

SCOTLAND / JUDGMENT

McKnight v Corus Construction [2006]

ScotCS CSOH_116 (01 August 2006)

[2006] ScotCS CSOH_116

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[2006] CSOH 116,

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[2006] CSOH 116 PD985/05 OPINION OF LADY SMITH in the cause PAUL MCKNIGHT Pursuer;
against CORUS CONSTRUCTION Defender: ____ Pursuer: M Stuart, Advocate ; Russell
Jones & Walker Defender: Middleton, Advocate ; Simpson & Marwick 1 August 2006

Introduction

[1] The pursuer claims damages in respect of an injury he alleges he sustained at work on 19 June 2002. Damages were agreed at £6,000. Background facts [2] I am satisfied that the following facts emerged from the evidence. The pursuer has been employed at the defender's steelworks since January 1984. He presently works as a steel dresser. As at June 2002, he was regularly involved in changing the equipment attached to an overhead crane used in an area of the defenders' manufacturing process. That equipment was known as a "dog". The dogs are, effectively, clamps used for the movement of sheet metal in and out of pits where the metal is heated up to temperatures of about 1250°C. The dogs are slung to an overhead crane. Two sizes of dogs are used. They have an upper and lower part. It is the lower part of the dog which can differ in size and requires, according to the size of sheet metal to be moved, to be changed. The dogs are hinged, rather like scissors and the legs of the dogs fold in and grip the metal when required. There are two retaining pins on each dog, one on each side. Each pin requires to pass through eyeletlike holes in separate parts of the equipment. [3] Changing the dogs requires the removal of the pins. It is essential, prior to trying to remove the pins, that the holes through which they pass be properly aligned and also that both vertical and horizontal strain is taken off. As the defenders' Mr Sommerville explained, the pin is held in place by the dog's diameter resting on it so it is necessary to release both the horizontal and vertical forces prior to trying to remove the pin. There is clearance built into the holes. The pins are smaller than the holes. If there is proper

alignment and proper release of these forces, the pin can be pushed through. [4] The dog changing procedure was filmed on 16 June . That film 7/7 of process was shown in court and it was evident from it that little effort was required in removing the pins. The tool used to achieve removal in the film and the tool used at the time of his alleged accident, according to the pursuer, was a metal bar. It did not, according to the film, appear to be a difficult exercise. [5] The pursuer first became involved in changing the dogs in about October 2000 and continued to do so thereafter. Prior thereto, the job had been carried out by fitters. The pursuer and his workmates were trained in the job of changing the dog in about October 2002. The pursuer was issued with a written description of the job and shown how to do it. That written description was contained in document 7/1 of process and included the following: "CHANGE OVER FROM DOGS TO DOGS REMOVAL; a) Ensure the dogs & spuds are at a safe temperature to avoid burns. b) Lower the dogs onto clear area of floor & have the craneman put them into the fully open position. c) Ensure that the ropes remain taut. d) Lower the dogging chain off & remove the 7/8" Hammerlock coupling. e) Move the O. H. C. over to the dog changing pit (dogs will automatically close) and lower the dogs into the spare pit note; as the dogs hit the pit bottom ensure that they fully open to wedges located in the pit bottom f) Insert the spreader bar between the bottom yoke bar & adjust to take the strain off the pin, then raise/lower the crane to release the vertical pin strain. g) Remove the pin lock bolts (these may require to be burned out). h) Locate the trolley at the first pin & knock through using the bar available. i) Follow item h) above to remove the second pin." It was clear from not only the pursuer's evidence but from that given by the other witnesses who had had involvement in dog changing, that initially, they had difficulty with the job. They found that the pins would stick but I am readily satisfied, on the evidence, that the reason the pins were sticking was that they were not doing the job properly in respect that they needed to give more attention to the adjustment of the crane and spreader bar to achieve proper alignment of the holes and proper release of the horizontal and vertical strain. Steven Kelly, for instance, frankly volunteered that in his case, when he had difficulty in removing the pins, it was inexperience. He sought further training, got further help regarding to the line the holes up and had had no problems since then. [6] It was plain from the pursuer's evidence, that he was well aware of the need to achieve proper alignment of the holes before trying to remove the pin. He said, " basically , alignment is critical". [7] The pursuer also described what seemed to be a sensible approach namely that once it seems that alignment has been achieved "you give it a tap. You don't hit it. You don't give it much more than a tap. Once you know its going to come out, it is relatively easy". [8] The pins are very heavy. Witnesses varied in their estimates but it seems likely that the heavier of the two weighed in the order of 40kgs and the lighter in the region of 30kgs. Both they and the dogs are often hot when the changeover process is carrying on. However, it does not seem that the pins exceed 26°C or so and the dogs 35°C or so. The alleged accident [9] The pursuer averred, on Record, that he injured himself in an accident at work when trying to remove a pin from a dog on June 2002 . In evidence, he could not be precise about the date. He said that he was involved in changing dogs. He thought that he had lined up the holes. He gave the pin a trial tap. He then went to hit the pin with "more than a tap". He said that thought it was lined up but he, did not explain, why he proceeded to hit the pin hard despite having previously explained that that was not the thing to do. Regarding how hard he had hit the pin, he said that

