

SCOTLAND / JUDGMENT

McPake v SRCL Ltd [2013] ScotCS CSOH_157 (24 September 2013)

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[2013] ScotCS CSOH_157 [New search] [Help] OUTER HOUSE, COURT OF SESSION

[2013] CSOH 157 PD492/12 OPINION OF LORD STEWART in the cause WILLIAM MCPAKE Pursuer
against SRCL LIMITED Defenders ____ Pursuer: Moll, advocate; Digby Brown LLP
Defenders: CS Wilson, advocate; bto 24 September 2013

[1] This is a case about a needlestick injury sustained by a driver working for a clinical waste management company. The driver sustained the injury when he was collecting clinical waste from a hospital. The immediate physical injury was a small puncture wound to the pursuer's right thigh. Even though, as in this case, the physical component is trivial, needlestick injuries may be compensable for their psychological impact and consequential losses [Fryers v Belfast Health & Social Care Trust

[2009] NICA 57]. The driver who sustained the needlestick is the pursuer in this action and the waste management company are the defenders. The pursuer's summons claims damages of £40,000. After evidence had been led pursuer's counsel quantified the claim at just short of £16,000.

[2] The pursuer blames the accident on the fact that his protective trousers did not protect the front upper thigh where the needle stuck. The pursuer's claim is principally based on an alleged breach by the defenders of the Personal Protective Equipment Regulations 1992. The defenders say that the accident was the pursuer's own fault. There is also an issue about the amount of damages. I heard evidence over four days 19–22 February 2013 with submissions on 27 February 2013 and made avizandum. I have now decided that the pursuer is entitled to compensation and that damages should be awarded in the principal sum of £3,500 with interest added to the date of decree. An odd case

- [3] This is an odd case. The accident happened when the pursuer was decanting a plastic clinical waste bag from one waste bin to another. He dropped the bag and it hit his upper thigh. There was a used, unsheathed needle in the plastic waste bag. On the face of it the blame attaches to the hospital, BMI Carrick Glen. It is sloppy, at best, to throw needles away in plastic waste bags; and to discard used, unsheathed needles in this way is totally unacceptable. I can see that there might be a number of complications suing an organisation that possibly uses feepaid clinicians, agency nurses and contract cleaners but I do not actually know why the pursuer has not sued the hospital company; and I do not know why the defenders have not convened the hospital company as third parties.
- [4] The pursuer has sued his employers alone; and he has sued them exclusively on the basis of breach of statutory duty. This is as much an unsafesystemofwork case at common law as it is a breachofstatutoryduty case. The proceedings could have been an object lesson in how not to plead an employers' liability case. Without the words "and at common law", or something with equivalent effect, the pursuer unnecessarily perils his case on the precise words of the statute. In this case, as it happens, the wording is accommodating; but I am not sure that this is a tribute to the pleader's judgement. (I emphasise that counsel who conducted the proof had apparently inherited the pleadings fully formed.)
- [5] Another curious feature of the case is that the pursuer's claim was intimated by his present solicitors to the defenders eleven weeks after the event. In the interval the pursuer had been continuously at work and was still waiting for his HIV and hepatitis B blood tests. The evidence does not explain why, how or precisely when the pursuer first consulted solicitors: but it seems that a mere three weeks after the accident, on 22 August 2011, the pursuer signed a mandate for his present solicitors to recover his general practitioner records under reference to "a claim for damages arising out of an accident on 01/08/2011". The shock arrival of the solicitors' peremptory claim letter at the pursuer's workplace
- the pursuer did not know it was coming either precipitated a chain of events that ended with the pursuer's summary dismissal for gross misconduct. The needlestick incident happened on 1 August 2011, the solicitor's letter arrived on 25 October 2011, the pursuer was suspended on 26 October and he was sacked on 7 November 2011. The pursuer now expects to be compensated for his lost wages: but there is a hotly contested question as to whether that head of his claim can properly be derived from the needlestick incident. Clinical waste collection, risk and protective measures
- [6] The defenders collect and process clinical waste. The waste is processed at their Cumbernauld depot. The defenders run six vehicles out of the Cumbernauld depot for waste collection, three 7 1/2 ton lorries, two 3 1/2 ton lorries and one "sprinter". Elsewhere the defenders run large lorries with articulated trailers for large quantity waste collection. The waste processed at Cumbernauld is collected from contract customers at hospitals, medical practices, dental surgeries, veterinary clinics, care homes and nurseries throughout central and southern Scotland, on the evidence I heard. Customers use orange or red plastic clinical waste bags for their general clinical waste. Customers are supposed to put "sharps" including

