

SCOTLAND / JUDGMENT

Berry v. McCowans Ltd [2005]

ScotCS CSOH_66 (18 May 2005)

[2005] ScotCS CSOH_66

Source: bailii.org · Research copy typeset by Esheria. Not court-issued or certified.

[Home] [Databases] [World Law] [Multidatabase Search] [Help] [Feedback] [DONATE]
Scottish Court of Session Decisions You are here: BAILII >> Databases >> Scottish Court of
Session Decisions >> Berry v. McCowans Ltd [2005] ScotCS CSOH_66 (18 May 2005) URL: https://www.bailii.org/scot/cases/ScotCS/2005/CSOH_66.html Cite as:

[2005] ScotCS CSOH_66,

[2005] CSOH 66 [New search] [Help] Berry v. McCowans Ltd [2005] ScotCS CSOH_66 (18 May 2005) OUTER HOUSE, COURT OF SESSION

[2005] CSOH 66 A3028/00 OPINION OF LORD DAWSON in the cause LINDA BERRY Pursuer;
against McCOWANS LIMITED Defenders:

Pursuers: Milligan; Thompsons Defenders: Thomson; Simpson & Marwick, W. S. 18 May 2005 [1]
The pursuer seeks damages in this case against the defenders in respect of an alleged injury which she claims she suffered while in the employment of the defenders. The defenders are a company engaged in the manufacture of confectionery. In particular they manufactured sweets called "Oddfellows" at their factory at 44 Tryst Road, Stenhousemuir. After manufacture, the sweets were scooped into buckets and delivered to a separate part of the factory for packaging into cellophane bags. The baskets of "loose" sweets were emptied into a hopper which then delivered the appropriate weight of sweets into the bags waiting below. On 18 November 1997 the pursuer was engaged in the task of emptying the baskets into the hopper. This was a job she had done many times before. The pursuer avers that as she tipped out a basket she felt pain across her right shoulder and neck. She further avers that the weight of sweets in the basket was too great to allow such a task to be undertaken safely. As a result of such a fault on the part of the defenders, the pursuer avers that she sustained a partial tear of her rotator cuff tendon. The defenders deny the pursuer's averments and claim that any problem the pursuer had with her shoulder were caused not by any injury suffered by her on 18 November 1997 but by degenerative changes in the right acromio-clavicular joint. [2] The first witness was the pursuer herself. She testified that she had been a factory worker with the defenders for eight years. On 18 November 1997 at about 1.50pm to 2.00pm she was working on the "Oddfellows" bagging machine. She was filling the hopper with sweets. The sweets came to the machine in baskets mounted on pallets.

The baskets had been filled by two other employees. To do the job she had to take a basket from its pallet, approach the machine and climb up two steps towards the hopper. She then laid the basket on the third step and lifted it into the hopper. In doing so, she felt pain in her right shoulder such as she had never felt before. She still had pain. She explained that the baskets were made of hard plastic and were about 18 inches deep by two feet. They were rectangular in shape. They were quite heavy, even without the sweets. She alleged that each basket weighed 28 kilograms. She knew that as she had weighed one after the accident. They were all of such a weight. They were overflowing, which was not common. They were normally about half full, usually about seven scoops of sweets each, an amount she could manage to lift to the hopper without difficulty. This basket was too full. She had complained about the weight "all the time" to Sally, her supervisor and to Robert Hunter, the "Health and Safety man". Sally did nothing. Robert said she should speak to the man who was filling the baskets. She told "Jock" who said it was nothing to do with him. [3] She then explained in more detail as to how she did the job of emptying the baskets into the hopper. She went up two steps carrying the basket. She then put the basket against her chest. Unlike her previous evidence, she could not remember if she put the basket on the third step. The hopper was about a foot above her head. She carried the basket with her fingers facing towards the ground. She then had to change the position of her hands such that her fingers were facing towards the ceiling. To do so, she held the basket with one side against her stomach and the other pressed against the hopper, thus freeing her hands. She then lifted the basket and tipped the contents in. At that stage the top edge of the hopper was at the level of her chest, again slightly different from her previous evidence. There was a third step. She could not stand on it, but could put the basket on it (not, it would seem, that she did so). She had complained because the baskets were too full and thus too heavy. If they ran out of baskets they would fill them up. In the past, they were less full. She had never been trained in lifting weights. The machine was no longer in the factory. The pursuer was then shown a document No.7/1 of process which was headed "Weight Control Check". That sheet was dated 18 November 1997. It appeared therefrom that six individual bags of sweets were weighed every fifteen minutes. The average weight of each bag was 104 grams. The last sample bags had been weighed at 1.45pm. The sheet was signed by the pursuer as "packer". She explained that that job entailed taking the individual bags after the sweets had been through the hopper and packing them into boxes. The packaging operation was a two person job. One emptied the baskets into the hopper, from whence they would drop in measured amounts into individual bags which would then proceed along a conveyor belt to the other person who would pack the bags into boxes. Her name appeared as packer as each of the two persons would change jobs hour by hour. The sheet was also signed by the pursuer's co-worker, Dawn Wilson. [4] The pursuer was also referred to No.6/8 of process which comprised two sketches of the bagging machine. The first had been made by two engineers at the pursuer's request. It showed the height of each of the three steps as, 340mm, 310mm and 300mm. The distance between the top step and the bottom of the hopper was shown as 680mm. Thus the height of the bottom of the hopper to the floor was 1.63 metres. The pursuer agreed with these measurements. In this sketch the steps are shown as facing the machine. In the second sketch the steps are shown as at right angles to the machine. The pursuer said she was 5'3" in height. She was also shown a sketch attached to No.6/7 of process and forming the sixth

page thereof. (This had been drawn in the course of compiling a report by Christopher Hayre, an ergonomist). The pursuer stated that the basket was not as big as shown in the sketch but that the position was the same. She did not tip it in like that as her hands were in fact under two side handles. [5] That day she had been working with Danny, Tommy and Dawn. Dawn was doing the packing and thus was near the pursuer and saw what happened. The pursuer dropped the basket and told Dawn she had hurt her shoulder. Then they swapped over and the pursuer went on to packing. She told Danny what had happened. He said he had hurt his wrist before on the same job. The pursuer continued packing until the end of the shift. She did not report the incident. She thought that she had just pulled a muscle and did not think it serious. She did tell someone called Cindy but had no idea where that person was now. She just carried on working. She took painkillers. [6] About two weeks later she went to her GP because the pain was worse and extended down her arm. She could still do her job - she just had to. The pain affected her when doing housework or shopping. She could not drive. It stopped her sleeping. She could not remember if she told the GP how it happened. She did not think it was serious. Her fingers were sore and tightened up. Her nails turned blue. She had no such problems before the accident. The GP gave her painkillers which did not help. She went back to see him and was sent to see Mr Lindsay, a specialist orthopaedic surgeon in about October 1998. This followed five visits to her GP. The practice records are No.6/1 of process. On 4 December 1997 she complained that for four weeks she had experienced aching arms, shoulders (plural) and hands (plural). She had one episode of blue discolouration of her hands and fingernails lasting about two hours. On examination she had good movement in all joints. She got occasional tingling at her arms and hands. On 19 December 1997 she informed her GP that her job involved repeatedly picking up small items on a conveyor belt. Her right hand tended to seize up and her right shoulder and arm were most painful. The GP suspected that this repetitive action was to blame for her symptoms. The painkillers were not helping. The GP discussed matters with her but she had no option regarding a change of work. The GP considered referring her to physiotherapy if a stronger painkiller he prescribed did not work. On 6 February 1998 the GP reported no change. She was complaining additionally of intermittent neck pain. He referred her for x-ray. On 20 February 1998, the GP recorded that the x-ray was normal. There had been no change. Accordingly he referred her to the specialist. From the date of the alleged incident in November 1997 until she saw Mr Lindsay in October 1998, she carried on working. She just took painkillers. After examination, Mr Lindsay reported back to the GP in the following terms:- (No. 6/1 of process, p.18) "Thank you for referring Linda Berry. She is a 38 year old lady who has had pain in her right shoulder, right arm and right hand and fingers since December last year. This apparently started after lifting a heavy basket at work. She describes the pain as being intermittent. She often feels her arm goes 'dead' in the mornings. She also feels that her fingers become numb and she has to manipulate them to get them moving. On examination, she had a full range of neck movement and a full range of shoulder movement. Manipulation of the shoulder showed a clicking sound over the anterior aspect of the shoulder. I think she may have a dislocatory biceps tendon. Examination of her hand showed normal power and sensation. She did, however, have mildly positive Tinel sign on the right with radiation to her fingers which was absent on the left and also a mildly positive Phalen sign on the right which was absent on the left. She may also have got a

mild carpal tunnel syndrome. I have ordered a nerve conduction test to be done. In the meantime, I think she should be booked for arthroscopy of her right shoulder to assess the state of the biceps tendon and rotator cuff. I have also ordered a series of shoulder x-rays which will be reviewed when available". This letter was dated 6 October 1998. On the same date Mr Lindsay wrote to Dr Cull, a neurophysiologist, requesting him to carry out certain studies on the pursuer in relation to carpal tunnel syndrome. [7] On 13 October 1998 (No.6/1 of process, p.20) the GP wrote at the pursuer's request to the defenders requesting that consideration be given to her undertaking light duties. The pursuer said that she gave the letter to George Ferguson but that nothing happened. She carried on working but it was hard to cope with the pain. In February 1999 she underwent certain nerve studies for her hand. On 8 March 1999 she complained again to her GP who gave her a certificate for three weeks as she was in pain and could not do work which involved heavy lifting. In March 1999 she was reviewed by the orthopaedic registrar (No.6/1 of process, p.23). Later that month, she was put on the waiting list for a right shoulder arthroscopy (No.6/1 of process, p.24). She was signed off work until after the operation. The problem was her shoulder not her hands. In September 1999, she saw Mr Lindsay again (No.6/1 of process, p.29). She was still off work. Page 33 of No.6/1 of process was a doctor's certificate regarding her benefits. Also in September she had surgery for the carpal tunnel syndrome. This helped for a couple of months. She did not in fact have the operation to her shoulder until September 2000. This helped. She still had pain but not as bad. She could cope with it. She returned to work in the November after the operation. She had light duties for two weeks. She can now do heavy lifting with the help of painkillers. She was coping with it but she found heavy lifting difficult. She could lift her arm to a position straight out from the shoulder. Above that was quite sore. Previously, she liked to swim but she has never been back. She got a bit "crabbit" because of the pain. [8] Mr Thompson, in cross examination, asked the pursuer about the operation she was carrying out when she allegedly suffered injury. She was shown the sketches No.6/8 and 6/7. She said she had to walk up the side of the machine. No.6/8, sketch 2 was correct. No. 6/7 was wrong. She said that she had to wedge the basket after turning round on the steps. She could rest the top edge of the basket on the top of the hopper. She then pivoted it, turned and tipped the sweets into the hopper. The pain which she suffered was sharp and caused her to drop the basket. She told her co-worker Danny that day that she had hurt her shoulder. She also told Cindy Buchanan. Dawn was only 4-6 feet away and saw it happen. The pursuer did not, however, report the occurrence to her employers. She had previously complained about heavy baskets but nothing had been done. There was no point in reporting it as nothing would be done. It was not sufficiently serious to report. She still did not report it afterwards even though the pain was still there. She measured the basket later because someone told her that if she wished to make a claim she would have to get the weight. Contrary to her evidence in chief, she did not weigh a basket on the day of the accident. The weight was definitely 28 kgs. She was referred to No.7/1 (the weight control check). She explained that this was not her job as the weights were done by Danny. The signature on the form was not hers. Her name appeared as "packer" because the jobs were swapped about in the course of the day. The accident happened about 2.00pm but the shift did not finish until 4.45pm. She therefore did a couple of hours work after the accident. They swapped every hour but she did not think she went back on the hopper. She thought Danny did it. She could not remember what

