

SCOTLAND / JUDGMENT

McFarlane v. Ferguson Shipbuilders

[2004] ScotCS 68 (16 March 2004)

[2004] ScotCS 68

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 >> McFarlane v. Ferguson Shipbuilders [2004] ScotCS 68 (16 March 2004) URL:
<https://www.bailii.org/scot/cases/ScotCS/2004/68.html> Cite as:

[2004] ScotCS 68 [New search] [Help] McFarlane v. Ferguson Shipbuilders [2004] ScotCS 68 (16
March 2004) OUTER HOUSE, COURT OF SESSION A616/03 OPINION OF LADY SMITH in
the cause WILLIAM McFARLANE Pursuer; against FERGUSON SHIPBUILDERS LIMITED
Defenders:

Pursuer: Hanretty QC., Henderson; Thompsons Defenders: Hofford; Simpson & Marwick, W. S.
16 March 2004

Introduction:

[1] The pursuer is 66 years old. He is now retired, having ceased working in May 2002. Between 1991 and the date of his retiral, he was employed by the defenders as a caulker/ burner. The defenders are shipbuilders. Most of the time, he worked with a tool called a grinder, removing excess weld and other metal material to produce a suitable finish on the steel plates which were used in the course of ship fabrication. The pursuer claims damages in respect of his having contracted lateral epicondylitis ('tennis elbow') whilst working for the defenders. The case came before me for proof before answer. Lateral Epicondylitis ('Tennis Elbow'): [2] Tennis elbow is a condition which occurs when the actions of the muscles in the forearm give rise to oedema around the short tendon which runs along the outside of the elbow joint. It is inflammatory in origin. There are three stages to it. The first, which is asymptomatic, is when oedema occurs. The second, which is symptomatic, is when the tiny fibres in the tendon become waterlogged and swell. The third, which is also symptomatic, is when some of those fibres lose their mechanical properties and rupture. Once the condition has progressed to the second stage, progression to the third stage is, according to the pursuer's expert, Mr Crossan, orthopaedic surgeon, inevitable. [3] In the case of most of the patients suffering from the condition who are seen by Mr Crossan, there is no obvious cause

for their having contracted it. Grinding Tools: [4] Grinders are electric tools operated by hand which have, at one end, a circular disc known as a "stone". When switched on, the stone spins and, when applied to the surface that is to be ground, produces a sanding effect on the weld or other metal material that is to be removed. Grinders can be of different sizes, which are usually denoted according to the width in inches of the diameter of the stone. The person operating the grinder holds it in two hands with one hand on the handle at the opposite end from the stone. There is a trigger there which, if depressed, causes the stone to spin. The other hand is placed on a handle that juts out at right angles, a short distance in front of the handle and close to the part of the grinder to which the stone is attached. To effect grinding, the operator moves the tool backwards and forwards over the surface that requires to be ground. The person will normally use a grinder in such a way as to have his dominant hand on the handle with the trigger and his other hand on the other handle. The weight of the grinder is, accordingly, distributed between the two hands. The pursuer's case against the defenders: [5] The pursuer's case at proof emerged in a somewhat different form than that which was pled on record, a document which was well furnished with averments of the sort that are more commonly found in cases of repetitive strain injury giving rise to conditions such as tenosynovitis or carpal tunnel syndrome. Parties were, however, in agreement that the pursuer's case was founded on an allegation that the defenders required him to work in a manner that involved repeated loading of the soft tissues of his forearm with such force as was liable to cause injury, in breach of their common law duty to take reasonable care, in breach of their obligations under regulation 4 of the Provision and Use of Work Equipment Regulations 1998 and in breach of their obligations under regulation 4 of the Manual Handling Operations Regulations 1992. They were also, ultimately, in agreement that, contrary to what might have been thought from the averments on record, the pursuer sought damages only in respect of the exacerbation of a pre-existing tennis elbow.