needles into separate seven litre "sharps boxes". They do not always do so. Clearly unsheathed needles in plastic bags, above all used, unsheathed needles, are not a good idea. There is a recognised risk of used needles sticking into persons handling clinical waste bags. Nonetheless it is important to acknowledge in fairness to the defenders that the first line of protection is the stipulation that customers must put sharps into separate sharps boxes; and that, on the whole, judging by the small number of reported incidents, the first line of protection seems to work. The defenders risk assessment for unloading waste at customers' premises, dated 6 March 2011, assessed the risk of sharps injuries to employees for frequency, severity of outcome and probability as "daily", "serious injury" and "remotely possible".

- [7] Persons potentially exposed to the risk of needlestick injury include the defenders' waste collection drivers. The defenders have a generally wellthoughtout safety regime to protect drivers from sharps injuries including needlestick from clinical waste bags. The regime includes procedural elements and protective equipment. Customers who produce a larger quantity of waste between collections are meant to place waste bags in 770 litre, wheeled, yellow plastic bins. At each customers' premises drivers simply exchange steamcleaned, empty bins for full bins. This operation is called a "binforbin" exchange. Ideally the defenders' drivers have no need to handle waste bags on a binforbin collection.
- [8] The defenders also offer a "loose waste" collection service dental surgeries and veterinary practices were mentioned in this connection. Drivers have to handle clinical waste bags when carrying out "loose waste" collections. Loose waste collections involve or can involve drivers entering customers' premises and interacting with customers' staff. John McMaster, manager at the defenders' Cumbernauld depot, explained that the pursuer's "route" had been changed and his vehicle had been changed to a 7 1/2 ton lorry earlier in 2011 to minimise customer contact. There had been "incidents" and customers had "complained". I gather that the idea was that on the new routes, including the route the pursuer was doing on 1 August 2011, the pursuer would simply exchange 770 litre bins without speaking to customers.
- [9] The defenders provide their drivers with clothing and equipment, including "personal protective equipment" for loose waste handling. The equipment consists of lifting tongs, otherwise "litter pickers" or "grabbers", hard hats, "hiviz" jackets, needleprotection gloves, capped boots and needleproof, otherwise "ballistic", trousers. The trouser legs are reinforced to protect the front and outside of the wearer's legs from midthigh downwards. The evidence does not explain whether the trousers are offtheshelf items; neither does it explain the thinking behind the design of the protected areas. I infer that the trousers are designed, or principally designed to give protection when waste bags are carried by hand, held by the neck, hanging by the wearer's side, out from the body. It seems to me that the trousers are well designed for that purpose: since the trousers were issued there is no evidence of any sharps injury to protected areas.