she did. [9] The pursuer was then referred to the GP records (p.4) which show that on 4 December 1997 she first sought his assistance regarding pain to her shoulders and hands. This was two weeks after the accident. The summary of her complaints was correct. However, the GP seems to record that she had been suffering these problems for some four weeks. When asked if she had had the symptoms for four weeks, she said she "didn't know". She could not remember saying four weeks. She did not say the condition was getting worse. She could not remember what was discussed. It was put to her that she had been experiencing pain for four weeks and that there had been no accident. She denied those allegations. She accepted however that she made no mention of any accident to the GP - saying "It was just a pain to me". She was then referred to the GP's entry of 19 December where he records his suspicion that "repetitive action was to blame". The pursuer recollected that there was some discussion as to the cause of her symptoms. It was again pointed out to her that she told the doctor that her job involved "picking up small items on a conveyor belt". She did not know why once again she made no mention of an accident. She accepted that she knew he was trying to find out what was the cause of the symptoms but still she did not tell him about heavy lifting. The next entry on the GP's records was at p.3A and related to 6 February 1998. This records no change in her condition with the addition of "intermittent neck pain". The pursuer claimed that she had always complained of neck pain. Again, she made no mention of any accident. Page 16 of No.6/1 of process was the letter of referral to the orthopaedic clinic dated 21 February 1998. In this letter the GP makes no mention of any accident to the pursuer. She accepted that she "just didn't tell him about the accident". She also accepted that the GP was correct when he said that she had "good range of shoulder movements". Page 18 is Mr Lindsay's response, already referred to. He apparently "asked her how she did it" and she told him about the accident. This was the first mention of any accident to any doctor and occurred on 6 October 1998, almost a year later. It was put to her that by this stage she thought a claim would be better if only one incident involving heavy lifting had been the cause. It was suggested that she had made up the story of the accident. It was further put that that explained why she had not mentioned it earlier. The pursuer denied these allegations. [10] The pursuer said that she was not always sure that the accident had occurred on 18 November. She remembered now because Dawn was paid off two weeks later. She originally thought it had happened on the 15th. It was put that she told her solicitors that and that her claim was intimated with that date. It was further put to her that it later turned out that she had not been working that day. The pursuer first said she did not know and then said she found out that the date was wrong. It was put that she then gave the date as the 17th. She did not know. She could not remember why she thought it was the 15th. [11] Some of the other records were then put to the pursuer. She accepted that as at 4 March 1999 there was "no tenderness". (P.23 of 6/1 of process). [12] The pursuer then claimed that even though she had worked in other factories she did not know that there was an accident book. She knew that there were union representatives but she had never had an accident before. She had worked for the defenders for two years. It was only after the accident that she was told she should have reported it. None of her colleagues suggested it. [13] Dawn Hunter was the next witness. She worked with the pursuer for the defenders as a packer. She was sure that the pursuer had an accident on 18 November 1997, two weeks before she was paid off on 5 December. She was working at the bagging machine with the pursuer, Danny, Tommy and Colin. She was packing the

bags of sweets. The pursuer was lifting the "loose" sweets into the hopper. The sweets were brought in in baskets about 2 feet by 2 feet. You went up two steps and tilted the basket into the hopper. She did that job sometimes, as did the others. [14] She saw the pursuer walk up the steps. The basket was full to the brim. It was fuller than it should be. It should have been about one-half full - some 14-16 kg. She weighed a basket that morning as she had hurt her wrist. It weighed 26 kg. She had weighed one a couple of weeks before when it was 24 kg. Lifting the baskets was heavy work and sometimes difficult. She had complained to the supervisor but nothing had been done as there was a shortage of baskets. She had been there five years and it was always a problem. The pursuer went up the steps with the basket. She tilted it into the hopper. She screamed that she had hurt her wrist. She had pains up her arm. She told her to report it to Sally but did not know if she did. She carried on working. It was reported to Danny who took over the packing. The witness was near to the pursuer and could see clearly. The pursuer mentioned pain right up to her shoulder. [15] In cross examination, the witness claimed to have weighed baskets several times. This was rather pointless as she never reported it nor did she complain about it. Her own wrist injury was too minor to mention. She weighed a basket that morning just out of curiosity. She had no intention of telling anyone. She had no reason for watching the pursuer that day. She told her to report it to Sally. They should have put it in the accident book. She knew there was one - everyone did. She was asked how many bags of sweets she would pack from one basket. She said about 60 although mathematically a basket of 28kg should produce about 280 x 100g. bags. [16] The next witness was Donald Wilson who was a plant operator with the defenders. He was in fact the group leader. The pursuer, and a number of others, were part of his group. The pursuer worked the bagging machine. It was his signature on No. 7/1 of process for 18 November 1997. He was aware that the pursuer was injured. She told him that a week to one and a half weeks before their conversation she had been lifting baskets and felt pain in her shoulder. It was still sore when she told him. She had pains down her arms and in her fingers. [17] Mr Wilson explained that the baskets were full - sometimes 14 kg. If they were short of baskets for Oddfellows, more had to be put in. 14 kg was about half-filled to the brim they would weigh 21-25 kg at least. Those who filled the baskets had a scoop which held about 7 kg. They should put two scoops in each basket. They were putting 3 or 4 in to get production up. Some people, including the pursuer and Dawn, complained that they were too heavy. Mr Wilson passed the complaints on to management who provided more baskets. Mr Wilson tried to keep the pursuer off heavy work but there were not many jobs that did not involve lifting. [18] Under cross examination, Mr Wilson was asked about No.7/1 which he had signed. It showed the shift finished at 13.45 (which appears to be before the accident at 2.00pm, according to the pursuer). He could not recall the early finish. There was no question about the pursuer telling him of an accident that day. She told him a week to a week and a half later that the accident had occurred on 18th. [19] Alan Hartley had been a maintenance engineer with the defenders for a long time. He knew the pursuer. He was aware of an accident as she had told him. About two weeks after the "accident" she asked him to do a drawing of the machine and he produced No.6/8 of process, No.2. He took approximate measurements with a tape. The steps were as shown and the height to where you fill the hopper was 1.65 metres. There was a lip on the hopper to stop sweets coming out. Mr Hartley weighed five baskets which averaged 28 kg. Sometimes they were full, sometimes half full depending on

the number of baskets available. There were steps beside the machine. You had to turn 90° to put the sweets into the hopper. This was altered after he did his drawing. The hopper could take 6 or 7 baskets. It was kept full. To tip the sweets in you would re-adjust your hold and lift to shoulder height. [20] In cross examination, Mr Hartley said that the pursuer never mentioned a claim when she asked him to do the drawing although he knew that was her purpose. This was two weeks after the accident. It could have been longer. She said she had hurt her arm lifting baskets. That is why he weighed them. She did not ask him to. The baskets were full but not overflowing. [21] The next witness was Mitchell Johnston who had been a maintenance fitter with the defenders for 25 years. He knew the pursuer and had heard that there had been an accident. The pursuer asked him to do a drawing some months thereafter. He produced sketch No. 6/8 of process, No.1. He was aware that the pursuer was putting in a claim and needed a drawing as the defenders would not allow a photograph to be taken. He also measured the machine. He drew it as it was on the day. It was different at the time of the accident. The steps were face on - they used to be the side. He also had seen the job of filling the machine done. You go up to the second step and rest the basket on the third. You then change grip, lift and tip in. there is 31/2 to 4 feet to lift. As for the baskets, the recommended weight was 14 kg - i.e. half full. This was always the case - it was standard practice. If there was a shortage of baskets you "double up". He had seen that often. He was shown the plan No.6/7 of process. He commented that the basket was 18 inches not 2 feet. He compared it to a large supermarket shopping basket. [22] Sally Hale was the packaging manager. She had started in May 1997 as a supervisor. She knew the pursuer and was aware she had been injured because the pursuer told her. She could not remember when. She accepted that sometimes the baskets were heavy and that she had received complaints. She could not say she did anything about them. She herself could lift 20 kg as she was used to it, although it could be heavy for someone else. The weights varied. She had seen them at 25 kg. All the staff would have passed comments about the weight. She had told those who packed the baskets to make them lighter but they could not do it if there were not enough baskets. [23] Dr Brian Merrick was the next witness. He spoke for the Greave Medical Centre where he was a partner and the pursuer had been a patient. He spoke to No.6/1 of process the GP records, many of which had already been discussed with the pursuer. Many of the entries shortly after the "accident" had been made by Dr Heckford, now retired. Dr Merrick could not, of course, speak to their strict accuracy but was able to confirm that Dr Heckford would have conformed to good practice and been as thorough as the circumstances permitted. The entry of 13 October 1998 was made by Dr Merrick himself. He probably asked how the problem had come about and was told that while at work the previous November the pursuer had suffered the onset of pain while lifting. It was he who wrote to the defenders requesting lighter duties. He did so because the symptoms would be aggravated by heavy lifting. Dr Merrick then confirmed the various certificated absences from work and spoke to his various contacts with the orthopaedic specialists and the treatment the pursuer had been given. [24] In cross examination, Dr Merrick agreed that where a fresh complaint was made to a GP he would be interested in the circumstances surrounding the onset of symptoms, "the precipitating circumstances". That was basic. If there had been an accident he would have expected the patient to tell the GP, although they did not do it in every case. There was no note of any such event. That means that she probably made no mention of an accident to Dr Heckford.

The entry "4/52" was inconsistent with 18 November. She complained of problems with her arms, shoulders and hands - all in the plural. She also complained of "aching" not of having been hurt in her right shoulder. The entry of 19 December made no mention of an accident even though the doctor was discussing the possible cause of her problems, which was stated to be the repetitive action involved in the job. Dr Merrick would have expected the pursuer to mention if she did have an accident, although not all patients tell their doctor immediately. As for the entry for 6 February 1998 alleging neck pain, this had not been mentioned before. It was an additional feature. There had been no suggestion of neck pain since the "accident". As late as October 1998 in the referral letter (p.16) there was still no mention of an accident or of heavy objects. Mr Lindsay's report of December 1998 did mention heavy lifting. Since the GP did not tell him about that, the pursuer must have told him. Although there was a suspicion of a problem with the biceps tendon (p.18) this was to explain "clicking" and the eventual diagnosis, was osteo-arthritis in the A. C. joint. [25] Christopher Hayne was called as an expert in occupational health and risk management. He was given sight of certain papers regarding the pursuer's claim and prepared a report (No. 6/7 of process). He was more than familiar with the Manual Handling Operations Regulations 1992. Attached to his plan, Mr Hayne provided two diagrams comparing the dimensions involved in the "bagging" operation with the safe weights according to guidance supplied to supplement the Regulations, which should be taken into account in assessing risk of injury. Mr Hayne first considered the situation if the steps were face-on to the machine. In such a case, the weight of the basket, which he had been given, exceeded the recommended maximum of 13.5 kg. If the weight were required to be held away from the body, the recommendation was 7 kg. Thus 28 kg was well in excess and a potential for injury existed. In such a case there are two choices, either limit the load or use a mechanical feed into the hopper. A weight of 14 kg would be marginally in excess if the elbows were held at the sides but would be double the guidance if the arms were extended. If the steps were at the side of the machine - i.e. at 90° - the question of rotation would have an effect. Mr Thompson objected to this line of evidence on the basis that there was no averment on record to the effect that the pursuer was required to twist or turn in the performance of the operation. On reflection, I sustain that objection. [26] In cross examination, Mr Hayne was referred to his report (No. 6/7 of process). In relation to paragraph 3 he had not been told that the pursuer had actually weighed a basket. With regard to the expression "head height" it was pointed out to him that the pursuer's evidence was "upper chest level". Therefore Diagram 2 was the more accurate. In paragraph 12, Mr Hayne accepted that he had got the weights of 15 kg - 20 kg from an unsigned document of the defenders. In diagram 1, it was assumed that the open end of the basket was where the curved arrow can be seen. In that position a good portion of the sweets will have gone from the full basket into the hopper. Although the pursuer had said she lifted the basket to chest height, it appeared from Mr Hayne's measurements and diagrams that the lip of the hopper would be at waist height. Further, if the basket was supported on the hopper, some of the weight (about half) would be borne by the hopper. Also, as the pursuer tipped the basket it would get lighter as the contents fell out. [27] The final witness for the pursuer was James Crossan, F. R. C. S. (Glasgow), a consultant orthopaedic hand and upper limb surgeon at the Western Infirmary, Glasgow. He had some 25 years experience in shoulder and hand surgery. He had seen the pursuer twice and prepared two

reports, one on 18 July 2001 (No. 6/10 of process) and one on 27 September 2002 (No. 6/5 of process). [28] He was referred first to No. 6/10 of process. He explained that the shoulder was a complex joint. Where the collar bone met the shoulder blade was known as the acromio-clavicular or A. C. joint. The rotator cuff tendon was between that joint and the rotator cuff from the muscles at the front and back of the shoulder blade. It stretched 5 or 6 cms over the top of the shoulder and arm. The A. C. joint was in direct contact with the upper part of the rotator cuff tendon. This was a very tight complex. The bursa provided a lubricating mechanism - i.e. there was fluid in it. The cortisone injected was therefore there to "bathe" the tendon but the injections failed to relieve the pain. They were less likely to be effective where there was tissue damage. The pursuer gave the classical description of rotator cuff tendon tearing which was partial and on the underside of the tendon. That did not show on x-ray. The arthroscopy showed no full-thickness tear. There was scope above the tendon. If put under the tendon, roughness would have been seen. "Shoulder impingement syndrome" occurred where the tendon was swollen in the tunnel or if the tunnel which holds it narrowed, as in degenerative change. Both partial tears and degeneration can occur at the same time. In a woman of the pursuer's age there would have been degeneration anyway and the partial tear would make it worse. As for the pursuer's present status, this came as no surprise to Mr Crossan and was likely to continue indefinitely. [29] By the time Mr Crossan came to prepare his second report on 27 September 2002 (No. 6/5 of process) he had seen the pursuer's medical records (No. 6/1 and 6/2 of process) and was therefore able to give more detail. He accepted that prior to 4 December 1997 the pursuer had no problem with her shoulder and that even at that time there was no mention of a rotator cuff injury. The fact that the pursuer had taken two weeks to go to her GP was not surprising as many patients think that they have pulled a muscle. Only when it fails to improve do they visit their doctor. In Mr Crossan's view, the problems with the pursuer's hand and neck were not related to the shoulder. Having reviewed all the documents relative to the time preceding the arthroscopy, Mr Crossan remained of the view that the pursuer suffered shoulder impingement syndrome and rotator cuff injury. As for the arthroscopy itself, the surgeons had removed part of the clavicle and the collar bone which left a gap creating space for the tendon to move. Mr Crossan described it as "taking the roof of the tunnel". This was a standard procedure which he had seen many times. He pointed out that the same operation will coincidentally assist the tendon. Mr Crossan was asked to comment on the observation that the pursuer had a "reasonably good" result from the resection. His view was that the result was "unexpectedly good" for someone with an injury. This, to him, indicated that she did have an injury, as, if the problem were purely arthritic, she would be symptom and pain free. [30] On 18 October 2002, Mr Crossan wrote a letter to the pursuer's solicitors (No. 6/9 of process) in which he detailed what he considered to be "important points". These were as follows:- "1. The shoulder impingement syndrome caused by partial rotator cuff tear is characterised by pain over the mass of deltoid muscle in the shoulder which is worse at night time than during the day. Patients characteristically have a painful arc of movement between 60 and 120 degrees.

