksbank had given oral evidence about his qualifications and had given oral evidence about the risk of injury. However, he did not give evidence about the threshold load for the risk of injury and did not give evidence about height and distance in relation to risk. The court required to have evidence about what lesser load and/or height would have avoided injury. The defender submitted that Mr Brooksbank had been reluctant to answer questions about correlation between load and injury, and attempted to anticipate questions and close down issues. His evidence about all of those matters had been taken under reservation, and the defender submitted it should not be admitted having regard to

the discussion in *Kennedy* v *Cordia*. Biomechanics and ergonomics are both recognised bodies of knowledge and are separate from Mr Brooksbank's core specialism. The fact that he was obviously uncomfortable in giving oral evidence indicated he was not comfortable dealing with some of the issues. In that respect *Hall* v *The City of Edinburgh Council* 1999 SLT 744, was instructive: expert evidence had been led and, calculations about load and its effect had been set out and explained. The issue really was one for an ergonomist which the pursuer had attempted to introduce but had decided not to proceed with.

[22] The pursuer had argued that the defender had made a concession about the risk of injury in the following averment in answer 4: "on the pursuer's hypothesis of fact (which is not known and not admitted) lifting a tray presented a low risk of injury". The defender submitted this was plainly a qualified averment and depended on the pursuer's account being accepted. It was not an admission the operation was inherently risky. Rather, this case was concerned with a material risk in whether injury was reasonably foreseeable in the course of carrying out a lifting operation.

[23] Turning to the question of training and safe system, the contemporaneous documents should be preferred to the pursuer's oral evidence. It was plain the pursuer had been trained in relation to movement of objects. It was also clear that the defender had considered the hazard involved with manual handling and had put in place measures to address the risk; that was evident from 6/8 of process. While it was true the defender had not led evidence, there was evidence before the court of consideration of the risk and control measures set out in that document, and the defender submitted that it was evidence of assessment of risk for the purpose. It was possible to separate out the statutory duty to carry out a risk assessment from the common law duty articulated in *Kennedy*, and there was no authority that a risk assessment which was not conducted under statute required to be

produced in a form that was headed "risk assessment". Accordingly, 6/8 was evidence the defender had considered the risk of manual handling and had implemented health and safety measures in the context of this system of working. Because this was a common law case, the question of onus shifting did not arise. It was submitted that it was for the pursuer to show what a risk assessment ought to have said and what control measures ought to have been identified. There was evidence in process of a risk assessment and some control measures. Reference was made to *Hall* v *The City of Edinburgh Council* at page 746H - 746L.

[24] There were a number of essential matters on which the court had no evidence. There was no evidence that the trays were objectively heavy, it did not appear that the pursuer's position was that they were heavy but there was simply no evidence about that. It was also relevant that the pursuer suffered injury approximately three quarters of the way through the task. The pursuer did not describe struggling or having difficulty doing the task prior to that. Even if Mr Brooksbank's evidence were to be admitted, that would not get the pursuer home on the foreseeable risk of injury issue. There is no evidence of a history of an employee having difficulty; there was no evidence of consideration of any of the factors mentioned in *Hall*; there was no evidence of the specific risks a prudent employer would have put in place precautions to deal with; there was no evidence of specific measures which would have avoided the pursuer's injury. Further, merely because this action proceeds under chapter 36 did not avoid the requirement for the pursuer to set out the essential elements of her case, reference was made to *Goodwillie* at paragraph 151. The appropriate test for the common law formulation came from *Stokes* v *Guest* as that had been applied in *Baker* v *Quantum Clothing*, and the onus rested with the pursuer. The defender submitted that was the effect of the 2013 Act. There was no shifting of onus after the 2013 Act; it was for the defender to aver and prove a reasonable practicability defence but

that was not the issue in this case. Accordingly, the court should reject the pursuer's argument that they met the Manual Handling Regulations were "imported" into the common law. The defender submitted that would undermine section 69 of the 2013 Act.