- [10] All drivers have to wear the standard issue clothing at all times when on collection rounds whether doing bin exchanges or collecting loose waste. The defenders' philosophy is that allowing drivers a choice about when to wear protective equipment would increase the health and safety risk. The pursuer had been doing mostly binforbin routes for several months. According to the pursuer there were occasions when he had to collect loose waste from dentists and decant it for transporting.
- [11] The defenders have a separate written protocol for loose waste collection. "Loose waste" means waste bagged in clinical waste bags. The "procedure for loose waste handling" stipulates: "bags must be picked up by their tied neck where possible;" and "bags must be carried avoiding contact with legs, body and arms." Catherine Cusack, a 3 1/2 ton lorry driver, explained how she had suffered a needlestick injury when collecting loose waste from a veterinary clinic: the needle went into her arm. I was given no further details. Another 3 1/2 ton lorry driver Rosalyn Corsar sustained a needlestick in her thigh in 2007 when collecting loose waste from a dental surgery: but that was before needleproof trousers were issued. The circumstances of the accident
- [12] The question in the present case as it is framed by the defenders is whether the pursuer should have been handling loose waste when he was doing a binforbin collection. The defenders of course say "no" and that the accident was totally the pursuer's own fault. They say that the pursuer "was acting beyond his instructions and training".
- [13] The pursuer was a 7 1/2 ton lorry driver. On the day in question, 1 August 2011, the pursuer was assigned a binforbin collection route with five stops. His lorry was carrying fifteen 770 litre bins in three rows of five. The route included BMI Carrick Glen Hospital. For this customer, the pursuer's route/duty sheet specified "07HN / 5x77HT", meaning, I was told, that the customer had one seven litre sharps box and five 770 litre bins for possible exchange. It seems that there were two bin stores at the premises, one with three 770 litre bins and the other with two 770 litre bins. When the pursuer went to the first bin store he found one bin full, one bin half full and one bin nearly empty with only two or three waste bags in it. He decanted the bags from the nearlyempty bin into the halffull bin with a view to exchanging the two bins with bags in them for two empty, cleaned bins. At least, that is what he meant to do.
- [14] The pursuer reached into the nearlyempty bin to remove the bags with his grabber. There was no problem with the first bag. When he brought the second or possibly the third bag out, it caught on the bin catch and fell from the grabber striking the pursuer on the right thigh. The pursuer felt a sharp jag. He immediately reported the incident to the hospital. The pursuer was found to have a puncture wound. Hospital staff investigated and found the bag on the tail hoist of the lorry. There was a 5 ml syringe with a 1 1/2 inch needle attached inside the bag. The plunger of the syringe was fully depressed, meaning, I assume, that it had been used. The needle was unsheathed. There is no difficulty in concluding that the pursuer did sustain a needlestick injury. I only have his word for it as to how precisely the accident happened but there seems to be no doubt that it happened, one way or another,

when he was handling loose waste in the course of decanting a bag from one bin to another.
Personal Protective Equipment at Work Regulations 1992/2966

- [15] Assuming that the decanting operation was in some reasonable sense part of the pursuer's job, I also have no difficulty in holding that the pursuer was exposed to a risk while at work such that the Personal Protective Equipment at Work Regulations 1992/2966 were engaged. Regulation 4 provides: "(1) Every employer shall ensure that suitable personal protective equipment is provided to his employees who may be exposed to a risk to their health or safety while at work except where and to the extent that such risk has been adequately controlled by other means which are equally or more effective." Subparagraph (3)(a) provides that equipment is not suitable unless it is appropriate for the risks involved and subsection (3)(d) provides that personal protective equipment is not suitable unless "so far as is practicable, it is effective to prevent or adequately control the risk or risks involved without increasing overall risk... ". The pursuer alleges a breach of regulation 4 in respect that the reinforced area of the protective trousers was not effective against the risk of needlesticks to the upper thighs.
- [16] The pursuer does not plead regulation 6 but I assume that it is necessarily part of his case. Regulation 6 provides that before choosing personal protective equipment employers have to ensure that an assessment is made to determine whether the intended equipment is suitable having regard to an assessment of the risks not "avoided" by other means and to the characteristics which protective equipment must have to be effective against those risks "taking into account any risks which the equipment itself may create", etc. I have difficulty in fully understanding what distinctions, if any, the legislator intends to make by deploying the different expressions "controlling risk", "preventing risk" and "avoiding risk". In some contexts "prevention" might mean stopping the harmful situation arising in the first place and "control" might mean mitigating the effects once the situation has arisen. Pursuer's counsel referred to case law to vouch the propositions that employers are required first to identify the risk and then, secondly, to determine the suitability of the proposed equipment [*Threlfall v Hull City Council*]
- [2011] ICR 209 ; *Blair v Chief Constable of Sussex*
- [2012] EWCA Civ 633 (15 May 2012)]. Was decanting "loose waste" part of the job?
- [17] The pursuer justified decanting loose waste by saying that this is what he was trained to do. He had been taught to do this by Mark Bulloch, then transport manager, when he started in 2008. "Everybody" did the same. There was advantage in having as few bins as possible at the processing end. There was no point in taking nearly empty bins back to the depot. The company would not be happy with half empty bins. If he brought nearly empty bins back to the depot he might have to return them to the customer. Sometimes he would find bins overflowing. Sometimes he would get the customer to decant an overflowing bin so that the lid would close. Sometimes he would do it himself. On other occasions he might find a loose waste bag beside the bins. He could take a photograph on his mobile phone and register a