2. Patients with pure acromioclavicular osteoarthritis do not have much in the way of night pain but do have pain over the top of the shoulder where the collarbone joins the shoulder blade. These patients have a painful arc of movement between 130 and 180 degrees of elevation. They also experience pain when the arm is drawn across the chest.
3. The operation to treat each of the above conditions happens to be the same.
4. Both conditions often coexist in the same patient.
5. In a recent series of patients undergoing surgical decompression of the rotator cuff, 25% gave a history of onset of symptoms caused by an injury (Nutton et al 1997: Journal of Bone and Joint Surgery).
6. Finally, her hospital notes record a maximum range of elevation of 90° indicating that she demonstrated a painful arc syndrome characteristic of rotator cuff disease (60-120 maximum)". [31] Under cross examination, Mr Crossan accepted that he was aware that Mr Hooper was acting as expert for the defenders. He had a very high regard for his professional skills. [32] Mr Crossan was first of all referred to the GP records (No. 6/1 of process). In terms of p.4 there was apparently no report of what had happened to the pursuer. He too would have expected that she would have told her doctor about the accident. He was referred to the note indicating that after four weeks she was complaining that her arms, shoulders and hands were aching. If that was true, he did not consider it relevant to his diagnosis. It was more like fibromyalgia. He found it surprising that she did not report the rotator cuff tendon injury. What she described was a separate non-traumatic condition. He was referred to the entry on 19 December where the pursuer complained that her right shoulder/arm was the most painful. He regarded that as the first indication of rotator cuff tendon injury, although there was nothing in the records to show any pain in the deltoid mass. He accepted that she had said that the pain was on top of the shoulder which was characteristic of arthritis in the A. C. joint. There was therefore no support for impingement syndrome in the notes. If the basic problem was pain in the A. C. joint then the note of 19 December was consistent. Mr Crossan was asked when was the first clear indication of impingement syndrome. He replied on 8 March 1999 when the shoulder pain was exacerbated by work. That, at least, gave some indication. He accepted, however, that there was no full diagnosis noted in the GP records. [33] He was referred to the note of 4 December when it was reported that the pursuer had good movements in all joints. If there had been damage to the tendon he would have expected limitation. You can get a slow build up of swelling of up to 6 weeks. This note was not supportive of his position. Although there was, on examination, no sign of muscle strain or spasm you would expect that from injury. The presence of impingement meant (a) tendon tear plus (b) a restriction in the width of the tunnel which would have been the effect of osteo-arthritis in the A. C. joint. However, according to the study he himself referred to 75% of patients with impingement syndrome had just (b) and not both. It was put to Mr Crossan that A. C. arthritis plus carpal tunnel syndrome would have accounted for the entry of 4 December. He said that was extremely unlikely due to the absence of complaint of specific hand pain at night. The entry for 4

December had nothing to do with rotator cuff injury but symptoms can build up over 6 weeks. When asked if it was likely then, that there was no accident, Mr Crossan said it points towards that. He accepted that it was perplexing that she did not complain of the accident when she experienced immediate and continuing pain. [34] Mr Crossan accepted that the entry for 19 December was equally consistent with impingement plus A. C. arthritis. It was neutral. He further accepted that on 6 February 1998 there was no complaint of shoulder pain. Even when the GP referred the matter to the orthopaedic surgeons there was still apparently a good range of shoulder movements. It was accepted that this pointed away from impingement. This was in February 1998, three months after the "accident" when the pursuer had not been put on light work until October of that year. Again, in that very month, Mr Lindsay, whom Mr Crossan accepted was the treating surgeon reported "full range of shoulder movement". When asked why there was no mention of pain in shoulder movement, Mr Crossan replied that "conditions wax and wane quite a bit" and "you cannot measure in absolute terms". Mr Crossan said that it was not dislocating biceps tendon. When asked if it did not even suggest impingement, Mr Crossan replied that he would have noted night pain, difficulty at work and limited range of movement. Mr Lindsay did not note any of these symptoms, therefore it had to be accepted that they were not present. [35] In September 1999 it appeared that Mr Lindsay was able to localise pain to the A. C. joint with no mention of pain to the deltoid mass which was an indicator of impingement. Similarly, his reference to pain on full abduction was consistent with A. C. joint and not impingement. However from the fact the Lignocaine had not completely abolished the pain, Mr Crossan concluded that the remaining pain was from a damaged rotator cuff tendon. It was put to him that there was nothing to suggest that Mr Lindsay was thinking that impingement was material, otherwise he would have mentioned it. Mr Crossan accepted that proposition. He agreed that the pursuer had A. C. arthritis but thought that she had a rotator cuff tendon tear as well. That was the source of the residual pain after the Lignocaine. He based that view on a noted limited range of movement prior to the operation. Some surgeons would have gone on to inject the rotator cuff tendon but Mr Lindsay did not do that. [36] Mr Crossan was then referred to the entry in the hospital notes (No.6/2 of process) for 4 May 2000 where, some 21/2 years later it was said that limitation at 90% indicated impingement. It was put to him that it was possible that the arthritis had just got worse with the spurs impinging on the tendon. Mr Crossan rejected that proposition. Again it was put to him from his own reports that most patients, some 75%, suffer impingement without any injury. From that he appeared to accept that his diagnosis did not prove that the pursuer had an accident. Some of the observations in his report No.6/10 of process were then put to Mr Crossan. He said that the GP had diagnosed possible rotator cuff injury. Mr Crossan agreed that he did not. He referred to hydrocortisone. Mr Crossan agreed that she did not have that. He said that what injections she did have did not relieve the pain. Mr Crossan agreed that it did so substantially. He said that the arthroscopy showed impingement. Mr Crossan agreed that that was not so and that it was just a "loose assumption" by him. Mr Crossan accepted generally that almost everything he was told by the pursuer was inaccurate. After re-examination that concluded the case for the pursuer. [37] The only witness for the defenders

was Mr Geoffrey Hooper, F. R. C. S., a consultant orthopaedic and hand surgeon since 1981. He was not a shoulder specialist but was fully trained in shoulder problems. He saw and taught about such matters frequently at St John's Hospital, Livingston. He also lectured in orthopaedics at Edinburgh University. He examined the pursuer on 30 May 2001. He produced a helpful diagram (No.7/2 of process) which showed the anatomy and movement of the shoulder. This showed the acromion process with the bony part of the shoulder which was part of the shoulder blade and below which lay the tendon (Figure 609). Figure 611 showed what happened when raising the arm from the side - the tendon can become trapped between the acromion and the head of the humerus. This was "impingement" when the tendon is pressed between the two. Normally the tendon moves freely. From 60-120 degrees there is pain if there is impingement. After 120 degrees the shoulder starts to rotate (as in Figure 610). The tendon clears the acromion. There is no impingement and the pain goes. [38] Mr Hooper was then referred to Mr Crossan's reports. As for No.6/10 of process he disagreed with Mr Crossan that there had been a partial tear of the rotator cuff tendon. In his view, the problem was due to osteo-arthritis. He made particular reference to Mr Lindsay's clinical notes which indicated wear and tear in the A. C.joint. If Mr Crossan were correct the tissue would be torn and swollen and prone to be trapped. With osteoarthritis the symptoms would be pain when the arm passes 120 degrees. There is then a twisting movement in the joint and pain when the arm is raised. The history given to Mr Crossan by the pursuer was the same as given to him and no mention was made of a rotator cuff injury. [39] Mr Hooper indicated that he had seen the GP notes and was aware that the accident was alleged to have occurred on 18 November 1997. The entry for 4 December, some 18 days later, was non-specific and there was no record of an accident. He would have expected that to be mentioned. Its absence was relevant. There were no diagnostic symptoms. Lots of people get that sort of problem. He could make no diagnosis from that and thought it significant that both shoulders and both arms were mentioned. If there had been a rotator cuff tear he would have expected symptoms shortly thereafter. There was nothing indicative of that in this entry. Good movement of the joints was against rotator cuff injury - such a patient would be reluctant to move at all. The entry for 19 December 1997 showed that the right shoulder was worse and indicated that repetitive action was responsible. This was very much against an accident having occurred. Again, the letter of referral to the hospital (p.16 of No. 6/1 of process) made no mention of an accident. Mr Lindsay was the specialist actually treating the pursuer. He was the consultant in charge of her case. He made the first mention of an accident at work - nearly a year later. Even then, there was no complaint of pain regarding any particular movement (for example 60-120 degrees which would indicate impingement or 120 degrees plus which would indicate osteo-arthritis). The fact that an arthroscopy was recommended did not indicate that a rotator cuff tear was suspected. Even in March 1999 (p.23) there were no signs of impingement. By September 1999 there was a change in the previous report of symptoms. The pain was more localised to the A. C.joint (which is exactly what the pursuer demonstrated in her evidence). This pointed very much to pathology in the joint rather than the rotator cuff tendon. There was pain on full abduction and on cross abduction "suggestive of A. C.joint pathology". The injection that the

pursuer was given indicated pain coming from the A. C. joint. It was strongly indicative. The fact that there were "signs of osteo-arthritis" indicated that Mr Lindsay was clearly of the same view as Mr Hooper. [40] The hospital notes (No.6/2 of process) for 4 March 2000 indicated that a history had been given of raising a heavy basket to head level. Mr Crossan had founded particularly on this entry as supporting impingement (cf 90 degrees). Mr Hooper thought this unlikely. The entry was made by a junior house doctor who was not an expert in shoulder examination. Notwithstanding this entry, Mr Lindsay still took the view of an A. C. joint problem. The entry for 8 September 2000 was made by another house doctor, but the phrase "top of the shoulder" indicated where the pain was as shown by the pursuer and was indicative of arthritis in the A. C. joint. Page 41 of No.6/1 of process showed that an arthroscopy had not proved possible and an open A. C. resection had been performed. The right hand end of the collar bone had been removed and there was therefore no longer a joint there. "Bony spurs" were a characteristic feature of osteo-arthritis and would have been removed in the resection. Pages 43 and 44 indicated A. C. joint arthritis and made no mention of impingement at all. [41] When Mr Crossan compiled his first report (No.6/10 of process) he had not seen any medical records. It was the pursuer who had said that the GP had said rotator cuff injury. There was nothing in the records to indicate that any such diagnosis had been made. Mr Hooper was baffled as to how Mr Crossan came to the view that such a diagnosis had been made. Contrary to what Mr Crossan said, there was no mention in the records of hydrocortisone injections. That was very different from what Mr Lindsay actually did for diagnostic purposes. It was a completely different procedure. There was nothing in the records to indicate impingement. No such diagnosis had ever been made that Mr Hooper could see. When Mr Crossan mentioned "decompression of the rotator cuff" he characterised the operation differently from either Mr Hooper or Mr Lindsay. The pursuer went back to work very quickly after this type of operation. Therefore she made a much better than average recovery, which suggested that she did not have an injury. The figure quoted on examination of 60-120 degrees was after the operation and did not inform as to the pre-operative situation. When Mr Hooper saw her on 30 May 2001 she had no pain at all. [42] By the time of Mr Crossan's second report (No.6/5 of process) he had seen the medical records according to his evidence. There was no mention of this in his report which was not the normal practice. His description of a decompression operation 11/2 years before return to work did not accord with the records. X-rays were taken which, some two years later, showed degenerative change in the A. C. joint. These showed a close-up view of the joint but were not referred to by Mr Crossan. He clearly could not have seen the second x-ray. [43] Under cross examination by Miss Milligan Mr Hooper said that Mr Crossan was a hand specialist but had experience of shoulders, just as he himself had. Mr Hooper had relied on one examination plus the notes, especially those of Mr Lindsay. His examination was of course after treatment. He accepted that it was possible to tear the rotator cuff by lifting a heavy basket of 25-28 kg or even in certain circumstances 14 kg. The pursuer had exhibited no symptoms prior to November 1997 but her condition was more likely to have been caused by an accident if reported by the pursuer immediately and involved immediate pain. It was put to Mr Hooper that both conditions could coexist and that a tear could