on a scale of 110, it was 9. He got a vibration feeling right up the length of his arm. He had to stop and shake his arm for 20 or 30 seconds. He was working with Craig Nicol at the time, who was waiting to receive the pin on the other side of the dog. He did not report the incident as an accident at the time because he just thought he had pulled a muscle. He insisted that he "would have" said to his team leader, Kenneth Wilson, what happened. The next day it was niggly. It steadily got worse. The pain went into his shoulder. He asked for light duties. He ended up doing Kenneth Wilson's job in the office having, he said, come to an agreement with him about a week or slightly over a week later than the incident itself. He went on holiday during the trades fortnight in the second half of July, found that his shoulder was very sore and niggly, experienced "absolute agony" on one occasion when he was getting up from the beach and when he got back from holiday, made an appointment with his GP by which time he had started having difficulty using the computer in the office. He was diagnosed as having suffered a capsulitis of his right shoulder, he was signed off work and required extensive physiotherapy and progressive mobilisation over a period of many months. I am satisfied, on the evidence, that the pursuer suffered a capsulitis of his right shoulder and that it was an injury that was consistent with him having forcefully hit a dog pin in the manner he described. The pursuer's averments [10] The pursuer's case against the defenders was said, on record, to be founded on the common law and on Regulation 4(1) and (2) of the Provision and Use of Work Equipment Regulations 1998. The averments in support thereof were as follows: "To remove the pins the defenders provided its employees, including the pursuer, with two steel bars ('the bars'). The bars are used to hit the pins, knocking them out of the dogs. The bars are made of scrap metal. Gloves must be worn as the dogs and pins are hot. The bars are smooth and difficult to grip. In the month prior to the date of the injury the pins became stiff and difficult to remove. The pursuer reported this to his team leader, Kenny Wilson. The difficulty associated with removing the pins required workers, including the pursuer, to strike the pins with greater force. On occasions this required the use of maximal or near maximal force. At the time of the injury, one of the pursuer's work colleagues, Craig Nicol, had tried, unsuccessfully to remove one of the pins. Craig Nicol had struck the pin twice with maximal or near maximal force. The pursuer then attempted to remove the pin. The pursuer struck the pin with maximal or near maximal force: Upon striking the pin the pursuer felt a shudder up his right arm and he sustained the injury. Work colleagues of the pursuer have felt a similar shuddering when striking the pins. Some have declined to continue with undertaking this work practice as a consequence. The bars were unsuitable for the purpose of removing the pins". Further, the pursuer avers: "When the fitters had responsibility for changeovers, the dogs were immersed in a tank of water or cold compressed air was applied to the pins. This cooled the pins and made them significantly easier to remove. Further, the training took place on dogs that were cold. Following the change in work responsibilities the dogs were no longer cooled before changeover. The heat makes the pins more difficult to remove. Greater force can be required to remove the pins. The difficulty was reported". There was, however, no evidence that the bars were difficult to grip. On the contrary, the pursuer said he found them relatively easy to hold. The pursuer was the only witness who suggested that in the month prior to the date of the injury the pins became stiff and difficult to remove. The weight of the evidence from the other witnesses was not to that effect. Rather, I was satisfied that the clear picture