complaint with the depot (for onward notification to the customer) or pick the bag up with his grabbers and put it in a bin. "It just depends," he said. On some rounds his instructions were to decant loose waste from 360 litre bins on dentists' premises into the 770 litre bins on his lorry. The defenders were perfectly happy with that. There was no difference, he said, decanting from a 770 litre to another 770 litre bin.

- [18] The defenders led witnesses to establish the proposition that the binforbin system involves no decanting whatsoever. This body of testimony was selfcontradictory. The two most important witnesses were John McMaster, who was the site manager at the Cumbernauld depot at the time of the accident, responsible for the processing side of the operation, and Mark Bulloch, the Cumbernauld depot service coordinator, meaning that he managed the collections side of the operation, transport and drivers. On the accounts given by these gentlemen, it seemed to me, there was no clear system. In essence Mr McMaster said that drivers should leave nearly empty bins with customers; and Mr Bulloch said that drivers are supposed to uplift nearly empty bins and bring them back to the depot.
- [19] In a little more detail, Mr McMaster said that it did not make sense to lift a bin with one, two or three bags in it. The company would run at a loss if drivers did that. All bins had to be handled and cleaned even if they had only one bag of waste in them. He expected drivers to bring back full bins. He would not expect drivers to bring back bins with only a couple of bags in them. Drivers were not instructed to collect all waste: they were instructed to collect bins. Drivers might use their discretion as to whether to uplift or to leave partly filled bins. Mark Bulloch would be the best person to speak about waste uplift procedures.
- [20] Mr Bulloch had started out as a driver. He said that if there were three bags in the bin, the bin should have been exchanged for an empty bin and brought back to the depot. If the pursuer had encountered five bins each with a single bag of waste he should have brought all five bins back to the depot. He was quite clear about that. That is the way the operation is carried out on a daytoday basis. He was emphatic that there is no reason for drivers to decant loose waste from one bin to another on binforbin collections. There is no reason for binforbin drivers to handle loose waste. Matthew Briggs, the defenders' district business manager based at Newcastle was called by the defenders to speak about the pursuer's dismissal. Pursuer's counsel asked him about waste collection: but I formed the impression that he was too far from "the coal face" to add anything of value.
- [21] On the whole I prefer the pursuer's version, and not just because Mr McMaster and Mr Bulloch contradicted one another. There are additional reasons. The pursuer reported the incident to Mark Bulloch the same day on his return to Cumbernauld. Mark Bulloch completed an incident report for the pursuer's accident. He was aware, when he filled out the form, that the incident had happened during a binforbin exchange. Mr Bulloch described the incident, presumably on the pursuer's account, as follows: "Taking waste clinical bags from one bin to put in another bin. The driver was wearing his ballistic trousers and needle stick gloves." In the "Incident Analysis" section Mr Bulloch answered the question "What was the root cause(s) of the accident?" as follows: "Needle not put in sharps

box, needle was in orange clinical waste bag." In the "Prevention" section Mr Bulloch answered the question about preventing a recurrence as follows: "Customer is to adhere to SRCL waste policy for sharps." There was a noticeable pause when Mark Bulloch was asked in crossexamination why he had not mentioned anywhere that the cause of the incident, or one of the causes, was the handling of loose waste on a binforbin collection. After the pause, he answered: "I don't know why I haven't put it in." He rejected the suggestion — without offering an alternative explanation — that the reason for the omission was that the pursuer had done nothing wrong.