[25] Finally, in relation to contributory negligence, the defender could not suggest that contributory negligence featured in this case. The tray was not heavy and the tray did not propose a foreseeable risk. There was no evidence the pursuer struggled with the task and so there was nothing to suggest the pursuer should have sought assistance. For all of those reasons the defender should be assoilzied.

Discussion and decision

The law about the defender's duties

[26] As will be evident, the nature and formulation of the duties of reasonable care on the defender, and their relationship to a number of health and safety at work regulations formerly carrying with them civil liability, was the subject of extended argument. This is not a new problem; it is a consequence of section 69 of the Enterprise and Regulatory Reform Act 2013 ("the 2013 Act"), and it is an issue which has had consideration in a number of cases in this and other courts. Whilst it may be true that the extent to which the answer to this has been the subject of argument has varied, for in some cases it appears to have been common ground between parties, it is also fair to say that in others there has been more extended judicial scrutiny of the relationship. It is convenient to begin with a survey of the legal landscape, before turning to the evidence in this case.

[27] Insofar as relevant, section 69 of the 2013 Act provides as follows:

> **"69 Civil liability for breach of health and safety duties**
>
> (1) Section 47 of the Health and Safety at Work etc. Act 1974 (civil liability) is amended as set out in subsections (2) to (7).
> (2) In subsection (1), omit paragraph (b) (including the 'or' at the end of that paragraph).
> (3) For subsection (2) substitute—
>
> '(2) Breach of a duty imposed by a statutory instrument containing (whether alone or with other provision) health and safety regulations shall not be actionable except to the extent that regulations under this section so provide.
> (2A) Breach of a duty imposed by an existing statutory provision shall not be actionable except to the extent that regulations under this section so provide (including by modifying any of the existing statutory provisions).
> (2B) Regulations under this section may include provision for—
>
> (a) a defence to be available in any action for breach of the duty mentioned in subsection (2) or (2A);
> (b) any term of an agreement which purports to exclude or restrict any liability for such a breach to be void.'
>
> …
>
> (10) The amendments made by this section do not apply in relation to breach of a duty where that breach occurs before the commencement of this section."

[28] The legislative intent of section 69 is tolerably clear. As it was put by Ms R Collins Rice, sitting as a Deputy High Court Judge (Collins Rice J, as she now is) in *Cockerill* v *CXK & ors* [2018] EWHC 1155 (QB) at [18]:

> "... by enacting s.69, Parliament evidently intended to make a perceptible change in the legal relationship between employers and employees in this respect. It removed direct actionability by claimants from the enforcement mechanisms to which employers are subject in carrying out those statutory duties. What I have referred to as this `rebalancing' intended by s.69 was evidently directed to ensuring that any breach of those duties would be actionable by claimants if, but only if, it also amounted to a breach of a duty of care owed to a particular claimant in any given circumstances; or in other words, if the breach was itself negligent. It is no longer enough to demonstrate a breach of the regulations. Not all breaches of the statutory regime will be negligent."

Her Ladyship also recorded at [17] that it was not disputed that:

> "in considering the nature of the modern common law employers' duty it is still permissible to have regard to the statutory duties, to understand in more detail what

> steps reasonable and conscientious employers can be expected to take to provide a reasonably safe workplace and system of work."

[29] Both of these propositions are important, and as I will come to explain, while they may have the potential to pull in different directions, the courts can and must reconcile them in any given case. Whilst dealing with the subject of legislative intent, I would observe that, in my view, subsections 69(1) - (3) of the 2013 Act are clear and unambiguous. Accordingly, I do not consider that it is either necessary or appropriate to refer to the ministerial statements to which I was directed in construing those provisions. Nor indeed is such reference appropriate in arriving at a view about their effect on the application of other statutory provisions, namely the health and safety regulations including the Manual Handling Operations Regulations referred to in this case.