aggravate a pre-existing osteo-arthritic condition. This line was objected to on the basis that there was no record for aggravation. On reflection I sustain that objection (cf. Closed Record pp.12-13). It was also put that it was unusual for a woman of that age to develop osteo-arthritis in that particular joint. Mr Hooper replied that the pursuer did because he saw it on the x-ray. Reference was made to Mr Crossan's evidence that a tear plus swelling amounted to impingement (although the site was not specified). Mr Hooper suggested that the real test was arm-raising and the crucial position at 120 degrees. Miss Milligan referred to the importance placed by Mr Crossan on night pain (No.6/9 of process). Mr Hooper replied that any shoulder problem would cause pain at night. In relation to para.3 of No. 6/9 of process, Mr Hooper suggested that that depended on the site of the impingement and the cause of it. Mr Hooper agreed with para.5 - he too had read the paper. In relation to the pursuer's evidence that the pain was similar to a pulled muscle, Mr Hooper accepted that that would be similar to a tear and accepted that it would get worse. He suggested that a torn muscle would cause immediate pain which would be sharp and not "aching" although the records could be inaccurate on this point. The radiation of pain down the arm was not necessarily indicative of a tear. It was neutral. In relation to the letter of referral, p.26, Mr Hooper said that usually patients mentioned an accident if the symptoms started then. The significance would be obvious if there was immediate pain. The recommendation of light duties would have been appropriate if there was any shoulder pain. Similarly, it was appropriate for the pursuer to be signed off work in May 1999. On the question of abduction, Mr Hooper accepted the possibility of an underlying tear but again would have expected some pain at 60-120 degrees. As for the entry of 4 May 2000 (No. 6/2 of process), Mr Hooper pointed out that what was being referred to there was flexion and extension, not abduction. This was indicative of impingement but could arise from a partial tear or osteo-arthritis. However, if it was osteo-arthritis, the pain would continue above 120 degrees. Although the diagnosis (p.43 of No. 6/1 of process) was one of A. C. joint arthritis, there still could have been a partial tear. Although she made a good recovery after the operation, the situation never goes back to 100% normality. The pursuer was very much better when he saw her but it was not 100% and it was still advisable to avoid very heavy work, especially lifting above the shoulder. [44] Mr Hooper remained of the opinion that the information strongly pointed to the fact that the problem was A. C. osteo-arthritis. She had been treated for that and had recovered from it. No tear had been noted at the resection. A partial tear was "quite unlikely". [45] In re-examination, Mr Hooper confirmed that he could see nothing in the medical records to suggest the possibility of rotator cuff injury. At that the defenders closed their case. [46] Miss Milligan for the pursuer invited me to sustain her first and second pleas-in-law and pronounce decree in the sum of £25,300. Her submissions fell into four chapters:-

- (1) liability on the facts - did the pursuer have an accident?
- (2) if she did then are the defenders responsible? - liability in law;
- (3) did it cause injury to the rotator cuff tendon? - causation; and

- (4) if so, what is the measure of loss? - quantum . [47] Miss Milligan moved me to allow the Record to be amended at p.6 B-C by deleting the word "head" and substituting therefore the word "chest". I allowed that amendment. [48] In relation to her first chapter, Miss Milligan referred me to Article 2 of Condescendence and submitted that the pursuer had proved that an accident had occurred as condescended on. She invited me to accept the pursuer and her witnesses as credible, reliable and consistent. Although they had been intensively cross-examined, no evidence had been led in support of the defenders' line. [49] Miss Milligan then proceeded to summarise the evidence led in support of the pursuer's contention that an accident occurred as averred. She submitted that the pursuer gave her own evidence to the best of her recollection. The weight of a basket was 28 kg when full. She complained several times to Sally and to Hunter. They had to be so filled as there were not enough baskets. Nothing was done about that. There was no training above weight or manual handling. The accident occurred when the pursuer carried an "overflowing" basket up two steps to fill the hopper. Whether the steps were face on or to the side was irrelevant. Either way was contrary to the Regulations. She took up the basket at stomach level. There was a bar on the hopper over which she had to tip the basket. She gave a demonstration of raising the basket to chest level. As she did so she felt a strong pain in her shoulder and dropped the basket. She did not report it as she thought it was just a pulled muscle and not serious. She did tell Dawn Hunter and went on to packing. Miss Milligan accepted that the question of weight was crucial and must be proved by the pursuer. The pursuer said 28 kg as she had weighed a basket containing a similar amount of sweets. Miss Milligan also accepted that Dawn Hunter was a critical witness. She had weighed a basket two months before the accident at 24 kg. She had told Sally but nothing was done. Again, she weighed a basket two weeks before at 24 kg again. This time she told Wilson. She weighed a basket on the day of the accident at 28 kg. There was no contrary evidence. Wilson said that the baskets should have been half full - about 14 kg, being two scoops of 7 kg each. Sometimes four were put in, in order to get production up. Johnson also said that there was a lack of baskets and that half full meant 14 kg. Hartley had weighed five baskets and that the average was 28 kg when the sweets were two inches below the brim. Miss Milligan therefore submitted that there was an abundance of evidence that the baskets weighed between 25 and 28 kg and that the pursuer had established a weight in excess of 25 kg. The pursuer had complained several times to Sally and to Hunter but nothing had been done. They told her to speak to the fillers who said there were not enough baskets. This was confirmed by Dawn who was just told to get on with it. She said the lack of baskets was a problem and she had told Sally and Wilson. Wilson confirmed the complaints and the fact that the management had done nothing about them. Sally gave similar evidence. Miss Milligan submitted that the pursuer had established that complaints had been made and that nothing had been done. [50] As for the occurrence of the accident itself that was spoken to by the pursuer and by Dawn who supported the pursuer in the essentials. Both were cross examined and the question had been raised whether both were lying and in collusion. Miss Milligan submitted that the evidence did not support that proposition. It was significant that their evidence concerning weights and complaints was supported by everyone. This tended to show that they were not lying about

the accident. Miss Milligan then turned to the matter of reliability, dealing first with the date of the accident. Both witnesses testified that the accident happened at 2pm on 18 November 1997. Dawn had left about two weeks later on 5 December. There was also the doctor's appointment she had for that day. The matter had not been reported and therefore there was no written record. No. 7/1 of process showed the weights of the packages which were confirmed by the pursuer while on packing. The jobs rotated and there was no contrary evidence. Although that record showed a 1.45 finish, the averment was that the accident occurred "at or about" 2pm. This offered a degree of latitude, since the witnesses did not recognise the importance of the accident at the time. As for reporting the accident, the pursuer was not aware of the accident book. She tried to report the matter some months later and was told she was too late. Although the GP records had no exact date or time for the accident the pursuer could not remember what she told her doctor. Miss Milligan submitted that the evidence was sufficient if I accepted both the pursuer and Dawn as credible and reliable. This I should do as their evidence was honest and straightforward and supported by the other witnesses. In addition, there was no contrary evidence. The pursuer told Sally and Wilson about the accident at the end of November. Miss Milligan submitted that the factual averments at p.5-6 of the Record had been established on a balance of probabilities. [51] As for liability in law, Miss Milligan referred to the common law case to the effect that the weight of the basket was in excess of what was safe. In relation to the Manual Handling Regulations referred to at p.10 of the Record, it was submitted that in terms of Regulation 4(1) this was a manual handling operation in respect of which there was a risk of injury. Reference was made to Mr Hayne's report (No.6/7 of process) and to the work done by Johnson and Hartley (No.6/8 of process). It was submitted that the measurements were substantially the same. It was accepted that Mr Hayne's drawing was not a fair representation as it was unlikely that the basket was at such an angle. Whichever way you looked at the Regulations or the guidance, nowhere was safe for a weight of 25 kg. Whether the basket was at head, chest or waist height, the weight was excessive. The pursuer's evidence was that she had to tip it over the bar which was at chest height and Dawn supported that. Miss Milligan submitted that the defenders had no answer and pointed out that Dawn had injured her wrist on an earlier occasion. Miss Milligan submitted that it was clear that the operation was not safe. It was for the defenders to aver and prove that it was not reasonably practical to make it safe and they had failed to do so. There was no evidence to call Mr Hayne's view into dispute and his evidence proved liability in terms of the Regulations. Miss Milligan submitted that there was also a clear common law breach. Anyone knew that 25 kg was excessive and there had been complaints and a previous injury. It was clear negligence to do nothing in these circumstances. [52] Miss Milligan's third chapter related to causation - had there been a partial tear of the rotator cuff tendon as averred. There was the evidence of Mr Crossan for the pursuer and Mr Hooper for the defenders. Although Mr Hooper was a well-known hand surgeon, he was not a shoulder specialist. Mr Crossan, however, was a hand and upper limb specialist who had held a shoulder clinic for 25 years. It was submitted that he had the greater experience. Mr Hooper saw the pursuer on 30 May 2001 but did not produce a report. His opinion was based on the

medical records, especially those of Mr Lindsay. Mr Crossan did not disagree with Mr Lindsay on the question of osteo-arthritis but felt that there was something else. [53] Mr Crossan's first report (6/10 of process) was prepared before he saw the records and was based on a history from the pursuer to the effect that she had suffered acute pain lifting a basket. It had to be accepted that as to the diagnosis of the GP, the treatment given and the period off work, Mr Crossan was wrong, but this could be put down to the pursuer being a poor historian. The critical issue was the acute pain while lifting. According to Mr Crossan's opinion at p.2 this meant a partial tear in the rotator cuff tendon plus impingement. He has not deviated from that. The accident could have caused the partial tear, as Mr Hooper accepted. The pursuer's evidence was that she visited her GP two weeks later as the pain was worse. It was present on top of the shoulder and down her arm. She had pain at night and pain in her fingers. The pursuer's evidence supported Mr Crossan's diagnosis. It could seem like a pulled muscle. Mr Crossan said this was a classic description of a tear of the rotator cuff tendon. [54] By the time of his second report (6/5 of process), Mr Crossan had seen the medical records and the x-ray. On examination, there was a full range of pain-free movement. He accepted that degenerative changes had been exacerbating the pain, whereas Mr Hooper ascribed all the pain to osteo-arthritis. Miss Milligan submitted that if the pursuer was a credible and reliable witness regarding the accident, then the injury occurred at that time and Mr Crossan's view should be accepted. His diagnosis did not change in this report. [55] Miss Milligan then turned to the GP records (6/1 of process). Although the first entry contained no mention of an accident, the pursuer said she was not asked. The entry did mention the shoulder and hands. The pursuer's account of an accident four weeks before was not accurate but the pursuer could have been a vague historian. This was just unfortunate. Mr Crossan said that it could have been weeks after the accident that she first suffered pain and she did mention pain on 19 December 1997. The fact that the pain was at the top of the arm was particularly suggestive of a tear. Miss Milligan submitted that Mr Lindsay, by October 1998, clearly went down the wrong road by looking at "clicking" and dislocation, although he did mention rotator cuff. At about the same time Dr Merrick saw her and had no reason to disbelieve her account of an acute onset of pain at work from which all her symptoms dated. Indeed, he requested light duties, a request which both Mr Crossan and Mr Hooper found reasonable. The fact that she had not been given light duties had not helped. In September 1999 the Lignocaine test was done by Mr Lindsay. There was pain on full and cross abduction which was suggestive of A. C. osteo-arthritis. Similarly, on x-ray, signs of that condition could be seen. However, a partial tear cannot be seen on x-ray and even though by that stage there may have been degenerative changes, the triggering factor was the tear. Miss Milligan submitted that Mr Lindsay's letter was not determinative of the issue, especially if the pursuer was to be accepted. Mr Crossan accepted that Mr Lindsay had not discovered the tear but this was not surprising since it was not to be seen on x-ray. Mr Lindsay did not mention the accident. The operation was appropriate to both conditions. Mr Lindsay was not trying to find the cause: he was trying to treat the symptoms. [56] Mr Crossan relied on the opinion of the junior house doctor contained in 6/2 of process that the pursuer was restricted to 90% extension and flexion. In 6/9 of process Mr Crossan