Background facts : [6] Between 1991 and October 2001, the pursuer used small four inch grinders and required to work in various parts of the vessels under construction. In October 2001, his foreman, Ronald Curran, took the view that at his age, the pursuer deserved to be given an easier job and he, accordingly, put the pursuer on to deckwork. That work involved him using a larger, heavier, seven inch grinder. There was no definitive evidence as to the weight of the seven inch grinder. There was one in court, which had been lodged by the defenders, (no. 7/15 of process). Its weight was estimated as being 13lbs, something which parties seemed to accept and which would not be out of line with my own impression, having picked it up in the course of the pursuer's evidence. [7] There was a dispute between the parties regarding how much of the pursuer's working day involved him operating the grinder but parties appeared to be in agreement that he was required to use the grinder to remove excess weld along the weld seams between metal plates, to remove random pieces of weld, referred to as "spatter" and also to remove the remnants of steel that were left behind after the "lugs" that had been used to lift the steel plates into position were taken off. Those lugs were removed by employees referred to as "burners" who used a tool called a "gouger" to do so. [8] By at least May 2001 and possibly as early as May 2000, the pursuer began to suffer pain in his right elbow. That pain got worse after he began working on the

decks. He consulted his General Practitioner in March 2002 and was diagnosed as having contracted a right sided tennis elbow. He was prescribed some cream to rub into it. He was not off work due to it. He was seen for the purposes of the present action, by Mr Crossan, consultant orthopaedic surgeon on 15 August 2003. Mr Crossan was not, in the course of his examination, able to reproduce pain in the pursuer's elbow but he did find that it was tender in the area between the common extensor origin across the outer capsule of the elbow and towards the olecranon. At proof, the pursuer gave evidence that his elbow had not been so bad since he retired. Whilst he mentioned that decorating, sawing wood, and carrying shopping in his right hand were problematic, the general activities of his daily life did not seem to be affected. He was asked whether he had ever told his employers about the symptoms in his elbow. His response was that there was no one to tell other than his workmates and his foreman. Two of his workmates gave evidence but neither of them said that the pursuer had told them of his symptoms. The pursuer's foreman, Mr Curran, said that he had never complained to him of suffering elbow pain. Nature of the pursuer's work : [9] Ultimately, the pursuer's case came to be that he was required, at times, to use the seven inch grinder with excessive force and it was that that had caused him to suffer the symptoms which arose after October 2001. The claim advanced on his behalf was, as I have indicated, only in respect of that symptomatology, the pursuer having given evidence to the effect that the tennis elbow symptoms first began at least a year prior to his retiral, if not more. [10] It was not entirely clear but the assertion seemed to be that excessive force was required whenever the pursuer had to remove the metal remnants left on the steel plates after the burners had taken off lugs, a task which, according to the pursuer, would take 10 minutes at the most and it could be a lot less than 10 minutes. What it was that rendered the force used "excessive" was never quantified and expressions such as "quite hard", "significant" and "excessive" were used interchangeably in the course of the evidence of the witnesses as was the simple reference to "pressure". The pursuer also explained that his job would require him to move around the deck. He would not stay in one place for long. [11] In evidence, the pursuer sought to distinguish between grinding and what he referred to as "polishing". The former was when, he said, quite a bit of force had to be used. The latter was, he said, what was being done on the video (no.7/2 of process) that the defenders had produced. That video shows a man using a seven inch grinder mainly along the length of a weld between two steel plates and also removing spatter. The impression given by the video is of a task that does not require particular effort. It does not, though, show the removal of metal remnants after a lug has been taken off. [12] The pursuer said that it was necessary to apply more pressure than could be seen on the video. He was supported in so saying by two of his friends and ex workmates who gave evidence. Neither of them, however, were grinders. The first, Walter Renfrew, had worked as a plater since 1990. The other, Samuel Ross, had worked as a burner since 1991. Neither had carried out the grinding job that the pursuer had been doing on the decks. They both, however, sought to distinguish between polishing and grinding and said that for grinding, it was necessary to put on more pressure. [12] It emerged in evidence that the pursuer, Walter Renfrew and Samuel Ross had got together on the Friday afternoon prior to the start of the proof to view the video in the pursuer's house. They had also travelled