[30] I turn next to a number of the cases to which I was referred in which the nature of the change made by section 69 of the 2013 Act has been the subject of judicial consideration.

[31] In *Dehenes* v *T Bourne & Son* [2019] SC EDIN 48, Sheriff Reith QC, sitting in this court, accepted the pursuer's submission that duties in health and safety regulations "inform and may define the scope of duties at common law" (see paras [10] and [24]). That was on the footing that the existence of a statutory duty may be regarded as evidence of the state of knowledge of a reasonable employer as regards a particular risk. The defender did not argue to the contrary, and Sheriff Reith felt able to accept that submission as part of her broader consideration of the question of liability.

[32] In *Goodwillie* v *B&Q plc* [2020] SC EDIN 2, Sheriff McGowan, sitting in this court, recognised that section 69 effected a major change in the law, and anticipated that courts would require to define the effect on common law duties of care (see at [134]-[135]). He went on to highlight the forces potentially pulling in different directions:

> "[137] The cases of *Gilchrist* and *Cockerill* highlight part of the problem. As it is put in Clerk & Lindsell in the Second Supplement to the 22nd edn at para.13– 02: '… if it is a criminal offence to fail to comply with the relevant statutory duty it is difficult to see how the employer can argue that it was reasonable to breach the duty.'
>
> [138] In addition, the Supreme Court has said that: '…in more recent times it has become generally recognised that a reasonably prudent employer will conduct a risk assessment in connection with its operations so that it can take suitable precautions to avoid injury to its employees. In many circumstances, as in those of the present case, a statutory duty to conduct such an assessment has been imposed. The requirement to carry out such an assessment, whether statutory or not, forms the context in which the employer has to take precautions in the exercise of reasonable care for the safety of its employees.': *Kennedy v Cordia*, para.110.
>
> [139] That approach has been described as being: '… consistent with those decisions where the existence of a statutory duty has been regarded as evidence of the state of knowledge of a reasonable (i.e. non-negligent) employer as regards a particular risk': Charlesworth & Percy, para. 13.73.
>
> [140] On the other hand, it cannot be the case that the law remains the same as it was prior to the 1974 Act being amended: *Cockerill*. A claimant must now demonstrate negligence; and there may be other consequences, bearing on matters such as pleadings, evidence and onus: Charlesworth & Percy, paras 13– 70 and 13–76."

[33] In *Goodwillie*, it may be noted that the defender accepted the proposition that regulations informed the scope of an employer's common law duty (see [103]). Rather, the defender took its stand in that case on the content of the duty, and the asserted evidential weakness of the pursuer's case ([98]-[110]). Sheriff McGowan went on to elaborate an approach to the questions of scope of the employer's duty:

> "[141] Therefore, I accept, as a matter of general principle, that the regulations relied on by the pursuer in this case are relevant to an assessment of the specific obligations (i.e. steps to be taken) which may be incumbent upon an employer in discharging its general duty to exercise reasonable care towards its employees. But the precise impact of that in any given case will depend on: (a) the factual circumstances prevailing; and (b) the precise way in which the statutory duty relied upon is formulated and/or has been interpreted.
>
> [142] I suggest that it may work in the following way. If a duty identified in a regulation can reasonably be said to fall within the duty of reasonable care incumbent on an employer (i.e. in the same way as certain elements have been held at common law to form part of that general duty, (e.g. to provide and maintain

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

[34] In my own decision in *Denny* v *Chivas Brothers Ltd* [2023] SC EDIN 10, at paragraph 70, I followed Sheriff McGowan's approach, albeit *Denny* was a case where the relevant exposure to harmful levels of noise spanned a period both before and after commencement of the 2013 Act. Thus there was a right of action under the relevant regulations for a significant part of the period of claim, and for the remaining part of the period of claim, the action was founded only on breach of common law duty. As a consequence, the section 69 issue was not a principal focus of discussion in that case.