expressed the view that pain between 60 and 120 degrees was suggestive of rotator cuff tendon tear and pain between 130 and 180 degrees pointed to osteo-arthritis. These were just tests and were not determinative. The pursuer had always spoken of pain in her arm and shoulder and the question was what started it off. Mr Milligan also submitted that Mr Crossan should be preferred both on the specific question of night pain and on the whole of 6/9 of process. The critical issue was whether the pursuer had had an accident which brought on the symptoms there and then. Mr Lindsay had gone first down the wrong road and then had taken the view of osteo-arthritis but he was looking at symptoms not cause. He would not see a tear on x-ray and everyone accepted that there was osteo-arthritis anyway. Miss Milligan submitted that there was nothing on paper to contradict the pursuer's evidence as to the onset of pain in the accident. Therefore, on the balance of probabilities, the pain was due to a partial tear. [57] Miss Milligan then turned to Chapter 4, the question of quantum of damages. In this context, Miss Milligan helpfully provided a schedule setting out the pursuer's claims. On the question of solatium, the pursuer had suffered pain from the accident to the operation, some three years. She was off work one and a half years. She still had pain at work and required painkillers. She had limited movement and could not swim any more. It was submitted that she was stoical. She had soldiered on and got back to work as quickly as possible. She had not exaggerated. An appropriate sum under this head was £8,000 with interest on two thirds to the past at 4% from 18 November 1997. Reference was made to *Mitchell v Glenrothes Development Corporation* 1991 S. L. T. 284. As to past wage loss, her absence had been appropriate and according to the Joint Minute the measure was £8,797 with interest making £11,153 continuing at £1.93 per day. Since the pursuer was now back at work a figure for loss of employability had to be taken out of the air (*Kirk v Fife* 2002 S. L. T. 21). She suggested £5,000. In the whole matter, Miss Milligan invited me to sustain the pursuer's first and second pleas-in-law and pronounce decree in the sum of £25,326. [58] Mr Thompson, for the defenders, kindly offered to provide me with a written submission in order to save me taking extensive notes. Little did I expect that that document would extent to some 26 pages of close typescript. In addition, Mr Thompson began by alluding to certain points made by Miss Milligan in the course of her submissions. Miss Milligan had referred to the witness Dawn Hunter as being "strong and forceful". Mr Thompson agreed with this but suggested that it was her very forcefulness which made her incredible and unreliable. It had been suggested that the baskets were "overflowing" at 28 kg. However, they had handles which were inside when the sweets were put in. They could therefore not be completely filled. Further, these handles had to flip out. Thus the baskets were not so full as overflowing and could be stacked. Mr Hayne, the pursuer's expert, had testified to a clear contravention of the guidance (and hence the Regulations) but that was not so as he had written his report on assumptions and inaccurate information provided to him. In addition, the "operation" in this case was not carrying but tipping. The phrase "pain in lifting the basket to the bar" was inaccurate as the pursuer was in the course of tipping the sweets into the hopper. It was for the pursuer to prove how much the basket did weigh. Mention had been made of a lack of training but there was no case based on that and such an objection had been sustained. 7/1 of process was the form for 18 November which indicated that packing finished at 11.45am.

However, the pursuer's evidence was that she continued to work on that machine after the accident until the end of the shift. The written record was not consistent with that evidence. Similarly, the GP's written note for 4 December was wholly inconsistent with the pursuer. The suggestion that the pursuer "lifted the basket over the bar at about chest height" was inaccurate as she had not lifted it but tipped it while its weight was still on the bar. In Mr Hayne's report (6/7 of process) at p.7 and diag.2 the height of the hopper was shown as at the abdomen. That is, the lip of the basket was at that height. It was then tipped with its weight supported. Further, the weight would be reducing as the basket was tilted. There was thus no risk of injury on that manoeuvre and no breach of the Regulations. [59] On the subject of causation, it was important to note that Mr Crossan did not get his theory of rotator cuff tendon tear from the medical records. The pursuer had not been examined by either Mr Crossan or Mr Hooper prior to the operation. No such diagnosis was ever made. Mr Lindsay only made passing reference to it in another context. Mr Crossan did not explain from where he got this diagnosis. Mr Thompson referred to the pursuer's evidence about the length of time between the accident and her first visit to the GP. On the one hand, she thought the accident minor while on the other she said that the pain started at the accident and was getting worse. That did not fit with the GP's entry for 4 December. The pursuer's evidence did not ring true. The account which the pursuer gave to Mr Crossan was given after the operation and in the course of litigation. Mr Crossan referred to the pursuer's complaints as a "textbook description of a tear to the rotator cuff tendon". Mr Thompson was intrigued by that since the pursuer had really only complained of a pain in the shoulder. Mr Crossan did not say what made him use that description; he did say that he thought the pursuer was a poor historian. The medical records contained no suggestion of symptoms of impingement. [60] Mr Thompson then referred to his own written submission. The following is a slightly edited version of this lengthy document in the form in which it was presented to me. Mr Thompson dealt firstly with the credibility and reliability of the witnesses, beginning with the pursuer herself, whom he asked me to find incredible and unreliable. Examples of incredibility (40 or so) [61] She procured Dawn Hunter as a witness to lie for her. Saying that the lip of the hopper was at mid or upper chest height, when it was at waist height. Claiming that she had to lift the weight above her head. The fact that at the relevant time at least half the weight of the basket was supported by the hopper. The simple fact that, when she was doing the operation, which she says caused the pain, the basket must have been effectively empty. Not mentioning the accident to Donald Wilson at the time. Claimed she did (in cross) but he contradicted that. Not complaining about accident to management at the time. (Particularly when she had previously complained about the baskets, according to her. She said she had complained to Sally the supervisor, Robert Hunter the health and safety manager, and thirdly, Jock Henderson). Not reporting accident at the time. (Particularly when she claims she told various work colleagues including Donald, and Cindy Buchanan). Not mentioning accident to the GP on 4 December 1997, two weeks after the accident. Telling the GP that she had been suffering from the pain for four weeks! Complaining to GP not just about the shoulder but about wrist and hand symptoms. All part of the same complaint, it seemed. Investigated for rheumatoid arthritis. Not

mentioning accident to GP despite detailed discussion of her work on 19 December. Not mentioning accident to doctor in February 1998 when seen on two occasions. Only complaining about neck pain in February, as a new complaint, but claiming in court that it was part of the alleged incident. Only mentioning accident to Mr Lindsay in October 1998. Pursuer's excuse for failure to tell the doctors is a combination of: she didn't think the accident was serious. Sometime in cross-examination she said she didn't know what was causing the pain, but when I asked why it never occurred to her to wonder what the cause of her pain was she said that was why she went to the doctor a fortnight later. Totally inconsistent with the idea that she did not tell the doctor what had happened in this immediate post accident period. She claimed that it never occurred to her to discuss the matter with the doctor. Totally incredible. Then no explanation at all for the detailed discussion on 19 December, but absence of any reference to the accident. Seemed to suggest that it was because she said what her job was at the time of attendance rather than what she had been doing when the pain started. Totally inconsistent with the idea that she never had pain before the accident and then had pain caused by, and suffered after the accident. How could she claim that she did not know what was causing the pain? She even claimed that she didn't know why the doctor was asking about her job on the 19 of December. Incredible. She told Mr Lindsay because he asked what happened, she said. But in fact what she said he said was not that, but "he asked what I had done at work - what my job was - I told him that I had done it when carrying baskets." So his question seems to have been the same as the GP's question, even on her account! She could not tell the court why she told the specialist but not the GP (cross-examination). Those excuses are totally incredible. [62] Further, in relation to the two witnesses who came to the court to say that she had told them about the accident and the fact that she had suffered an injury only a week or two after the accident. At least one of them was lying and the other may have been mistaken rather than lying, but esto she did say this it completely undermines the idea that she did not realise the supposed injury at the time of speaking to her doctor. According to the pursuer she suffered bad pain in her shoulder at the time of the accident which got worse consistently thereafter until she went to her GP. Further, she was adamant that she had never suffered shoulder pain before the alleged accident. The idea, as she claimed in cross-examination, that she did not wonder what the cause of her pain was, was unbelievable. It was equally unbelievable that she would not explain to the doctor what she thought had caused the trouble. They obviously had a long discussion about possible causes on 19 December, yet she never mentioned a heavy lifting incident. Other claims by the pursuer which were incredible [63] Claiming to have weighed a basket of sweets on the day of the accident, after it. (She said this in Chief. After it was pointed out that this position was ludicrous given that she did not complain to management or report the accident, (and was also inconsistent with the idea of her not mentioning the incident to her doctor because she thought it was insignificant) she claimed that the weighing exercise was done at some other time substantially after the alleged accident). The idea that the basket weighed 28 kilos at all. 4.5 stones. The idea that the basket contained the equivalent of 280 bags of sweets. (Un-bagged). (If they could not weigh that, then she fabricated the whole story about weighing the basket). Her claim that the

baskets were filled to overflowing. That would mean sweets were spilling on the floor at all the time. (Even Dawn Hunter said the baskets in question could be full to the brim rather than overflowing). Being unaware of the existence of the accident book at the defender's factory. Being unaware of the existence of any accident book in any factory where she has ever worked previously. (Miss Hunter gave the game away by accepting that anyone would know that the accident book existed. She simply claimed not know where it was, which is perhaps more understandable). Both these points are strengthened by the fact that at first in her evidence in chief the pursuer said that she did not fill in the accident book because she did not think the accident was serious. Claiming to be able to date the accident to the 15th because Miss Hunter said that she was paid off about two weeks later. No clear explanation as to why she changed from 15th to 18th. Not sure if she had ever suggested the 17th! Then she said she couldn't remember why she had said the 15th. Claiming that the accident happened at or about 1:50 or 2 pm, when on the 18th the machine closed down about that time. The pursuer claimed she continued working on another aspect of the machine. But it was not working then. Claiming she told Donald that she hurt her shoulder and him saying that he had hurt his wrist beforehand. (Donald indicated he was only told later and said nothing about his wrist, so did not support the pursuer on this)." [64] In relation to the pursuer's reliability, Mr Thompson submitted that the court should take into account all the above factors plus the pursuer's vague and inconsistent demeanour. [65] Mr Thompson then referred to the principal eye witness, Dawn Hunter, whom he claimed was also incredible and unreliable. He referred to the following factors. Bristling with hostility to the defender, even before I started questioning her. Standing watching the pursuer go up the steps and tip the basket, for no apparent reason. Not in her line of sight normally. [66] Allegation that the pursuer screamed. The pursuer said no such thing. The pursuer was at pains to emphasise that it seemed minor at the time. Allegation that the injury was obviously quite serious: I asked for this in cross-examination and she agreed. Contradicted by the pursuer. Allegation that the pursuer hurt her wrist and pain went up her arm. No mention of her shoulder until counsel for the pursuer suggested to her that the shoulder was hurt as well. Completely different description of injury to that given by the pursuer. The claim that she told the pursuer to report the accident. The pursuer contradicted this. The pursuer claimed that the accident was not serious enough for her to consider reporting it. Her claims that they all continued working on the machine when the form shows that the machine had either already stopped, or stopped almost immediately. Her claim to have weighed baskets of sweets on three separate occasions. Supposedly essentially for her own curiosity. Her estimate of being able to get 60 bags into the basket being contrary to the supposed 240. One-quarter! Her claim to have weighed the basket on the second occasion, when she hurt her own wrist, only two weeks after weighing one previously. No reason to do it again. Particularly as she accepts she did not complain to management on this occasion, nor report her accident. The claim not to have bothered reporting her accident or injury to the defender's management or supervisors, despite weighing the basket on that occasion too. Her claim that the purpose of weighing the baskets was to let her fellow employees know. They knew that the baskets were heavy anyway. Her claim to have weighed a third basket on