together to and from court. It was evident from the description of the discussions that had passed between these three men that emerged in cross-examination, that there had been discussion between them about grinding, about there being a difference between grinding and polishing and about the pressure that was required when grinding. Some of these discussions had occurred whilst the pursuer was in the course of giving his evidence. In these circumstances, it is not surprising that it was submitted on behalf of the defenders that Walter Renfrew's and Samuel Ross's evidence should not be accepted as reliable. Even if they had not been intending to mislead the court, the risk of their evidence having been unduly influenced by the pursuer was such as to taint their evidence so as to make it unacceptable. [13] There was a dispute between the parties regarding how long the pursuer had been required to carry out grinding work each day. The pursuer spoke of working at grinding for three, four or five hours each day, depending on how busy he was. Although, at one point in his evidence in chief, he indicated that he could be involved in forceful grinding for up to five hours per day, his answer was in response to a leading question and, at other points in his evidence, the three, four or five hour periods to which he referred seemed to refer to all his work with the seven inch grinder, including what he would have called polishing work. His evidence as to timing was vague and general. He appears to have told Mr Crossan that he used the grinder constantly for five or six hours every shift, an extreme position that he did not adopt in evidence. He accepted that he had never timed the periods spent. [14] It seemed to be accepted by the pursuer and his witnesses that the pursuer's foreman would be in the best position to assess how long each day the pursuer had spent grinding. His foreman's evidence was, ultimately, that his best estimate was an average of one and a half hours each day. He, Mr Curran, said that three hours was feasible although that would be seldom. He had never seen the pursuer work at grinding for as much as five hours per day. He pointed out that there was not enough work on the decks to do to justify a full day's work on grinding. The pursuer would have to carry out other tasks as well such as brushing, tidying up and lifting "strongbacks". Clearly, Mr Curran had never timed how long the pursuer had spent actually using the grinder. Nor, as I have indicated, had the pursuer. It was all very much a matter of impression and I was left with the impression that the truth as regards the time spent actually operating the grinder probably lay somewhere between the two sets of estimates. What was, though, clear, on any view, was that the pursuer was not constantly using the grinder, when it was operated, it was operated in short bursts and that even if there were times when more pressure was required than at others, there was no satisfactory evidence that they were in any way frequent or prolonged. Mr Curran did give a description of some occasion or occasions on which it may have taken about half an hour to grind off the metal remnants left after the removal of lugs. That, however, was something which had happened many years earlier, at a stage when they were short of gougers and too much metal had been left behind when lugs had been removed using a different tool. It was not something which had been happening when the pursuer was working on the decks. Indeed, Mr Curran seemed clear that, from his knowledge of the pursuer, had the burners left behind excessive metal after taking off the lugs, he would have been the first one to complain to Mr Curran and ask that more be burnt off before he was required to do the