- [22] It should be noted that at the time the pursuer was not reprimanded or counselled; and he was not disciplined later. The claimed breach of binforbin procedures did not form part of the charges in the proceedings that led to the pursuer's dismissal. The absence of managerial intervention contrasts with the defenders' averment: "Had the Defenders been aware that the Pursuer was acting beyond his instructions and training when engaged on a bin for bin exchange they would have intervened and reprimanded the Pursuer." The evidence in court of the defenders' group health and safety manager, Chris Alcock was to the same effect as the averment: if he had been aware that the pursuer was decanting on a binforbin round, he said, he would have stopped him doing so and would have raised the matter at site manager level. As I say, Mr Bulloch was aware; and that did not happen.
- [23] The incident report was received by Chris Alcock at his Liverpool office the next day 2 August 2011. Mr Alcock added the following comment: "This incident is due to the customer failing in discarding sharps waste correctly in a sharps container and instead discarding it in a clinical waste bag. The driver was wearing all the correct PPE but this only offers increased protection and unfortunately [sic] not full cover protection." In crossexamination Chris Alcock described his phrase "unfortunately not full cover protection" as "the wrong choice of words". The pursuer's solicitors intimated the pursuer's claim to the defenders' Cumbernauld depot by letter dated 17 October 2011. The letter seems to have arrived on 25 October 2011. Mr Alcock then "reviewed" the incident report on 28 October 2011 and added another comment as follows: "Upon further investigation into this claim it has been discovered that W McPake was instructed on his route/duty sheet to only carry out a bin for bin exchange. There are no written instructions to remove loose waste bags from one bin to another. W McPake's line manager also states that W McPake he [sic] has had no verbal instructions to carry out this loose waste procedure at customers premises. W McPake took it upon himself to physically remove the loose waste bag from the bin and therefore placed himself at risk and ultimately [sic] exposed himself to the needle stick." In evidence Mr Alcock stated that he had received the information in the additional comment from Mr McMaster and Mr Bulloch. The cynic would infer that the incident report was rewritten to blame the pursuer when it was realised that a claim was on the way.
- [24] Then there is the matter of the defenders' general waste collection protocol. The protocol applies to 770 litre binforbin exchanges. It includes the instruction for drivers: "If loose waste must be decanted litter pickers must be used." The protocol also states that all staff

must wear personal protective equipment including "Sharps Gloves, Toe Protection, Ballistic Trousers", which would seem a reasonable precaution if waste bags are to be handled loose and in particular decanted. Mr Bulloch accepted that the procedure envisaged decanting: but he was at a loss to explain in what circumstances decanting would be called for.

- [25] The defenders' separate loose waste handling protocol lays down the procedure for retrieving waste bags from (the bottom of) 770 litre bins for loading into bulk trailers: "...litter pickers must be used to retrieve waste." There is the same requirement for wearing personal protective equipment as in the general waste collection protocol. On 10 June 2011 Mark Bulloch conducted "work activity observation" on the pursuer. The list of activities to be observed "to determine that drivers are being compliant with their duties" included: "Drivers moving/ decanting bins with correct manual handling techniques." None of the defenders' witnesses could explain what made decanting during a binforbin collection different from decanting during a loose waste collection. The most they could say was that there was no requirement for decanting, no reason for it, it was not in the procedures for bin forbin.
- [26] Driver Rosalyn Corsar supported the pursuer. She said it was "standard practice" to decant waste bags from nearly empty 770 litre bins on binforbin collections. Her attitude was that Mark Bulloch would have done it too. She was never told to do it or not to do it. Ms Corsar was a driver on a 3 1/2 ton lorry and didn't do a full binforbin route. She mostly collected loose waste. Rosalyn Corsar no longer works for the defenders. The third driver who gave evidence, Catherine Cusack, still works for the defenders. She was trained by Rosalyn Corsar. She has some 770 litre binforbins on her route. She would never decant. She said that the strict contract was to take away all bins however many bags are in them but "you make a judgement call and you use common sense". Her motto was "customer first"; and she asked, rhetorically: "What's the point of the customer paying £45 for one bag?" It wasn't commercial for the customer. She would just leave a bin with one bag in it, using her "customer first initiative" unless "the customer wanted it away". Ms Cusack supported the defenders' case. She said she was trained not to decant 770 litre bins except on loose waste collections; and she wasn't aware of other drivers doing it. She was told about Ms Corsar's evidence: Ms Cusack said that she "agreed to disagree".
- [27] The evidence of Ms Corsar and Ms Cusack confirmed me in the impression that the defenders had not instituted and did not maintain a system for dealing with nearly empty bins encountered during binforbin collections. The economics of the operation were not well explained but I was left with the impression that customers were charged a flat rate for each bin uplifted plus a weightrelated scale rate for the contents. Even if this is not quite right it seems that what the pursuer was doing when he decanted waste bags from a nearly empty bin to a fuller bin suited the economics of the operation as described by Mr McMaster; and it was also in customers' interests as explained by Ms Cusack. Was there a breach of the regulations?