the morning of the supposed accident befalling the pursuer. She said this was a coincidence. She would have no reason for doing this. She had weighed two previously, one only two weeks before, she claims. [67] Her initial position was that she was sure that the date of the accident was the 18th because she had been paid off about two weeks later. That would be no reason to conclude that it was the 18th rather than some other date around that time. Her later "recollection" in cross-examination that she knew it was the 18th because she went off work early that day for a doctor's appointment. The pursuer claimed that she got the date of the 18th from Mrs Hunter's recollection of being paid off. But if the pursuer had asked, surely Mrs Hunter would have said the date under reference to this supposed appointment. The appointment was just made up during cross-examination. The denial by Mrs Hunter of any discussion with the pursuer including the date on which the accident happened, when even the pursuer claimed that they spoke about that. [68] Mr Thompson then turned his attention to the next witness Donald Wilson whom, he claimed, was unreliable in certain respects and contradicted the pursuer in others. The pursuer claimed that she told Wilson on the day of the accident: immediately, and that he said that he had hurt his wrist doing the job. She said she was positive that she had told him that day (in cross-examination). Wilson did not confirm any of this. Rather, his recollection was that he was told by the pursuer one of one half weeks later that she had hurt her shoulder. Accepting him as reliable would leave the court with the bizarre situation that the pursuer did not tell the GP about the accident to which she was attributing her shoulder pain, despite the fact that she was attributing it to the accident to Mr Wilson only a few days earlier. Further, it would be left with the proposition that she reported to Wilson but did not report it to the defenders. That is a highly unlikely state of affairs. The overwhelming likelihood is that Mr Wilson is wrong about when the pursuer mentioned the supposed injury. (In any event, if Mr Wilson is right, just because the pursuer told Mr Wilson then does not mean that it was true. She may have made up her mind to claim that she had suffered an accident earlier in November, but she may not have thought to lie to her doctor about it! After all, she no doubt was looking for successful treatment. So she might well tell him the truth, while fabricating a story to co-workers in the hope of making a claim.) Alan Hartley [69] In Chief he stated emphatically that the pursuer told him about the accident a fortnight after it happened. In cross-examination this turned out to be complete fabrication. He had no basis for even suggesting that it was a fortnight after accident. He was yet another (third) witness who took it upon himself to weigh baskets. According to him he was not asked to do this by the pursuer, but did it himself. All the baskets averaged 28 kilos, he said. This runs contrary to even the pursuer's evidence, which suggested that over-loading was not particularly common. Accepted in cross-examination that he knew that the pursuer must have been contemplating making a claim at the time that she asked him to do the sketch. Utterly inconsistent with the pursuer's story if this was two weeks after the accident. Mitchell Johnston [70] Generally credible. Measurements of the steps and hopper were reliable, (as were those of Alan Hartley). Sally Hale [71] Generally credible. Not reliable on maximum weight. She never weighed the boxes and it would be difficult for someone to say that the box was 25 Kilograms rather than, say 20. Reliable that nobody ever told her that they had

weighed a basket or what the weight had been. Dr Merrick [72] Credible and reliable. Not the best witness to speak to the obvious issue. One might ask why the pursuer did not tell her solicitors that the GP she saw about her injury early on, and most of the time, was a different doctor in the practice, Dr Hickford. But in any event, Dr Merrick's views and opinions about his colleague, and likelihoods of what was said and done, are of importance in the case.

Christopher Hayne [73] Credible and generally reliable. However, Mr Hayne was hampered by the fact that he was told a story by the pursuer which was inaccurate in several material respects. The orientation of the steps; lack of information about the gap to the hopper; the width, breadth, and depth of the basket; the shape of the basket; the fact that the basket had handles; the requirement to lift the load above head height; the omission of the fact that the basket rested on the lip of the hopper; and the height of the lip of the hopper being at her waist, rather than at midchest level.

Mr Crossan [74] With considerable regret it is submitted that Mr Crossan did not approach this case in the manner reasonably to be expected of any expert witness charged with a duty to consider and report objectively upon the matters in respect of which he was instructed. The delay between examining the patient and writing the report provides at best only a partial explanation for his errors and inadequacies. It is utterly plain that he simply accepted at the outset all the suggestions and allegations made by the pursuer in respect of her accident, her injury, her symptoms, and the supposed diagnosis made by those treating her. It was on information from the pursuer alone, together with his post-operative examination of her, that Mr Crossan made his diagnosis of impingement syndrome. At the time of expressing his concluded view, he had no information otherwise available to him. Thereafter, when presented with the GP records and medical records, he should have considered fully all the elements of the case, including suggested accident, suggested earlier complaint of pain, suggested attendance at the general practitioner, and suggested diagnosis by the doctors treating the pursuer. Had he done this he would have recognised that in every material respect what he had been told by the pursuer was untrue or inaccurate. This ought to have given him pause for thought. Further, it is submitted that any orthopaedic surgeon producing a proper objective report, would have gone through the GP and medical records in detail to describe the history of the case and, where appropriate, compare the evidence therein with the account given by the patient. It is submitted that this is invariable practice. The fact that it was not followed by Mr Crossan in this case would be a grave and valid criticism in the ordinary case. Mr Crossan, in cross-examination accepted that he should have put in these details. He really did offer no tenable explanation for his failure to do so. He seems never to have taken account of the fact that everything he had been told by the pursuer, which could be checked by the records, had turned out to be inaccurate or untrue. Instead of looking at the matter objectively, he continued with premise that the pursuer had suffered an impingement syndrome, and it is plain that what he did, at best, was to ask himself whether he could continue to support his original diagnosis notwithstanding the contents of the records. His approach clearly became an exercise in trying to support his original diagnosis of tendon damage causing impingement. This is demonstrated throughout his evidence by the fact that time and time again he accepted that his postulation could only be correct if the less likely of two

possibilities applied. [75] For example: he should have expected the pursuer to report the accident to the doctor at the time, though a minority of patients might not; he should have expected there to be clear symptoms of a shoulder injury by the first attendance at the GP, though a minority of patients might not have the symptoms; he should have expected the symptoms to be clearly stated in the few consultations with the GP following the initial one, though a minority of patients might not have the symptoms; he should have expected the symptoms to include pain over the deltoid mass, though a minority of patients might not have this symptom, or otherwise that the explanation for silence in the records was a series of doctors had failed to note such symptoms even though they were present; he accepted that in 75% of patients suffering the very condition which he posited, the condition arose without any accidental injury at all; he accepted that the treating surgeon did not consider that the patient had any material impingement syndrome, his diagnosis, and therefore he depended on the treating surgeon being wrong at least in relation to the contribution of the supposed syndrome; he accepted that there was only one note in the entire records which showed restriction of movement supposedly consistent with the condition he claimed the pursuer had. Accordingly his diagnosis depended upon all the other doctors failing to make adequate examination or adequate notes. Further, it depended upon misinterpreting the record in question because the movements described were not those necessary for his diagnosis. Further, it involved preferring the note-taking of a house officer to that of the treating consultant orthopaedic surgeon; he accepted that the fact that the restriction of movement in question was only noted at the time of the pursuer's attendance at hospital for her operation nearly three years after the supposed accident, was hardly supportive of his position, yet he chose to explain this on the basis that the condition could have been getting worse over the three-year period; he accepted that the treating surgeon made findings which were unsupportive of his diagnosis, such as movement being full and the pain being on full abduction, and accordingly that his diagnosis depended on the pursuer being better on the days when she was seen by the treating surgeon than she was at other times, although at some points in his evidence Mr Crossan seemed also to suggest that such symptoms and signs might have been present but missed by the treating surgeon: Mr Lindsay examined, found signs for AC joint and not impingement syndrome; this is no way to approach the issues involved. One cannot start with a diagnosis and then try to squeeze it to fit the available information. But that is precisely what Mr Crossan did in his reports and what he persistently did during the course of his evidence. As a matter of the most simple logic, this approach and the concessions which had to be made by Mr Crossan along the way, mean that it was impossible for him reasonably to assert that on balance of probabilities the pursuer suffered an injury in the course of the accident which caused impingement syndrome by virtue of damage to the tendon in question. [76] Mr Thompson then turned to deal with the merits and, firstly, the question of whether the accident happened as averred by the pursuer. The defender avers: "on the day in question the records indicate; pursuer was on bagging machine with Donald Wilson . (Admitted). Pursuer says that she was taking turns with Mr Wilson. (But did not say that in evidence: rather she said she was with Dawn Hunter). pursuer has given at least two dates for her accident in the past: first date given

was 15/11/97. Pursuer accepted that date was wrong. Later date given was 18 th November 1997. For that day there is an 'weight control check document'. It ends before or at the time of the accident. Yet the pursuer and Hunter both claimed that they worked on at the same machine on the day of the supposed accident. Normally they would. But not on that day. Sally Hale in evidence: did not support any idea of early mention of an accident befalling the pursuer. She said that there was mention of one or more injuries at indeterminate times. She did not support the idea that the pursuer came to her and reported an accident or injury as having recently befallen her. Donald Wilson said: he did not recall mention of any accident at the time it allegedly happened. Accordingly he was contradicting the pursuer. He said he recalled her mentioning it a week or 11/2 weeks later." [77] Mr Thompson submitted that it was not clear how he could be sure five years later. At least in part his evidence seemed to be derived from later information. Even if it was when he said, it is still suspicious that the pursuer did not make the same claim to the general practitioner. The pursuer could be prepared to lie to her work colleagues and bosses, but not to her doctor, at least initially, from whom she hoped to get a cure. [78] He further submitted that the fact is that the accident could not have happened as the pursuer claimed. Her claims are demonstrably unfounded. The hopper was at her waist. The basket was supported by the hopper lip - while she changed grip. The weight decreased as it was tilted. No evidence supported the idea of the basket overflowing with sweets, as it could not be stacked with sweets above the handles when they were tucked into the basket. No need to raise the basket to head height. Even supposing the basket was raised to head height, it would be empty by the time it reached there. [79] There was inadequate and incredible evidence of the weight of the basket. The witnesses who spoke to weight did so by claiming that they had carried out measurements themselves. The evidence of such evidence should be rejected as incredible for the reasons earlier discussed. Without that evidence, there is no proper evidence of weight. [80] In any event, the only point at which the supposed 28 kg weight was borne by the pursuer was when she was lifting the basket to the hopper lip. From the moment it was resting on the lip, as the pursuer describes, the effective weight of it was at most 14 kg. There can be no doubt that the bulk of the weight was being borne by the hopper lip, with perhaps some contribution from the pursuer's torso, as the pursuer was able to change her grip on it without it failing and without any difficulty whatsoever. [81] Even if the view were taken that there was a breach of the regulations in the lifting of the basket to the hopper, that was a separate movement and manoeuvre to the one allegedly causing the accident. Accordingly, the pursuer must fail if that is what she proves. [82] Mr Thompson suggested that the failure of the pursuer to report the accident at the time demonstrates that there was no accident. The pursuer was not above complaining to the management. She claimed that she had complained before. If Mrs Hunter is to be believed, she told the pursuer to report the accident. She claimed the pursuer screamed out. The idea that the accident did not seem sufficiently serious to report does not explain the matter and is untenable. The only way in which the pursuer could possibly be believed on this point is if Mrs Hunter is disbelieved. The fact that the pursuer says that she had complained about the weight of the basket previously makes it still more unlikely that if an accident had occurred

she would not have mentioned it to her employers. [83] Further the GP records fail to support the pursuer in relation to an accident happening: " 4/12/97 : (GP records, page 4): first attendance by pursuer at GP at the alleged accident. [Read]. '4 week-aching of arms/shoulders and hands' not consistent with accident only two weeks prior. 'shoulders'. Not right shoulder. Complaint is of general ache. Seventeen days after the date of 'accident' Injury supposedly sufficient to cause supposed 'impingement of rotator cuff'. Yet: no visit to GP (or hospital) for seventeen days. And: no mention of accident. Complaint is of 'aching arms/shoulders and hands'. In this entry there is discussion/consideration of synovitis. And mention of tingling at arms and hands. Suggest: not consistent with shoulder injury in accident at work." Even Mr Crossan accepts that this is inconsistent with the idea of an overt shoulder injury as claimed by the pursuer. He thinks that this entry is something to do with a complaint of fibromyalgia, a totally different condition to anything later diagnosed by anyone. But leaving aside the issues of medical causation, the pursuer has claimed consistently that she suffered significant pain at the time of injury; never suffered shoulder pain before the accident; and suffered increasing pain in her shoulder between the accident and her first attendance at her GP, yet on any view this attendance has nothing to do with any such history whatsoever. It is submitted that this fact on its own, in the particular circumstances of the case and given the claims made by the pursuer as to the nature of her injury and the symptoms developed thereafter is sufficient reason for disbelieving the pursuer and holding her to be a liar. [84] This adminicle of evidence on its own justifies the defenders being assoilzied in this case. It simply cannot be explained away. [85] One only has to contrast what is contained in this record and in her concessions in evidence with the story she gave Mr Crossan (first report) to see that she is lying. She is lying to try and prove a connection between the supposed accident and her condition that does not exist. " Also : 'good movement or joints'. Suggest: not consistent with injury suggested by Crossan. further : the GP records no accident-type signs or symptoms such as muscle spasm or muscle strain, or anything of that nature." As Mr Hooper said in cross-examination: "One would expect complaint to be of sharp pain. Not 'aching', which implies a dull pain. 19/12/97: GP records, page 4. Pursuer goes back to general practitioner. Still no mention of any accident. Quite the contrary: job's repetitive nature emphasised. 'I suspect repetitive action is to blame for symptoms'. 'Discussed. No option re change of work'. no hint of an accident, despite much discussion. 6/2/98: GP records, page 3A. 'No change - also mentions intermittent neck pain? Element of cervical spondylosis - try soft collar... night time!'" The neck pain was new, 21/2 months after the supposed accident. Yet the claim on record was that she hurt her neck in the accident. The pursuer never mentioned neck pain in evidence in relation to the accident until I challenged her about the matter in cross-examination. " 21/2/98: GP records, page 16. GP referral. 'Troubled with intermittent neck and right shoulder/arm pain. This started around November 1997...' No mention of specific incident. No mention of injury at work. Rather there is reference to repetitive manipulation of small objects. Also: shoulder good range of movement . And nil specific. Intermittent. Not indicative of acute shoulder injury, surely? Then: 6/10/98: GP records, page 18: report from orthopaedic surgeon. 'Pain in right shoulder, right arm and right hand and fingers since