grinding. Mr Curran had known the pursuer for many years. [15] Mr Curran said that force was not required to carry out the grinding tasks that were allocated to the pursuer. There was no really heavy work on the decks. There were no awkward areas and there were no areas where burning required to be restricted, leaving extra work for the grinders to do, such as the points on the outer shell where the propellers come into the body of the vessel. Nothing that he was required to do in the course of the working day required him to carry out work that was any more severe or testing than was shown on the video. Whilst the grinding of the metal left after removal of a lug was not shown on the video, the force required to grind that down was not significant. He was adamant that it was wrong to suggest, as did the pursuer, that as much as 6 -10mm of metal would be left behind for grinding after the removal of a lug. [16] Evidence on behalf of the defenders was also led from Mr Clive Andrews, consultant ergonomist. Earlier in his career, Mr Andrews had carried out various grinding processes required when working with diesel engines, in the oilfields, and at an oil refinery. He considered that modern tools for grinding work were, essentially, the same as those he had worked with, although they vibrated less. He had visited the defenders' premises and watched the demonstration of grinding that had been carried out for the purposes of being recorded on the video. He said that grinding did not require the application of significant force. Efficient grinding did not, he said, require the grinder to put pressure on the stone. Nor did he see that there was any need for the tool to be gripped forcefully. [17] No ergonomist was led in evidence on behalf of the pursuer although an expert ergonomist had sat in and listened to the evidence given by the pursuer and had provided a report, which was lodged in process. [18] Mr Crossan, the consultant orthopaedic surgeon who gave evidence on behalf of the pursuer, offered some opinion as to what sort of force or pressure would be required when grinding. It was based on a single experience that he had recently had. He explained that he went to his local tool hire shop and tested out a grinder similar to the one that had been lodged by the defenders. He accepted that he was not experienced in using the tool and that he may have been somewhat clumsy in doing so. He tried grinding a rusty metal beam and held the tool in various postures to do so. It was not possible to tell, from his evidence, whether the postures he had adopted reflected those used by the pursuer in the course of his normal work. The pursuer had demonstrated, by using a small stool (no.6/39 of process) how he had worked from a seated posture resting his left arm and some of the weight of the grinder against his left leg. Mr Crossan's evidence did not suggest that that was a posture adopted by him. Indeed, he seems to have been standing at a workbench. Mr Crossan said that he had had to push considerably to achieve grinding when he went over a bump on the rusty beam, that that was not physically demanding but that if you had had pre-existing symptoms of tennis elbow, "you would know about it". [19] Mr Crossan also gave evidence, under reference to another study which was not produced, to the effect that that study had found that some grinders working in the automotive industry had experienced a high incidence of tennis elbow. He often referred back to that epidemiological study in the course of his evidence for, it seemed, reassurance that his conclusion that the pursuer's tennis elbow was attributable to his grinding activities, was correct. It was not, however, possible, on the evidence, to

ascertain whether the grinding activities of the workers in that study were comparable to those being carried out by the pursuer when he was working on the decks. Further, he proffered the opinion that the operation of the grinder would involve the forearm muscle being subjected to static force when the tool was lifted, particularly if lifted with one hand, or if the handles had to be gripped tightly in use, something which he seemed to believe would be required if the grinder had to be pushed over "more solid bits of metal". He did, however, indicate that there was not much in the literature regarding static forces and their effect. Further, the pursuer did not, in his evidence, complain of having any difficulties in lifting the grinder or indicate that he was in the habit of lifting it with one hand or indeed of having to grip the handles any tighter when using the force to which he referred. Parties submissions regarding the nature of the pursuer's work: [20] On behalf of the pursuer, it was submitted that the pursuer was, on the evidence, involved, at times, in heavy and forceful grinding. Reliance was placed on the evidence of the pursuer, Walter Renfrew, and Samuel Ross. Some reliance was also placed on Mr Crossan's evidence regarding the nature of the task. The preponderance of his work was, it was submitted, forceful grinding. It may well be, it was submitted, that the pursuer was using the wrong technique but he was, nonetheless, involved in carrying out forceful grinding. Although the submissions were generalised, it did seem that the pursuer's main complaint was that excessive force had to be used when it came to removing the metal remnants left after the lugs had been removed. [21] On behalf of the defenders, it was submitted that it had not been established, on the evidence, that the pursuer was required to carry out forceful grinding. The pursuer himself was an evasive and unreliable witness. His evidence to the effect that 6-10mm of metal was left after the removal of lugs, for him to grind off, was not credible. The evidence of his two ex workmates should not be accepted because of the discussions that had taken place amongst them at the time of viewing the video and in the course of the proof. As against that, Mr Curran, who had been the pursuer's foreman had given evidence which should be accepted. He had years of experience, had done the pursuer a favour in giving him the job on decks and had no reason to give evidence against the pursuer's interests. As regards Mr Crossan, he was straying well out of his remit in carrying out his experiment at the tool hire shop. Mr Andrews had been clear in his evidence that there was no requirement to exert excessive pressure when grinding. Discussion : [22] Having considered all the evidence, I can see that the pursuer may, in the course of his grinding work, have experienced differences in the resistance that he met depending upon what it was he was grinding. For instance, it may well be that the resistance provided by excess weld was different from that provided by the metal remnants left after lugs had been removed. I cannot, however, accept that, as a regular feature of his work on the decks, the pursuer was required to use significant or excessive force when grinding. His own evidence regarding the total time spent doing all grinding was vague and unsatisfactory and even on his own evidence he did not present a convincing picture of any periods which could be described as lengthy being taken up carrying out forceful grinding. No evidence was, for instance, given as to how often lug remnants required to be removed. [23] I agree that no reliance should be placed on the evidence of Walter Renfrew or Samuel Ross as regards the matter of how much force or