[35] In *Rose & ors* v *WNL Investments Ltd* 2023 SLT 829 ([2023] CSOH 49), Lord Sandison noted that in a number of cases, the approach in *Cockerill* had been adopted without contrary argument (see [30]). His Lordship was critical of what he considered to be "consensus between the parties to the litigation as to how the question should be answered." With the result that:

> "That seems to have resulted in something of a lack of searching judicial analysis of precisely why, and thus how, the content of any regulations which might previously have engaged with the situation under consideration continues to have a role in assisting the court to determine the incidence and nature of a common law duty of care in that situation." ([35]).

His Lordship was particularly critical of *Goodwillie* in that respect.

[36] In his own analysis of the operation of section 69, Lord Sandison covers similar ground to Sheriff McGowan, but with important differences of emphasis. His conclusions about the scope of section 69 are in the following terms:

"[36] The starting point for an analysis of these matters must be the indubitable fact that section 69 of the 2013 Act was intended 'to make a perceptible change in the legal relationship between employer and employees', as it was put in *Cockerill* at [18]. It is the duty of the courts to give effect to that change, rather than to undermine it or to arrive at conclusions by routes which in practical terms ignore it. It is not correct as a matter of law to suggest that any health and safety regulation falling within the scope of the general rule in section 69 may, directly or indirectly, be the source or origin of a common law duty of care, whether with or without adaptation of some sort. Regulations are not generally promulgated in an attempt to restate the common law. In situations where they may have been intended to restate or clarify the common law, they may not have succeeded in doing so. Recognition of the existence and content of common law duties of care remains, as always, the sole prerogative of the judiciary.

[37] The fact that an employer or other duty holder remains under a statutory duty in certain situations to do particular things or achieve a specific result is not in itself relevant to inform the existence of any common law duty in those situations. That there may be criminal liability for breach of a health and safety regulation in no way involves or infers a conclusion that a common law duty of care exists in the situation at hand, or what the content of any duty which may exist might be. That is most obvious in cases where such regulations create strict liability, but the principle is not restricted to such cases. Criminal liability for breach of health and safety regulations and common law duties of care operate on entirely different legal planes; any other approach impermissibly undermines section 69.

[38] None of that is to say that health and safety regulations have no potential relevance in assisting the court to come to its own conclusions about the incidence and nature of a common law duty of care. However, that potential relevance is limited in scope. The existence and content of such regulations may inform the court about what risks have been generally recognised as inherent in a particular situation or activity and what steps have been similarly recognised as apt to mitigate or eliminate those risks. Reference to health and safety regulations is properly aimed at providing a factual basis, or factual support, for those kinds of proposition, rather than at claiming any residual legal effect said to inhere in the regulation for the purposes of informing common law duties of care, for no such effect exists. There is no greater role for the content of health and safety regulations or guidance in the determination of common law duties than that.

[39] In most cases, the utility of reference to such regulations and guidance will be extremely limited, because the regulation or guidance will at best simply confirm conclusions that are amply capable of being arrived at by the court without such reference. There may be circumstances, however, in particular in cases involving rather specialised areas of activity, where they are capable of making a greater contribution to the conclusions which require to be drawn as to the demands of the common law."

[37] Having regard to their statutory form, it is plainly correct that health and safety regulations are not the *source* of individual common law duties. As Lord Sandison observed, recognition of the existence of common law duties is the sole preserve of the courts. It follows in my view that the sentence in paragraph 142 of *Goodwillie* that if a duty contained in a regulation can be said to fall within the duty of reasonable care, it should be treated as creating such a duty at common law, requires to be read subject to that. However, as Lord Sandison recognised, that is not an end of the matter. In *Kennedy* v *Cordia* at paragraphs 107-111, the Supreme Court made it clear that the common law duties of an employer have developed and expanded in the century and more since *Morton* v *William Dixon Ltd* 1909 SC 807 was decided. In that section of its judgment, the Supreme Court was concerned with the assessment of risk, something which is, of course, not uncommonly found in health and safety regulations. The court was satisfied that:

> "it has become generally recognised that a reasonably prudent employer will conduct a risk assessment in connection with its operation so that it can take suitable precautions to avoid injury to its employees. In many circumstances… a statutory duty to conduct such an assessment has been imposed. The requirement to carry out such an assessment, whether statutory or not, forms the context in which the employer has to take precautions in the exercise of reasonable care for the safety of its employees. (Lord Hodge at para 110)."