December last year. This apparently started after lifting a heavy basket at work.' This is the first mention of alleged accident in the records. Almost one year after it is supposed to have happened. So generally:

1. No claim of accident at natural time and no credible explanation.
2. Information given which was inconsistent with any accident happening at all, and inconsistent with the supposed date of the accident.
3. Symptoms inconsistent with the accident and with the date of the accident." [86] Mr Thompson then turned to the question of liability on the part of the defenders if an accident had in fact occurred. In his view no issue arose at common law which was not covered by the statutory case. He suggested that the pursuer's case depended on the evidence of Mr Hayne, but Mr Hayne was not really able to assist the pursuer's case. He had been proceeding upon largely inaccurate information. In that event Mr Thompson submitted that the court has a clearer idea of what the pursuer was doing than Mr Hayne did. One would either lift the basket from the bottom to tip the contents (so the hands remain well inside the 13 kg zone (with support for at least half the weight from the hopper), or the operator's hands would be higher, but not really supporting any weight at all, but merely pushing forward a rapidly decreasing weight. As mentioned above, the issue of whether or not the guidelines were broken in moving the basket to the lip of the hopper is irrelevant. That was not the cause of any accident according to both the pleadings and the evidence of the pursuer. Expert report for the pursuer presupposes a stretch over the top step. This did not happen. The hopper was close to the step and to the operator. The pursuer's case is that she had to lift the basket above her head height. At no stage did she indicate this to be true. All she had to do was lift it to chest height, rest it on the hopper edge, and tip it. In all her demonstrations the pursuer's hands never went above her shoulders, and certainly never above her head. Also, sketch of man lifting basket shows too big a basket according to even the pursuer. Too big in every direction and ignoring the taper. Sketch also shows the hands of the operator in the wrong position. [87] The next issue was that of causation. The pursuer's case depended entirely on there having been a tear in the rotator cuff tendon. The pursuer avers: "She felt a pain across her right shoulder and neck. 18 th November 1997. She thought she had only a pulled muscle and continued to work. However she suffered increased pain and she suffered numbness in her right hand. Attended her GP on 4 th December 1997. Pain in right shoulder, arm and hand. Fingers became numb. Clicking of right shoulder. Mild carpal tunnel syndrome right side. Surgery 1999. Surgery: unrelated to shoulder. Arthroscopy to shoulder September 2000. Diagnosis: shoulder impingement. Treatment: open decompression of rotator cuff. Likely partial tear of the rotator calf tendon." Despite the slightly hesitant way of pleading the tear to the tendon, it is that the pursuer must prove to succeed. There is no other basis for establishing causation on the pleadings or in evidence. GP records fail to support the pursuer in relation to any accident causing shoulder injury. The issue of whether an accident happened at all has been dealt with above. In this section concentration is more upon the issue of what injury, if any, was

sustained an any such accident. [88] It is possible, and indeed on one view consistent with the evidence given by the pursuer, that some sort of minor incident did occur at about the time the pursuer stated. But even if that is right, and it is denied by the defenders, it does not mean that any injury was sustained by the pursuer, still less that the tendon in question was damaged in the course of it. It seems that the pursuer's own view was that she had sustained little or not injury at the time. It is only subsequently that she has claimed that her symptoms date from the supposed accident. " 4/12/97: (GP records, page 4): first attendance by pursuer at GP at the alleged accident. [Read]. '4 week-aching of arms/shoulders and hands'. It is submitted that that is not consistent with accident only two weeks prior. 'shoulders'. Not right shoulder. Complaint is of general ache. Seventeen days after the date of 'accident'. Injury supposedly sufficient to cause supposed 'impingement of rotator cuff'. Yet: no visit to GP (or hospital) for seventeen days. And: no mention of accident. Further: complaint is of 'aching arms/shoulders and hands'. All symptoms together : not carpal symptoms later as Crossan suggests. Crossan suggests this on the basis of what he has been told by the pursuer. Mr Crossan said he did not consider that this entry was related to any supposed tendon damage or shoulder impingement syndrome. He sees it as being possible fibromyalgia. It certainly seems to have been treated as such by the GP. So the only explanation consistent with Mr Crossan's diagnosis is of the tendon had been damaged in the accident but had not yet swollen sufficiently to cause impingement. Given that much of the evidence emphasised the narrowness of the passage through which the tendon moves, common sense suggests that the likelihood in most cases would be for an earlier, rather than a later onset of the problem. That was the evidence of Mr Hooper. In any event, as was so often the case with his evidence, Mr Crossan could only assert his proposition by dismissing this likelihood on a "not necessarily" basis. In this entry there is discussion/consideration of synovitis, and mention of tingling at arms and hands. Suggest, not consistent with shoulder injury in accident at work. Also, "good movement of joints". Suggest, not consistent with injury suggested by Mr Crossan. It is all very well for Mr Crossan to say that it could have taken six weeks for the injury to manifest itself. But the likelihood must surely be that it would have manifested itself straight away, especially with the sort of injury described by the pursuer. " 19/12/97: GP records, page 4. Pursuer goes back to general practitioner. Still no mention of any accident. Quite the contrary: job's repetitive nature emphasised. 'I suspect repetitive action is to blame for symptoms'. 'Discussed - No option re change of work'. no hint of an accident, despite much discussion. No hint of any feeling that there was a rotator cuff injury." Mr Crossan said, for him this was the first indication of there being shoulder impingement. But the sole basis for that was simply that shoulder pain was singled out. That was equally consistent, as even Mr Crossan accepted, with the pursuer feeling pain in the AC joint. " 6/02/98. GP records, page 3A. No change. Also intermittently pain-? Cervical spondylosis. 20/02/98. X-ray normal. still no mention of accident. 21/2/98: GP records, page 16. GP referral. 'Troubled with intermittent neck and right shoulder/arm pain. This started around November 1997...'. no mention of specific incident. No mention of injury at work. Rather there is reference to repetitive manipulation of small objects. Also: shoulder good range of movement. And nil specific. Not indicative of acute shoulder injury, surely. Then

(eight months later!): 6/10/98: GP records, page 18: report from orthopaedic surgeon. 'Pain in right shoulder, right arm and right hand and fingers since December last year. This apparently started after lifting a heavy basket at work.' this is the first mention of alleged accident in the records. Almost one year after it is supposed to have happened. Record continues at page 18: 'full range of movement' in shoulder. Carpal tunnel suspected. And arthroscopy for shoulder - may have 'dislocating biceps tendon'. Assess 'state of biceps tendon and rotator cuff'. specialist is saying full range of movement. No suggestion of restriction in accordance with impingement syndrome. No suggestion of painful movement on abduction between 90 and 180 degrees. Specialist is focusing on completely different possibility because he sees nothing indicating impingement syndrome." But instead of accepting all this Mr Crossan seeks to explain it away by suggesting that Mr Lindsay has missed symptoms which existed; claiming that Mr Lindsay saw the pursuer on a good day. "

13/10/98. GP records, page 20. GP request for light duties . If we are talking about acute injury in acute incident , surely we would expect request for light duties immediately? Not one year after the alleged accident. 12/02/99. GP records, page 21. Nerve conduction studies results. Mild carpal tunnel suggested. Non-accident explanation for arm symptoms thereby given. 04/03/99. GP records, page 23. Falkirk District Royal infirmary letter to GP. Report regarding nerve conduction studies, but also: 'her right shoulder she says then pain is still persisting. No tenderness or instability could be elicited.' not supportive of the Crossan theory. No mention of impingement syndrome or similar. No mention of any sign on symptoms supporting the syndrome. No mention of restriction of movement; pain on particular movement; pain in the deltoid mass. Then 4 GP attendances for other things... Then: 08/03/99. (GP records, page 3). Complaint of painful shoulder + + 'exacerbated by work'. Three-week certificate sign off work . Then continued thereafter. not being said ' caused by'. She had arthritis in shoulder (as we later learn). So movement can be painful... yet another opportunity to record a symptom or sign indicative of shoulder impingement, yet nothing supportive of Mr Crossan was said. Up until now the pursuer had been doing full duties. She was quite adamant in evidence this was the case. She seemed to be aggrieved she had not been put on light work when earlier requested. So how would she have managed with shoulder impingement for so long? Then just repeat attendance for certificates while awaiting orthopaedic appointment and arthroscopy. Till 21/06/99, plus four weeks.... May 1999. Thompsons intimate claim for the accident (date of accident said to be th November 1997. (02/0699. (GP records, page 26. (Pursuer signs mandate for records for this litigation . (So she is making an accident claim by now.) *22/09/99. GP records, page 29. Mr Lindsay, orthopaedic surgeon, report to GP. Shoulder considered to be separate problem from carpal tunnel. Pain localised to right AC joint (acromio-clavicular). Pain on the full abduction and cross abduction of arm, suggestive of AC joint pathology. Confirmed by lignocaine injection helping." [89] Mr Thompson submitted that localised pain means AC joint (especially at top as demonstrated in evidence by the pursuer). Pain on full abduction contra indicates impingement syndrome, even on Mr Crossan's own evidence! It indicates pain in the AC joint itself. The same is true of pain on cross abduction . That is clear evidence of pain in the AC joint itself, then the lignocaine injection is given and Mr Lindsay concludes that the

problem is in the AC joint itself. Mr Hooper agrees: strong significance is relief of pain. No significance in "not completely abolished". Mr Lindsay makes this conclusion because the injection relieves her discomfort. He does not give any injections for tendon impingement because there is none. He thought it was AC joint. That is what he said. That is how he acted. However, Mr Crossan, who was not there, and who did not see the experiment being done, has no idea of the extent of any remaining pain, turns the conclusion of Mr Lindsay on its head. Mr Crossan concludes that because the pain was not totally abolished that means that the problem from which the pursuer suffered was joint impingement. When challenged about that, he cannot support that position and changes his stance to say that well really it is all part of the same general sort of problem and the two things are very closely related. Eventually he accepts that Mr Lindsay either considered there was no impingement or, if he considered there was impingement, he did not consider it material. It is submitted that Mr Crossan cannot be in a better position to make that judgment than Mr Lindsay and indeed can only be in an infinitely worse position to do so. Mr Crossan's evidence simply cannot be accepted in the face of the diagnosis made by Mr Lindsay. Further, Mr Crossan accepted that there were other explanations for the pain not being completely abolished, including the ignocaine not getting to the joint fully and he accepted that if it was felt that there was an element of impingement by the treating surgeon he could have given an injection to relieve that problem, and Mr Lindsay did not. " Record of 22/9/99 continued: Also: new x-ray showed Joint space narrowing and signs of osteoarthritis there. Plan: admitted after carpal tunnel operation, for arthroscopy and AC joint resection. the x-ray confirmed the diagnosis made by Mr Lindsay. Arthritis in the AC joint. this is nearly two years after the supposed accident. Two years' of wear and tear on the tendon and AC joint, regardless of the supposed accident. Even if there was an element of shoulder impingement at this stage, nobody could properly assert that on balance of probabilities an apparently minor incident two years earlier was the cause or a material contributor to it. 04/10/99. GP records, page 33. Certificate by Dr Merrick . Regarding shoulder. Heavy lifting in December 1997 mentioned. This is what the pursuer is now claiming. He simply based this on the erroneous information in the letter from Lindsay provided by the pursuer to him. 07/10/99. GP records, page 35. Orthopaedic report to GP. Carpal tunnel symptoms disappeared after carpal tunnel release. 12/01/00. GP records, page 2. GP clinical notes. 'Shoulder painful again recently.' Carpal tunnel release September 1999: 'not made any difference'. Tingling and numbness. this shows shoulder has been better and is now worse again. Still off work throughout the period. Suggests osteoarthritis. Tends to point away from Crossan theory. Inflammation and: no reason to get worse again. Then: 4 more GP attendances for other things in the following six months. None for arm or shoulder. 04/05/00. Falkirk District Royal Infirmary attendance Pursuer goes into history of supposed accident. Lifting the basket mentioned. 'Pain-sharp and hot in ant aspect of shoulder' but this is a list of present symptoms. Not an account of pain at the time of accident. The record says 90 degrees restriction on extension and flexion. Pain making sleeping on right side difficult." Mr Crossan seizes upon this as supportive. Mr Hooper, however, pointed out that these notes were made by a house officer. Not a specialist. They fall to be compared with the notes made by Lindsay six months earlier. Abduction is