pressure was required when grinding. They may not have been seeking to mislead the court but the risk of their having been influenced unduly by the pursuer's own view of a matter that was so central to his case, is such as to lead me to the conclusion that their evidence is unreliable. Further and in any event, they did not carry out the same job as the pursuer so were not speaking from the perspective of having actually experienced performing the same tasks. [24] As regards Mr Crossan's evidence about his observations when he tried out a similar tool, I do not find them of any assistance. As I have already observed, he was not trying to do the same job as had the pursuer nor, apparently, was he using the same posture as the pursuer. Further, as he himself indicated, he was not experienced in the work. And, in any event, his description of having had to push considerably has to be considered in the light of his comment that it was not physically demanding to do so. It is also interesting that his immediate reaction seems to be not that the activity would provoke the onset of tennis elbow but that if the user already had symptoms of tennis elbow, they would certainly feel pain during it. [25] As regards Mr Crossan's evidence to the effect that a grip on the handle of the tool might have to be applied which would involve the imposition of static force on the muscles of the forearm, it was not evidence upon which I would place weight. He is not an ergonomist and that matter was not one which had been addressed by him in his report, the purpose of which had been to assess the nature of the pursuer's condition. It seemed to amount to no more than supposition on his part albeit based on his own single experience of using a similar tool but, as I have already indicated, his evidence about that experience was not, in my view, of assistance for the determination of the issues in this case. Nor, in any event, did the pursuer suggest that he had to use an increased grip at any time. [26] In short, I was not led, by the pursuer's evidence, to conclude that he had proved that he was engaged in forceful grinding. There then falls to be considered the evidence led for the defenders from Mr Curran and Mr Andrews. They both refuted the suggestion that the pursuer had to use force in the grinding work that he was required to carry out. I found their evidence convincing. Mr Curran did concede that there had been a time, years earlier, when problems had been encountered in the removal of metal remnants after lugs had been taken off and that forceful grinding had probably been required at that time. He gave a cogent reason, however, namely the increased availability of gougers, for that problem having been eliminated. He also gave a reason personal to the pursuer for such a problem not arising in his case namely that, from his knowledge of him, he would not have tolerated it and would have asked that the burners be sent back to remove more of the metal remnants. As regards the evidence of Mr Andrews, it was interesting to note that he had, apparently, asked the grinder who gave the demonstration that was recorded on videotape, an employee of the defenders called Crawford McShane, to demonstrate exactly how the pursuer's job was done. Despite the pursuer's protestations that Mr McShane was only polishing, not grinding, it did not, in the end of the day, seem to be disputed that what Mr McShane was demonstrating was at least part of the pursuer's work. There may have been a question as to whether, in the demonstration, Mr McShane completed the job he was carrying out on the plate to plate weld but there did not appear to be any question of Mr Andrews getting the impression that, at any time in the course of what he saw, Mr McShane had to press or push on the grinding