- [28] Regulation 4 of the 1992 Regulations is prima facie engaged where workers are "exposed to a risk to their health or safety while at work". An employee is "at work" in terms of the principal Act "throughout the time when he is in the course of his employment, but not otherwise". I am satisfied that what the pursuer did by way of decanting the clinical waste bags was done "in the course of his employment". This is not a case of a worker cutting corners to make life easier for himself — "it is much harder to decant than it is to exchange bins," as Mr Alcock said; and what the pursuer was doing was for the defenders' benefit. It is open to employers to "disengage" regulation 4 by taking advantage of the exception, namely "except where and to the extent that such risk has been adequately controlled by other means which are equally or more effective". Counsel for the defenders submits that the risk was "adequately controlled" in this case by virtue of the fact that the pursuer was instructed to carry out a binforbin collection, the "other means" being the bins themselves and the instruction to exchange bins. Had the pursuer carried out his instruction literally, the clinical waste bag containing the unsheathed needle would have remained inside the bin and the pursuer would never have come into contact with it.
- [29] I think that this is to take a rather too narrow a view of the situation. One of the witnesses demonstrated that the 770 litre bins come up to chest height. Accordingly, I can envisage this was not explained in the evidence that there is an added risk in decanting. This is because the bags have to be raised high enough above midhigh level to clear the rim of the bin, both removing the bags and dropping them into another bin. Drivers are exposed to the same added risk when they are expressly mandated by the defenders to decant loose waste from bins on customers' premises to bins on the lorry. Rosalyn Corsar, for example, serviced one dental surgery that kept their 770 litre bins in the basement: the bins could not be loaded and she had to decant the waste bags. What the pursuer did on 1 August 2011 was not obviously riskier than what the defenders' drivers seem to have been doing day and daily on loose waste collections albeit perhaps mostly from smaller 360 litre bins.
- [30] Coming back to the binforbin routine, the "other means" of protection relied on by the defenders were not, in my view, "equally or more effective" in the absence of a clear system for dealing with nearly empty bins. If the defenders did not want their drivers to decant on binforbin rounds because of an added needlestick risk they should have prohibited drivers from doing so; and they should have instructed them, subject possibly to customers' contrary directions, either, as per Mr McMaster, to leave nearly empty bins, or, as per Mr Bulloch, to uplift nearly empty bins.
- [31] On the evidence put before me the necessary inference is that if the defenders had conducted an assessment in terms of regulation 6 they would have recognised that waste bags were being decanted by at least some drivers during binforbin collections and that waste bags were being decanted routinely by all drivers during loose waste collections; and it would have registered that there was an added risk of needle stick injuries which was not prevented, controlled or avoided by the standard issue needleproof trousers and the instruction to carry bags by the neck away from the body.