[38] From this it can be seen that the content of an employer's obligations under statute may very well overlap with its obligations at common law, or vice versa. Such obligations of course have a different juridical source, but are likely to have common features and content. In that way, the observation at paragraph 17 of *Cockerill* is consistent with the discussion in *Kennedy*, whilst nonetheless respecting the boundary erected by section 69.

[39] In *Kennedy*, the Supreme Court was concerned, inter alia, with the place of a generalised assessment of risk by the reasonable employer in discharge of its common law duty of care. However, just as assessment of risk may be recognised as an obligation arising

both as a consequence of statutory regulation and in the exercise of reasonable care, I see no reason in principle why a court could not conclude that an assessment addressed to the same or similar matters as those desiderated in regulation 4 of the Manual Handling Operations Regulations, and having regard to some or all of the criteria there specified, is part of an employer's duty of reasonable care at common law. In that sense, the court's delineation of the employer's common law duty is informed by the regulation, but does not have its source or juridical authority in the regulation. I consider that is what Sheriff McGowan is describing, albeit in different language, in paragraph 142 of *Goodwillie* where he says this: "Moreover where a regulation provides specific, concrete steps to be taken in the fulfilment thereof, they may also form part of the duty to take reasonable care." I consider that paragraph 38 of Lord Sandison's Opinion is to like effect, though stressing the place of regulations as evidence of recognised risks and routes to mitigation.

[40] I consider that the final sentence paragraph 142 of Sheriff McGowan's judgment in *Goodwillie*, which was offered by the pursuer in this case as a distinct class of regulations does give rise to a confusion of juridical source and content of duty. I am unable to accept the pursuer's submission founded on this sentence of the judgment. Nor do I consider the pursuer's three-fold characterisation of the effect of section 69 on pre-existing health and safety regulations either to be a helpful gloss on Sheriff McGowan's decision, or a sound explanation of the interaction of section 69 of the 2013 Act with common law duties of care.

[41] As we have seen, in *Kennedy*, the Supreme Court held that an employer's common law duty extends to the assessment of risk. The nature of the risk(s) so assessed will in turn inform the precautions reasonably to be taken to safeguard against such risk(s). In my opinion, the long practice of assessment of the risks associated with manual handling operations undertaken by employers since at least 1992 are relevant to that common law

duty. However, it does not follow, as the pursuer appeared to contend, that the common law duty is in substance identical to that in regulation 4 of the Manual Handling Operations Regulations. The content of the employer's duty of reasonable care in any given case is an evidential matter.

Assessment of witnesses

The pursuer

[42] The pursuer gave her evidence through a Polish interpreter. It is therefore difficult to form an impression based on her engagement with the questioner. However, the pursuer appeared not to display any difficulty with the form or content of the questions. In general, the pursuer appeared to me to be doing her best to tell the truth. There were however two chapters of her evidence which I did find to be unsatisfactory. The first relates to the meeting on 13 November 2020. Whilst I accept that the pursuer is not a fluent English speaker, and that is possible there may have been incomplete communication between the pursuer and those present at the return to work meeting on 13 November 2020, it is striking that the one passage in the meeting note (6/5) with which the pursuer takes issue is that about receiving physiotherapy prior to the accident. In relation to training, the pursuer did not dispute that she had received induction training from the defender. She deponed that there were two sessions: one on fire safety, and one on what she called health and safety. The latter involved being shown a video, and then being required to consider and complete a series of forms including questions to demonstrate understanding of the content of the training. Again acknowledging the pursuer's imperfect command of English, I am unable to accept that the pursuer's evidence of her knowledge of safe manual handling is entirely derived from subsequent training. The court heard little or nothing of the content of the