presented was, as I have indicated, that there were difficulties with pin removals in the early period immediately after the teams, including the pursuer, took over the dog changing task from the fitters. However, those were difficulties that were attributable to their own lack of experience in aligning the holes properly and seeing to it that the strain was properly taken off the pins. Kenneth Wilson, who I found to be a credible and reliable witness, had no recollection of the pursuer making any report such as that averred and, indeed, rather than positively assert that he had done, the pursuer said that he "would have" done so. Regarding any difficulties with removal of the pins, the picture presented, on the evidence, was not of workers having to strike the pins with greater force to deal with difficulties of removal. On the contrary, as Craig Nicol put it, "you don't have to hit the pin 'hard' that would be a waste of time you could hit it all day and it wouldn't move." [11] That was in the context of an explanation that, as the pursuer himself accepted, what was critical was to see to it that the preparatory work of alignment had been properly carried out. Craig Nicol did have some recollection of harder pin hitting and of men, on occasion, getting a "shudder" up their arms. He had however, great difficulty in recalling exactly what happened when and I do not consider that his evidence can be safely interpreted as indicating that that was something that was happening at the time of the pursuer's alleged accident or in the months leading up to it. The tenor of his evidence was, rather, to the effect that this was an early, "teething trouble" problem. There was no evidence at all of work colleagues declining to continue the work practice described and no witness spoke of the metal bars that were used for pushing the pins through being unsuitable. Heat [12] I have already indicated , there was evidence that both the dogs and the pins are often hot at the time of the changeover process. Also, there was evidence from the pursuer and others to the effect that the job was easier to do when dogs and pins were cold. The pursuer thought it was something to do with expansion. However, Mr Pollock, Consultant Metallurgist, who gave evidence for the defenders, clearly explained that both the pins and the holes through which they passed would expand when subjected to heat. The degree of expansion was so similar that the clearance between the pin and the hole would not alter. Calculations had been carried out on the basis of an assumption that the pins and holes would have been subjected to temperatures up to 240°C. However that if the dogs were in fact at 35°C and the pins at 24 or 26°C, the clearance between pin and hole would, in effect, be no different from the clearance at ambient temperature. I accepted his evidence in its entirety. It was not challenged. Further, there was evidence, which I accepted, that, in practice, heat did not cause the pins to stick. Richard Jackson, a workmate of the pursuer's said that if everything was properly lined up, the pins should come out, even if they were hot ; indeed , they could be pushed out. Submissions for the pursuer [13] Mr Stuart submitted that the defenders should be found liable because the steel bar was not suitable for the purpose for which it was provided. It gave rise to a foreseeable risk of injury because the defenders knew that there had been occasions when the pins had stuck. Reference was made to Regulation 4(1) and (2) of the Provision and Use of Work Equipment Regulations 1998. For interpretation of the regulations, Mr Stuart relied on the case of *Moohan v City of Glasgow Council* , unreported, 11 March 2003 . He submitted that the steel bar was intrinsically unsuitable for the purpose for which it was provided. It was reasonably foreseeable that it would affect the health and safety of the employees using it. That was because the pins had been sticking at the time of the pursuer's

injury and for sometime before that. Employees were, as a consequence, hitting the pin harder and, in some cases, hard. There was evidence that were occasions on which they thought the pins were aligned but they still stuck. The problem was known about by the team leaders. The employees had been experiencing shuddering up their arms when striking the pins. Dr Garrett's evidence showed that there would be acute deceleration if the pin was struck hard. That would involve a high degree of risk of injury to the rotator cuff. [14] Further, Mr Stuart submitted that if a proper risk assessment had been carried out then the defenders would have discovered that the pursuer's working conditions posed a risk. He submitted that a proper risk assessment had not been carried out. That submission seemed to rest wholly on the fact that in the risk assessment which the defenders carried out in respect of the dog changeover job (7/2 of process) no express reference is made to the Provisions and Use of Work Equipment Regulations 1998. [15] Regarding the fact of the alleged accident, Mr Stuart submitted that the core of the pursuer's story was credible and reliable on the important facts and ought to be accepted. They were that, on 19 June , he had sustained injury to his right shoulder by striking a pin the dogs with a steel bar in an attempt to move it. Submissions for the defenders [16] Mr Middleton, for the defenders, submitted that the tenor of the evidence was overwhelmingly in favour of the defenders. The pursuer had failed to prove his case on record. He had not proved the averments in support of his case that his working conditions caused him an injury. He had not proved, on a balance of probabilities that he was involved in any accident at all. Even if he had, he had not proved precise circumstances of any injuries. The pursuer's case proceeded on the basis of there being a difficulty in removing the pins because they were hot. That difficulty was said to have manifested itself by the pins becoming stuck. The pursuer said that meant that employees required to use maximal or near maximal force to remove the pins. That was clearly the line that had been adopted in evidence. The pursuer's case had never, in fact, been about the suitability of the metal bar (assuming that it was used). Rather, as presented, it was about the efficiency of the dog/pin relationship. He referred, in respect of the interpretation of Regulation 4, to *Hurley v William Muir (Bond 9) Limited* an unreported decision of Lord Macfadyen dated 18 January 2000. Also, he referred to *Moohan and Fraser v Fife Council*, an unreported decision dated 7 April 2006 . He referred to the lack of evidence of any employee sustaining injuries from using the metal bar on any previous occasion. Further, he submitted that the general tenor of the evidence was that problems with pin removal occurred in the early period that that had been sorted out. Further, if employees followed the safe system laid down by the defenders in 7/1 of process, there was no need to use force and, therefore, no reason for the defenders to foresee that the use of the metal bar would affect their health or safety. [17] Regarding the matter of the defender's risk assessment, Mr Middleton submitted that it was not a requirement that the defenders expressly refer to the regulations in their written assessment. What mattered was substance not form. Mr Sommerville had compiled evidence 7/1 of process in conjunction with others who knew about work. He had addressed, in that document, various safety requirements. The risk assessment was then also compiled by Mr Sommerville so there was a continuity of approach. The risk assessment produced a computer generated hazard rating showing that, ultimately, an objective not subjective view was taken of the rating of risks. Hand tools had produced a low hazard rating. It was difficult to see what else the defenders could have done to fulfil the risk assessment