tool. Nor was there any question of his grip being a tight one, as Mr Andrews specifically had checked by having him remove his gloves during one part of the demonstration. That would then leave only the job of removal of the lug remnants as having the potential for requiring the force complained of by the pursuer. However, Mr Andrews had two answers to that. One was that it was simply not grinding practice to use force and the other was that even if significant force was used, the muscle action involved would come from the shoulder and not from the forearm. [27] I did not consider that any feature of the evidence led on behalf of the defenders were such as to lead me to the conclusion that the pursuer had been required to use excessive force. Rather, it presented a credible picture which was to the contrary. [28] I would add that whilst there are cases where the nature of a injury can indicate what has caused it and, in particular, that it has been caused by a particular working practice, I do not consider that this case falls into that category. Mr Crossan's explanation of tennis elbow is that, if the sufferer does not rest the arm, it is a progressive condition. It becomes symptomatic when the tendon fibres become waterlogged (the second stage) and the symptoms will progress when, as is inevitable, those fibres break (the third stage). It is, accordingly, clear, as seemed to be accepted on his behalf, that the pursuer had reached the second stage of the condition prior to October 2001. Given his explanation of increasing symptomatology thereafter, the picture presented and relied on by the pursuer was one of the tendon fibres breaking in a cumulative progression, after that date. The question that then arises is that of whether the fact of that stage of the condition being reached gives any indication as to what the pursuer was doing at work or how he was doing it. Does it, for instance, indicate that he must have been engaged in forceful grinding? I conclude that it does not do so because Mr Crossan said in evidence that no one knows how much force is required to rupture the fibres of the tendon. Further, he said that it would not have taken much force to "kick start" the pursuer's symptoms if the tendon was already in a degenerated state, by which he seemed to be referring to the symptoms complained of by the pursuer after he had started work on the decks. The Law Common Law case : [29] In the circumstances, the pursuer has failed to establish that he required to carry out grinding in such a way as to involve the regular or repeated use of significant or excessive force. That being so, he has failed to establish that the soft tissues in his elbow were being repeatedly loaded in such a way as to involve a failure by the defenders to take reasonable care for his safety and the case at common law fails. [30] It follows that, since the pursuer has failed to establish the factual basis which underlies all aspects of his case, both common law and statutory, that all these cases fail. Since, however, parties were not in agreement as to the applicability of the regulations relied on to the work process being carried out by the pursuer, I should deal with those arguments also. The Provision and Use of Work Equipment Regulations 1998:

- [31] Regulation 4 of the regulations provides: "(1) Every employer shall ensure that work equipment is so constructed or adapted as to be suitable for the purpose for which it is used or provided....."

- (3) Every employer shall ensure that work equipment is only used for operations for which, an under conditions for which, it is suitable". [32] The pursuer's case was not to the effect that there was anything intrinsically unsuitable about the grinder that was provided to the pursuer to carry out his work. The problem was, according to the submissions of his senior counsel, the period of time over which he was required to use it. That period was one of the "conditions" in which it was used and so the regulation applied. [33] Counsel for the defenders submitted that the case was not, even if the pursuer's assertions of fact were accepted, covered by the regulations. He referred to the guidance notes promulgated by the Health and Safety Executive. In particular, he referred to the notes applicable to regulation 4(3) which give as examples of unsuitability the use of a circular saw in circumstances where a spindle moulding machine would be safer since it could be guarded and of the use of a knife with an unprotected blade in circumstances where scissors would be safer. As these examples showed, he said, the reference in regulation 4(3) to conditions referred to the factual conditions surrounding the use of the tool. [34] Had I found that the pursuer had had to use to grinder for an excessive length of time and had the pursuer's case been simply to the effect that prolonged use of the grinder was liable to cause injury (which it was not) I would not have been persuaded that such use amounted to a breach of regulation 4(3). The regulations seek to protect employees from equipment which could injure them. "Suitable" in terms of the regulations means suitable "in any respect which it is reasonably foreseeable will affect the health or safety of any person". Accordingly, the obligation on the employer is to ensure that work equipment is only used under conditions which do not involve a reasonably foreseeable risk of the employee being injured by the equipment, as is exemplified in the guidance notes to which reference was made. Even on the hypothesis that prolonged use of an otherwise safe grinder could lead to injury, the pursuer's case under these regulations would, in my opinion, have been bound to fail since the causation of injury by prolonged use of a piece of equipment does not infer the causation of injury by the equipment itself. The problem would not have lain in the provision for that job of that piece of equipment and so would not have been one to which the regulations were directed. The Manual Handling Operations Regulations 1992 : [35] Regulation 4(1)(a) of these regulations requires each employer, so far as is reasonably practicable, to: "avoid the need for his employees to undertake any manual handling operations at work which involve a risk of their being injured".
- [36] Regulation 2 defines manual handling operations as being: "any transporting or supporting of a load (including the lifting, putting down, pushing, pulling, carrying or moving thereof (by hand or bodily force)". "Load" is said to "include any person and any animal" but is otherwise undefined in the regulations. [37] It was the pursuer's contention that the use of the grinder involved pushing and transporting a load. Reliance was placed on the cases of *Divit v British Telecommunications PLC* unrepd 20 February 1997 and *McIntosh v City of Edinburgh Council* 2003 SLT 827. The pursuer also submitted that, for there to be a risk of injury in terms of the regulations, injury needed to be no more than a foreseeable possibility (*Cullen v North Lanarkshire Council* 1998 SC 451 ; *Taylor v City of Glasgow Council* 2002 SC