video, however the forms 6/1 and 6/2 clearly indicate that at least some elements of safe moving and handling featured, and I therefore conclude on the balance of probability that it did feature, albeit I am unable to make any further findings. Nonetheless, I accept the pursuer's evidence that there was no live demonstration, nor was she asked to demonstrate safe techniques. On balance, I consider these deficiencies go to the pursuer's reliability, rather than to her credibility. Neither bears directly on her account of the accident.

Mr Brooksbank

[43] I heard the chapter of Mr Brooksbank's evidence about the risk of injury to the pursuer in carrying out the lifting operation under reservation. The defender renewed the objection in the course of submissions. In essence, the objection was that while Mr Brooksbank was undoubtedly a skilled witness as an orthopaedic and trauma surgeon, it did not follow that he was in a position to give evidence about risks of injury in specific lifting scenarios. When the objection was renewed, it was submitted that the level of generality of Mr Brooksbank's oral evidence justified the objection. When the defender's objection was first made to the line of evidence about risk, I allowed the pursuer to explore Mr Brooksbank's qualifications and experience specifically related to this. From Mr Brooksbank's evidence about his training as an orthopaedic surgeon which included training in biomechanics, I was satisfied that, in principle, and subject to the ground being laid in evidence, Mr Brooksbank was qualified to give evidence about risk of injury in carrying out lifting at lease at the level of principle as to whether certain types of lifting activity carry foreseeable risk of injury. I therefore repel the objection to admissibility in principle. There remains a question about the detail of the evidence, and therefore the weight to be attached to it.

[44] Mr Brooksbank's assessment of the nature of the pursuer's injuries and her prognosis was not really a matter of dispute, his report (5/2) having been agreed as his evidence in the Joint Minute. Mr Brooksbank is a consultant orthopaedic surgeon of 19 years standing and well qualified to given an opinion on the nature of the pursuer's injuries and prognosis. No contrary medical evidence was led. I accept his evidence about those matters. As discussed above, the pursuer's primary purpose in leading Mr Brooksbank in oral evidence was to address the question of foreseeable risk of injury. Although some aspects of his training and experience ought to have been more fully explored in the course of his evidence, as indicated above, I am satisfied that Mr Brooksbank was able to give such evidence. That is not an end of the matter, of course, because the key points are whether Mr Brooksbank's evidence about the specific risk, or risks, of injury is sufficient, and, if so, whether it should be accepted. The defender was critical of this aspect of the evidence; however, I do not consider that Mr Brooksbank was evasive or especially partisan in his evidence, and in particular in response to robust cross-examination. I do consider that he was sometimes reluctant to answer questions about risk of injury based on mechanisms of injury expressed at an abstract level. Given the terms of his report, I suspect that this was the first time in the context of this case that Mr Brooksbank had been asked to give any detailed thought about the issue of risk of injury.

[45] While the defender was correct to point to the passage in cross-examination where Mr Brooksbank was unable to point to clinical studies showing a correlation of load and back injury, he did point to what he described as "health and safety regulations", which were clear in describing load and risk. He was not examined further about that. It might very well be that this was a further confirmation that Mr Brooksbank was being asked to consider and to give evidence about this topic for the first time in the context of the

pursuer's case. When he was asked questions more closely tied to the pursuer's evidence about what she said actually happened, Mr Brooskbank gave an opinion that there was a risk of injury, and when the pursuer's account was put to him directly, he affirmed his view. It seems to me that in approaching the question in that way, he was showing appropriate professional caution, and was doing his best to assist the court, albeit he might have been able to do so more fully with more notice of the issue. However, I was not satisfied on the evidence I heard that Mr Brooksbank was in a position to give evidence about possible causation in specific situations. For example, at what carried weight would the risk of injury in a particular lift be more than de minimis; or again, how many repetitions of a particular lifting operation would give rise to a foreseeable risk of injury, and it was evidence at that level of detail which was wanted and required.