requirements. Further, even if the risk assessment was deficient in some way, if the defenders were not in breach of Regulation 4(1), no separate liability arose. [18] Mr Middleton questioned the pursuer's credibility and reliability. He referred to his vagueness about the date of the accident, changes in his evidence as between the first and second day of the proof, conflict between his and Kenneth Wilson's evidence regarding the reporting of problems with pin removal, to disparities between the pursuer's case on record and evidence , and to different descriptions of the accident having been recorded in his medical records. Particular reliance was placed on the fact that it had not been established in evidence that, at the time of the alleged injury Craig Nicol had, initially, unsuccessfully tried to remove one of the pins. Discussion [19] Evidence about the pursuer's alleged accident was far from satisfactory. I have already referred to the pursuer's failure to explain why he hit the pin with maximal force at all. He could not remember whether they were changing a dog or changing back a dog at the relevant time. I noted that, at first, he confined his evidence to saying the he had hit the pin with "more than a tap" and that it was only on the second day of the proof, in answer to a leading question, that he said he had hit the pin "hard". No incident on 19 June 2002 was recorded in any document. The pursuer could not, in evidence, remember the date of the incident. He said that Kenneth Wilson was lying when he said he had not received an accident report from the pursuer as he had put one in his box by the weekend after the accident. However, I am satisfied that it was not until Friday prior to the trades holiday (i.e half way through July 2002) that the pursuer filled out a hazard form. I accepted Mr Wilson's unchallenged evidence that that day, the pursuer had had to go and see the defenders' Eddie Callaghan and Jan Wilson (of Human Resources) for some unspecified purpose the result of which was that he was not at all happy and reacted by filling out a hazard form at that time. It was not until 6 August 2002 that the pursuer went to see the doctor. It was not until after that, that he reported his shoulder condition to the defenders' Occupational Health Department. [20] Craig Nicol worked with the pursuer then but he had no recollection of him having any accident at all. The pursuer did not suggest, in evidence, that events involved Craig Nicol having first tried to remove the pins, notwithstanding the very specific averments to that effect. The only support in the evidence for the pursuer's account came from his wife's hearsay evidence. She indicated that near to the end of June 2002, her husband told her that he had pulled a muscle in his arm at work, that he had had to "push" a metal pin out of a hole and had had to use some force to do so. She said nothing about him using a metal bar and nothing about him having struck or hit the pin. Further, the pursuer gave no evidence as to how the pin was, ultimately, removed at the time of the alleged accident. He did not explain, for instance, whether, the pin not having moved, he then reverted to aligning the holes using the crane and/or spreader bar, as might have been expected. Another unsatisfactory aspect of the pursuer's case was that the GP records (6/2 of process) record the pursuer as having hit one pin with another pin, the physiotherapy notes (7/10 of process) record that he hit the pin with "a hammer" and a report within the GP records (6/2 P.29) records that he hit a heavy metal object with a "mallet". The pursuer was the only possible source of information for these records. [21] In these circumstances, I consider that all I can be satisfied of is that at some date prior to the trades holidays in July 2002, the pursuer did something to himself that made him feel that he had pulled a muscle in his shoulder and it developed into a capsulitis. I am not, though, satisfied that he has