not recorded. Different movements are recorded. The record is irrelevant. Even if it is relevant, all it could possibly show is an impingement, but not an impingement caused by rotator cuff tear. Pain at 90 degrees can be either AC joint or tendon, but pain on high abduction or cross abduction can only be AC joint, and Lindsay never changed his diagnosis because of this finding, so why should we? Even if Mr Crossan were right it is only evidence of impingement developing since she was last seen in September 1999. Shoulder AC joint could just have got worse in the six months, causing impingement but not through any tear of the rotator cuff tendon. So not accident related. Could quite easily have developed naturally in a way explained by Crossan, as happens in 75% of cases. But more importantly: pain at night is just as consistent with AC pathology. No pain over deltoid mass is recorded, even at this point. The treating surgeon still does not diagnose impingement. Then: " 22/06/00. Solicitor request. Awaiting operation. 24/07/00. GP records, page 1. 'Right shoulder still causing problems' 'also tingling in right hand again - had decompression in September' 02/8/00. GP records, page 40. GP letter to employers. Not fit for work at present. Not until after shoulder operation. 28/08/00. Solicitor request in letter regarding fitness for light work. 'Still gets a lot of problems with right shoulder even doing light housework.' Not fit at present. 08/09/00. Hospital records. Pain top of shoulder. No shoulder stiffness." [90] It is submitted that this indicates AC arthritis. Contra indicates impingement according to Crossan's own third report. Indeed, in evidence the pursuer always indicated she had pain in the top of her shoulder. Fingers touched the top of her shoulder. No deltoid pain, here or ever. No shoulder stiffness. Yet Crossan still insists there is impingement due to rotator cuff tear. Untenable. " 10/09/00. GP records, page 41. Hospital operation notes. Arthroscopy of shoulder. Open AC resection. Open resection of lateral end of clavicle (GP notes page 42), 'Diagnosis: AC joint arthritis right shoulder'. no need for acute incident to explain the shoulder pain. Progressive symptoms to operate, expected. Pursuer had arthritis in right shoulder. The treating surgeon did not mention the condition speculated about Mr Crossan." As Hooper explained: during operation he would expect surgeon to look for their two rotated enough. But none was noted, therefore none was seen. Therefore, reason to think the pursuer had a tear, the arthritis provides a sufficient explanation for the pursuer's symptoms. The treatment worked: that suggests that the diagnosis was correct. " 30/11/00 GP records, page 45. Recurrence of carpal tunnel symptoms. And getting it in the left arm. 'Good recovery following shoulder operation for AC Joint arthritis.' November/December 00. Hospital records. Review and discharge of pursuer. Pain free. Full Movement. October 2001 . GP records, page 61. Crush injury to the left hand. No further entries regarding carpal tunnel syndrome or shoulder up to recovery of documents in May 2002. No suggestion by pursuer that she has ever had to go back to GP or hospital because of her shoulder problem." Mr Hooper, on 31 May 2001, found the pursuer pain free with a full range of movement. Return to work 2 months post operation is an astonishing recovery. [91] Mr Thompson then summarised his submissions by saying that Crossan's assessment is not based on the GP or medical records, but account given by pursuer. The account is inaccurate. For example, the carpal tunnel syndrome started at the same time as the shoulder symptoms. There is no support for his diagnosis in the records. All symptoms are simply be due to arthritis in the

AC joint. That was the diagnosis of the treating surgeon before the surgery. It remained the diagnosis after the surgery. The surgery cured the symptoms, or at least improved them substantially. The arthritis. For Crossan to be correct, we would expect a consistent degree of disability and pain. For Crossan to be correct we would expect significant injury to the tissues for them to remain swollen for three years. For Crossan to be correct we would expect substantial injury/accident/pain to instigate problem. For Crossan to be correct we would expect sufficiently serious accident for the pursuer to associate it with the shoulder pain two weeks later. Yet there was no mention of it then, or subsequently for nearly a year. For Crossan to be correct we would not expect her to keep working for 16 months and then stop work. Would expect her to be absent straightaway, or shortly afterwards. Accident just did not happen. Even if something happened, there was no rotator cuff tear. Crossan produced a report riddled with fundamental errors. He did not apply his mind to the issues. Crossan gave his evidence in a partial manner. [92] Mr Hooper gave his evidence well and fairly. No impact was made by cross-examination. His assessment and logic is flawless. All the acceptable evidence indicates: no rotator cuff tear. AC joint pathology only. Mr Crossan's own tests suggests that (except nocturnal pain and that is a worthless point because the pursuer's own evidence about such pain was scant; such evidence as was given way in response to a leading question. Hooper rejected the thesis. If you lie on a sore shoulder you get pain. It is obvious. There is nothing to choose in general between the expertise of the two experts. But Hooper did his job properly. Crossan did not. Hooper diagnosed on the basis of examination, what the pursuer said, the medical and GP records, and detailed and objective consideration and thought. Crossan quite simply did not do this. [93] Mr Thompson invited the court to reject the evidence of Mr Crossan and accept that of Mr Hooper. The final chapter was quantum . Pain and suffering [94] The pursuer has suffered from two conditions unrelated to any accident. Carpal tunnel syndrome, and degenerative change of the right acromio-clavicular joint. Esto any accident whatsoever occurred, there was no injury. At the most there was some sort of transitory discomfort. Not really an injury at all. The pursuer continued working , both that day and subsequently. Until at least 16 months after the alleged incident, then went off work. (Esto the pursuer suffered some injury, it could only relate to pre-existing degenerative change). Likely that she would have suffered the same pain, anyway but perhaps a little later. Her life was hampered anyway by the carpal tunnel syndrome which, on any view, was not caused by the alleged accident. In any even, the surgery in September 2000 effectively cured the problem. When examined the pursuer has full and pain free range of movement in her shoulder. She returned to work quickly after the operation. Problem is re-occurrence of carpal tunnel syndrome in right, and start of it in left, arm. Wage loss [95] The pursuer avers she was off work from 8 March 1998. [96] The defender avers the pursuer was off work from March 1999 until November 2000. That is supported by GP records (see above). Wage records [97] Absence 13/03/99 or so until 02/11/00. Eighty-one weeks. Pre accident earnings £122 say £125, = £10,125, projected. Sick pay and SSP, total £1644.44. Net wage loss £8480.56. Interest: 2.75 years @ 8% per annum = 22 percent = £1865. Total wage loss inclusive of interest = £10,345. Joint minute deals with wage loss. The pursuer was unemployed for three or four years before starting

employment with the defender starting in June 1996. Why? Not married. No family. Loss of employability [98] Pursuer claims to be unable to carry out heavy work and unfit for light work. In Mr Thompson's submission, she is able to do her old job. She has free and full range of movement in her shoulder. If she is restricted in her activities at all, it is because of carpal tunnel syndrome. Any unfitness for repetitive work is particularly due to the carpal tunnel issue. Carpal tunnel syndrome symptoms commenced in her left arm at about the time that they re-occurred in her right arm.

Conclusion

[99] The pursuer has failed to prove that any accident happened; that an accident happened in the way claimed by the pursuer on record; that an accident happened in the way claimed by the pursuer in evidence; that if an accident took place it occurred in breach of common law duty on the part of the defenders; that if an accident took place it occurred in breach of statutory duty by the defenders; that she suffered any injury whatsoever; that in particular she suffered a tear to her rotator cuff tendon; that any such tear caused an impingement of her shoulder; that the symptoms she suffered, and the operation that she required, were caused by any impingement of her shoulder. That esto there was any such impingement it was caused by the accident. That the pursuer suffered any loss, injury and damage as a result of any accident. Opinion [100] I deal with matters in the order of the four "chapters" suggested by counsel. The first of these was liability on the facts, posing the question "did the pursuer have an accident?". At the outset, it has to be noted that, in relation to this question, no evidence was led by the defenders. To answer this question, then, I am wholly dependent on the impression made upon me by the pursuer and her witnesses. There were only two eye-witnesses to the alleged accident on 18 November 1997, the pursuer herself and Dawn Hunter. Largely for the reasons given by Mr Thompson, I found neither of these witnesses credible or reliable. Almost from the start of her evidence, the pursuer seemed to me to be evasive and changed her evidence several times. Further, there was such inconsistency between her evidence and other evidence in the case that I found it difficult either to credit or trust what she said about any "accident" in which she hurt her shoulder. These were specified by Mr Thompson in his submissions and can be found at pp.36-38 hereof. The pursuer also made a number of claims concerning her "accident" which I found difficult to accept (pp.39-41). Miss Milligan, herself, conceded that in this case the weight of the basket which the pursuer was required to tip into the hopper was crucial. Only if that weight was excessive could the pursuer's claim succeed. Miss Milligan submitted that it had been proved, on uncontroverted, evidence that it was probable that the basket weighed some 25-28kg. While I accepted that from time to time there were not enough baskets and that on such occasions the "scoopers" probably did put in more sweets than the norm in order to keep production flowing. I was not satisfied that the basket lifted by the pursuer probably was of the weight that was claimed. In the first place, that seemed to me to be inherently unlikely. 28kg amounts to some 41/2 stones which is quite a weight to lift repeatedly to the height of the hopper. Further, the evidence which supports such a weight

depends almost entirely on a number of actual weighings having taken place before, at the time of and after the "accident". I had considerable doubts about that evidence. Firstly, the idea that a number of employees would independently go about weighing basket after basket seems in itself unlikely. Secondly, what would be the point in repeating such an exercise if nothing was ever done about it? Thirdly, surely one weighing would be sufficient to enable anyone to tell the approximate weight of subsequent baskets just with the naked eye. I had considerable doubts about such evidence and did not therefore find the assertion it was designed to support to be established. Apart from the question of weight I found the other evidence of the employees to be credible and reliable with the exception of Dawn Hunter (dealt with by Mr Thompson at pp.40-41). I found this witness to be aggressive in her evidence. My impression was that she did not care for the defenders as employers and was prepared to exaggerate and amplify her evidence when it appeared to her to support the pursuer's claim against them. Further, there were a number of inconsistencies between her evidence and that of the pursuer, most significantly that the pursuer had hurt her wrist and not her shoulder. For all these reasons, I do not find it proved even on a balance of probabilities, that the pursuer sustained an accident as averred and testified to by her. [101] The second "chapter" in the case related to liability in law and the question posed was "if the pursuer did have an accident are the defenders responsible?". Miss Milligan relied in this context on the expert evidence of Mr Hayne. While I accept that evidence, it becomes clear on close examination that his conclusions were based upon information supplied to him which, as I have said, I do not hold to be accurate. I therefore answer this question in the negative also. [102] The third "chapter" was causation - that is "did any accident to the pursuer cause injury to the rotator cuff tendon?". Miss Milligan dealt with this at pp.31-34 hereof and relied on the evidence of Mr Crossan. A detailed critique of Mr Crossan's evidence was made in Mr Thompson's written submission (set out in some detail at pp.44-47 and pp.56-69 hereof). By and large, I agree with those submissions. In saying that I mean no disrespect to Mr Crossan who clearly was given some inaccurate information from the outset and was unable to look at the fuller picture painted by the medical records until some time after the preparation of his first report. Also, I was impressed by the logical and measured way in which Mr Hooper gave his evidence. He, of course, had the advantage of a "pre-view" of Mr Crossan's reports but, nevertheless I found that his criticisms thereof cast considerable doubts on Mr Crossan's views. I do not, therefore, hold it to be established on the balance of probabilities that the pursuer sustained the injury averred by her. That, of course, fits in with the view I have expressed as to whether the pursuer even had an "accident" at all. [103] Had I been awarding damages I would have done so on the basis of Miss Milligan's Schedule brought up to date. Although I consider the case of Mitchell to have been more serious, there has been a further lapse of time and therefore I would have awarded £8,000 as solatium. The parties were agreed as to wage loss in a Joint Minute and were further agreed that the relevant figure as to benefits was £4,063.37. [104] In the whole matter, therefore, I sustain the second and third pleas-in-law for the defenders and assoilzie them from the conclusions of the Summons. BAILII: Copyright Policy | Disclaimers | Privacy Policy | Feedback | Donate to BAILII URL: <https://www.bailii.org/scot/cases/ScotCS/2005/>

CSOH_66.html

Source & reproduction note

Judgment wording, source notices and original paragraph numbers are retained. Esheria supplies the layout and this PDF's page numbers; these are not the source pagination. This is a research copy, not an official or certified court document. Check quotations, citations and publication restrictions against the original source before relying on it.

ORIGINAL SOURCE <https://www.bailii.org/scot/cases/ScotCS/2005/>

CASE PAGE <https://chat.esheria.ai/case-law/scotland/berry-v-mccowans-ltd-2005-scotcs-csoh-66-18-may-2005>

Prepared on 26 October 2026 · Esheria