Assessment of evidence about breach of duty

[46] For the reasons discussed above, I am satisfied that the defender's common law duty of reasonable care towards its employees, and in particular the pursuer, included a duty to take reasonable care to assess risks in relation to manual handling. I did not hear direct evidence from the defender about the carrying out of such a risk assessment. However JB116 is a document prepared by the defender, and is headed "Manual Handling & Lifting" and contains a mix of guidance and instructions to employees "before lifting an object" and "lifting loads" and "repetitive work". The document also contains an acknowledgement by the pursuer of having received training "on all the topics above". I consider it is reasonable to infer that an assessment of risk in relation to manual handling has been carried out, otherwise such a document has no meaningful purpose. Further, the "safe system of work" document JB131-132 describes a number of processes to be carried out around the sanitiser

tunnel, which, it was common ground, was the area where the pursuer was collecting the cream. That document includes a column on each page headed "health and safety", with a number of instructions to staff including "always use proper manual handling techniques". Again it seems to me these can be inferred to be the output of an assessment of risk. However, beyond that, I am unable to make any findings about the content of such risk assessment. Nor, for the reasons which I have given about the limits of Mr Brooksbank's evidence about foreseeability, can I make any findings about the adequacy of such assessment.

[47] Likewise, for the reasons discussed in my assessment of the pursuer's evidence, I conclude on the balance of probabilities the pursuer's induction training on commencement of her employment with the defender included training about manual handling operations.

[48] These findings are but a starting point in the determination of the central questions about the scope of the defender's duty, and whether there was a breach of duty. I consider that after that, the evidence peters out. For the reasons I have given, I consider that Mr Brooksbank was able to give only the most general evidence about foreseeability of the risk of injury. In my view, there was no meaningful evidence about the risk of injury to the pursuer in carrying out the manual handling operation in which she was engaged. There was little detail about the sanitiser tunnel, described as the window by the pursuer. There was some evidence about the dimensions of the trays, but no evidence about their weight or construction. There was no evidence about the trolley, beyond the evidence that was the place where the trays were stacked. These all bear in understanding the manual handling operation and the risks attaching thereto.

[49] As a matter of impression, there appeared to me to be a number of components to the operation: bending, lifting, and turning, all the while bearing a weight whose

characteristics were known only at a high level of generality. Repetition may also be relevant, given the evidence that the pursuer had carried out the operation a number of times without apparent difficulty. I heard no evidence about the relative significance of these, and the foreseeability of injury attributable to them individually or collectively.

[50] In addition to averments about a duty to assess risk and to provide training, the pursuer's case on record is that the defender should have avoided the manual handling operation, or at least reduced the risk to the lowest level possible. Further it is said the defender should have considered the number of trays the pursuer was being asked to move and the height to which she was lifting them. There was no evidence before me which would allow me to find that the exercise of reasonable care required the defender to do any of those things.

[51] Accordingly, I conclude that the pursuer has failed to establish breach of duty at common law.

Damages

[52] Given the conclusion I have reached on breach of duty, it is not strictly necessary to address the question of damages. However, in terms of the Joint Minute, parties agreed quantum of damages in the sum of £6500. That amount was not apportioned among particular heads of claim.

[53] While the defender pleads contributory negligence on record, in submissions, that was departed from. In my opinion, the defender was wise to do so. Had I found breach of duty established, I would have not made any deduction for contributory negligence. On the facts I have found, there was no evidence to indicate the pursuer should have acted in a different manner in carrying out the task.

Conclusion

[54] For all of these reasons, the defender is entitled to decree of absolvitor. Parties invited me to fix a hearing on expenses, and I will do so.