proved that he sustained the accident he alleges. [22] Further, I did not consider that the pursuer had established that any difficulties with pin removal had arisen in the month prior to the incident. Firstly, as I have indicated, the whole tenor of the evidence was that the difficulties with pin removal were in the early days, at a time when the men were inexperienced in the job, and in particular, were inexperienced in the task of aligning the holes properly and seeing to it that the vertical and horizontal strains had been released. There is no question, on the evidence, of heat having been responsible for pins sticking. The pursuer could point to nothing that had changed in the month or so prior to the alleged incident other than some thoughts amongst the men that "there could be a twist in the frame of the crane", but as he himself added, they were not experts and, furthermore the pursuer makes no case in this litigation that there was any problem with the construction of the crane. Also, I consider it significant that despite the reference in the evidence to difficulties with pins sticking and to men, on occasion, having felt shuddering up their arms on hitting stuck pins, there had been no previous injuries. The Regulations [23] Although the Provision and Use of Work Equipment Regulations 1998 are referred to in the pleadings, the suitability of the metal bar was not raised by the pursuer as an issue in the evidence at all. It was not easy to ascertain the exact focus of his case but, if anything, it seemed to be the effect of heat on the dogs and the pins. Regulations 4(1) and

- (2) provide: "(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. (2) In selecting work equipment, every employer shall have regard to the working conditions and to the risks to health and safety of persons which exists in the premises or undertaking in which that work equipment is to be used and any additional risk posed by the use of that work equipment. (4) In this Regulation 'suitable' (a) means suitable in any respect which it is reasonably foreseeable will affect the health or safety of any person; It is generally accepted that the regulations should not be interpreted narrowly lest the purpose of the underlying directive (the Work Equipment Directive 89/655) be not fully implemented (English v North Lanarkshire Council 1999 SLR 310, McGhee v Strathclyde Fire Brigade 2002 SLT 680 and Moohan v City of Glasgow Council). There was no doubt that the metal bar used in the pin removal exercise in this case was work equipment. If it was reasonably foreseeable that it would affect the health or safety of any person, it required to be constructed or adapted so as to be suitable, in the sense of Regulation 4(4)(a), for the pin removing job, which failing, should not have been used for that job at all. But, was it reasonably foreseeable that the use of the metal bar would affect the health or safety of employees including the pursuer? The clear answer to that question is, in my view, on the evidence, no. Putting aside, for one moment, the problems for the pursuer's case of the lack of evidence of specific difficulties a month or so prior to the incident, all that was established in evidence was that on occasions pins stuck and that, on some occasions when that happened, workers had struck them and felt shudders up their arms. However, if an employee hit rather than tapped the pin, he would not have been following the safe system of work set out in 7/1 of process. He would not have been following the proper practice of working at proper alignment of the holes and releases of the horizontal and vertical forces.

It was plain, on the evidence, that if that was done, then the pin would come out easily. As witness Richard Jackson had said in evidence, once the crane and the spreader bar were adjusted for proper alignment, you gave the pin a light tap and if it moved, you could actually push it out. It was self evident, it seemed, that if the pin did not move in those circumstances, a further attempt at exerting force on it should not be made. Rather, the employee required to revert to the alignment exercise. In short, I am not satisfied that the defenders should have foreseen that the men would be exerting force on the pins at all. Further, even if they should have done, on the occasions when it happened, the men were not getting injured. That being so, I cannot see that there was any reason for them to foresee any risk that the health and safety of any employee would be affected by the use of the metal bars for the purposes of the job. The pursuer's case came to be that they should have had such foresight because, as Dr Garrett had explained, a capsulitis could result from a person forcefully striking metal on metal when using a tool like the metal bar in a forward movement of the arms. That approach would, however, involve attributing to the defenders expert medical knowledge which they cannot reasonably have been expected to have. I cannot accept that such an approach is well founded. Further, I agree with Mr Middleton that breach of Regulation 4(2) could be of no assistance to the pursuer's case absent on breach Regulation 4(1). I should, however, add that it seems to me that the pursuer's case to the effect that there was a breach of Regulation 4(2) was wholly misconceived. It is perfectly plain from the risk assessment 7/2 of process that a detailed analysis of the relevant job was carried out. The question of risks from hand tools is specifically covered and it is plain both from the terms of 7/1 of process and from the fact that Mr Sommerville, the author of the risk assessment, consulted fully with others who knew about the job at the time of completing it, that one of the features covered was that the job was carried out using the metal bar referred to. I am, accordingly, satisfied that there was no breach by the defenders of the provisions of Regulation 4 (1) or (2) of Provision and Use of Work Equipment Regulations 1998. [24] In the event, therefore, the pursuer has not proved the accident alleged but even if he had done, he would not have proved that it was attributable to a breach of the regulations founded on by him. I will, accordingly, accede to the defenders' motion which was for absolvitor and, further, find the pursuer liable to the defenders in the expenses of the cause. BAILII: Copyright Policy | Disclaimers | Privacy Policy | Feedback | Donate to BAILII URL: https://www.bailii.org/scot/cases/ScotCS/2006/CSOH_116.html

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