364). Senior counsel did not invite me to adopt the approach adopted by Lord Carloway in Taylor to the question of whether or not the risk referred to in regulation 4(1) requires to be foreseeable or not. Rather, he accepted that there required to be a foreseeable risk of injury to the pursuer before liability under the regulations could arise. Further, he accepted that the regulations would not apply in this case unless the pursuer were to be regarded as having established that he had had to use the grinder with repeated excessive force. He submitted, however, that the pursuer had proved that such a risk arose in this case in respect that he had had to use force whilst grinding and also in respect that doing so put him at particular risk of injury. His pre-existing condition was such that there would, he said, be continuing injury with cumulative rupturing of the fibres in the tendon. In short, his case was that the risk arose from the particular condition of the pursuer who had a pre-existing condition which made him vulnerable to further injury. [38] Counsel for the defenders submitted that these regulations did not apply. The grinder was a tool that was being put to normal use at the relevant time. It was not a load that was covered by the regulations. The circumstances of McIntosh could be distinguished and the cases of Mitchell v Inverclyde District Council unrepd 31.07.1997 , and King v Carron Phoenix Ltd 1999 RepLR 51 involved comparable examples of circumstances in which the regulations were held not to apply. The pursuer conceded that he had to rely on cumulative use of the grinder and on an "eggshell skull" approach. This showed that his case fell outwith the ambit of the regulations. Further, even if the pursuer could rely on the regulations in circumstances where the injury had arisen from a pre-existing condition, the defenders would have to have had some knowledge of it. There was no evidence of any prior knowledge of the pursuer's pre-existing tennis elbow on the part of the defenders. [39] I have reached the view that these regulations do not apply in the circumstances of this case. I agree that the use of the grinder does not fall to be regarded as the transportation or supporting of a load. I disregard the pursuer's suggestion that it falls into that category because the pursuer had to lift it in the course of his work because his complaint was not, as I have already indicated, that he found any difficulty in lifting it. That leaves for consideration the question of whether or not the pushing of the grinder over a surface could be so regarded. I do not see that it can. The use of the expression "load" connotes something that is to be conveyed. The expressions "transporting", "supporting", "lifting", "putting down", "pushing", "pulling", "carrying", and "moving" are all descriptive of different activities involved in the conveyance of a load. The activity being carried out by the pursuer when he was grinding was, however, nothing to do with the conveyance of a load. It may have involved pushing but that was not for the purpose of moving the grinder from one place to another. It was for the purpose of producing a particular effect on the surface over which it was being pushed. I agree that the circumstances can be regarded as comparable to those surrounding the use of the lawn mower in Mitchell . [40] Further and in any event, the pursuer failed to establish, on the evidence, that the defenders had any knowledge that he was particularly vulnerable to injury because of his pre-existing tennis elbow. In these circumstances and on the approach that was adopted by the pursuer in the end of the day, the case under these regulations would have failed in respect of his not having established that there was a foreseeable risk of

his being injured as a result of forceful use of the grinder. Causation : [41] It was submitted on behalf of the defenders that the pursuer had also failed to establish causation. He had a pre-existing tennis elbow and, on the evidence, it was bound to deteriorate in any event. Whilst Mr Crossan had given evidence to the effect that he thought that the pursuer's tennis elbow was caused by his working with the seven inch grinder, he had so concluded on what he referred to as a temporal basis. That was that the pursuer had told him that the onset of his symptoms post-dated his starting work with the larger grinder. Mr Crossan had, separately, indicated that progression to the third stage of the condition was inevitable once tennis elbow had reached the second stage, as the pursuer appeared to have done prior to beginning work on the decks with the seven inch grinder in October 2001. [42] The defenders' submission on causation had not been anticipated in the pursuer's submissions beyond the general approach that this was a case of exacerbation of a pre-existing condition. [43] Causation is, I agree, a problem for the pursuer in this case. Whilst he gave evidence that his elbow pain "got bad" whilst he was working on deck, it was clear that he had had it for some time prior thereto, perhaps from as early as May 2000. That means that, according to the explanation of the progression of tennis elbow that was given by his expert, Mr Crossan, he had already reached the second stage of the condition prior to his beginning the work complained of. There was then, according to Mr Crossan, an inevitability about the progression to the third stage. It did not necessarily follow that force would be required to bring about the progression to that stage. Since, according to Mr Crossan, the only way of achieving remission of the condition would be to rest the arm, it seems that any continued use would have had the potential for bringing about that progression. Certainly, Mr Crossan attributed the pursuer's tennis elbow to his having had to work with the seven inch grinder after he began deck work but he had reached the conclusion on the basis of a belief that he had had no symptoms at all prior thereto. Indeed, his understanding, on the basis of the history that he took from the pursuer, was that it was a year or so after he had started working with that grinder that he had first suffered the symptoms. It was clear that, to a large extent, Mr Crossan's conclusion was drawn from what he believed to be a temporal connection between a new working practice and a subsequent onset of symptoms. But that was not, according to the pursuer, the order of events. It in fact appeared that he had symptoms for a significant prior period. In that respect, Mr Crossan made a highly relevant comment namely that if the pursuer had contracted the condition when he was using the lighter grinders (i.e. prior to his starting work on deck in October 2001) then his condition was a constitutional one and not due to his work. [44] For these reasons, I conclude that the pursuer has not proved that the tennis elbow symptoms suffered by him after October 2001 were caused to any extent by his working practices. Quantum: [45] The pursuer's claim for damages was only in respect of solatium. It was submitted on behalf of the pursuer that it should be valued at £7,000. In support of that submission, senior counsel referred to the Judicial Studies Board Guidelines which indicate that a range of £7,750 -8,500 would be appropriate in a case of continuing but fluctuating and unilateral symptoms of tennis elbow. He recognised that allowance would require to be made for the fact that the pursuer had pre-existing symptoms but submitted that a reduction to £7,000 would be adequate. [46] For the

defender, it was submitted that there was, on the evidence, no question of the pursuer's symptoms being any worse since he retired than they were prior to October 2001. That meant that any award of solatium would be in respect of some pain and suffering over a period of only about seven months during which the pursuer had not had to stop work. The pursuer had said very little about his symptoms in evidence. [47] Had I been awarding damages, I would have considered the pursuer's valuation to be grossly overstated. The Judicial Studies Board range applies to a case where a claimant has no pre-existing symptoms and has continuing symptoms for which the defenders are responsible. In the present case, the pursuer did have pre-existing symptoms and those which he suffered after retiral did not seem to be any worse than them. Indeed, insofar as could be ascertained from the pursuer's somewhat sparse evidence on the matter of the symptoms suffered by him, his post-retiral symptomatology may not have been as bad as that suffered prior to October 2001. The pursuer's pain and suffering was, I note, such as to lead him to consult his general practitioner in March 2002 but, equally, he did not, at any time, stop work on account of it. In all the circumstances, the pain and suffering can, at best for the pursuer, be regarded as moderate in nature, not significantly disabling and lasting for a limited period of months. I agree with the defenders that the most that could have been awarded as solatium would have been the sum of £1,000. [48] In these circumstances, I will sustain the defenders' second and third pleas-in-law and pronounce decree of absolvitor. BAILII: Copyright Policy | Disclaimers | Privacy Policy | Feedback | Donate to BAILII URL: <https://www.bailii.org/scot/cases/ScotCS/2004/68.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/2004/>

CASE PAGE <https://chat.esheria.ai/case-law/scotland/mcfarlane-v-ferguson-shipbuilders-2004-scotcs-68-16-march-2004>

Prepared on 26 October 2026 · Esheria