- [32] The defenders may have conducted some kind of assessment under Mr Alcock's predecessor which led to the introduction of needleprotection gloves and needleproof trousers in 2009–2010 but Mr Alcock did not know the details: he "just took over the reins". In evidence Mr Alcock confirmed his understanding that the standard issue needleproof trousers do not protect the upper thigh/groin area. He suggested that the risk in supplying "fully protective" equipment was that drivers might not wear it. I agree with counsel for the petitioner that Mr Alcock's opinion on this matter is speculative and not based on an assessment. I have to add that the issue is not about fully protective equipment: it is about equipment that protects the upper thighs. The defenders did not lead any independent expert evidence to support their position on "effectiveness" and "practicability". Prima facie the defenders were in breach of their duty in terms of regulation 4 to ensure that suitable personal protective equipment was provided to the pursuer and the defenders have not made out any of the statutory exceptions. They are therefore liable to compensate the pursuer for any loss, injury and damage he has suffered as a result of the needlestick incident, unless and except to the extent that they show the incident to have been caused by the pursuer and that it was the pursuer's own fault. Was the pursuer at fault?
- [33] The only fault alleged by the defenders on the part of the pursuer is that by decanting the waste bags during a binforbin exchange the pursuer did something he was not authorised to do, acted beyond his instructions and training, disregarded his training and failed in these respects to take reasonable care for his own safety. Defenders' counsel referred to *Neil v East Ayrshire Council* RepLR 18. There was discussion about the meaning of the pursuer's averment that he "required" to handle loose waste. Counsel for the defenders submitted that it was unnecessary for the pursuer to handle loose waste and that the pursuer had failed to prove his case as pled. Counsel for the pursuer submitted that the averment simply meant that the pursuer "felt the need to" handle loose waste. I reject the defenders' submission. I am inclined to accept the pursuer's account that he was trained to decant from nearly empty bins. In any event I am well satisfied that he was not prohibited from doing so, that it was a reasonable thing for him to do and that there was no fault on his part in doing so. The defenders advance no other case of fault on the pursuer's part: there is no case, for example, that the pursuer was careless in allowing the waste bag to snag on the bin.
- [34] For completeness I should mention that the pursuer also puts his case, in respect of precisely the same facts, on the basis of a breach of regulation 4 of the Provision and Use of Work Equipment Regulations 1998/2306. This ground of claim was faintly advanced in submissions by pursuer's counsel. I agree with counsel for the defenders that, on the evidence, this ground of claim is without merit. The damages claimed
- [35] The physical component of the pursuer's injury was trivial. The consequential psychological element was sufficiently significant to sound in damages. The psychological element is classified on both sides as an "adjustment disorder". The pursuer claims solatium for the disorder, with compensation for wage loss said to be consequent on the disorder and awards for services in terms of section 8 and, following amendment, section 9 of the Administration

of Justice Act 1982. The pursuer's claims for wage loss and services, as presented, are perilled on the proposition that the needlestick incident and the psychological trauma that followed caused the pursuer to be dismissed by the defenders in November 2011 leading to the psychological trauma and consequential losses that followed the dismissal. It might have been argued for the pursuer on an alternative basis perhaps but was not that the pursuer's condition and the consequential losses after November 2011 represented the combined effect of the needlestick trauma and the trauma of dismissal.

- [36] Counsel for the pursuer made the submission that there should be apportionment of the wages compensation and the services awards to reflect the fact that the adjustment disorder was a recurrence or exacerbation of a preexisting condition and that a number of stressors including the needlestick contributed to these heads of loss. Counsel proposed an apportionment of 50 per cent. As authority for this approach counsel referred to "Sutherland v Hatton", in the Court of Appeal, one of a number of conjoined cases usually cited as Barber v Somerset County Council, which is reported at
- [2002] 2 All ER 1. See paragraphs 38-43 per Hale LJ giving the judgment of the Court of Appeal (subsequently reversed in the House of Lords on a different point). The practical proposition distilled by the Court of Appeal, is [§ 43 (15)]: "Where the harm suffered has more than one cause, the employer should only pay for that proportion of the harm suffered which is attributable to his wrongdoing, unless the harm is truly indivisible. It is for the defendant to raise the question of apportionment." I may be mistaken but I thought counsel for the pursuer, who, as I say, raised the question, made rather the opposite submission, namely that there has to be apportionment in the present case, in a rough and ready way, because there are a number of causes which cannot be disentangled. Also, if I understand the reasoning of the Court of Appeal correctly the thesis is that an identifiable "exacerbation" or "acceleration" of a condition would result in apportionment but that a "recurrence" attributable in part to preexisting vulnerability would not call for apportionment.
- [37] As I understand it, counsel does not propose apportionment of the solatium element even though he submits that a number of stresses contributed to the adjustment disorder. This may be because there are enough reported awards for needlestick injuries with psychological complications to allow a tariff to be derived. Counsel for the pursuer illustrated the appropriate level for solatium by reference to seven cases (inflation updated amounts as at February 2013 in brackets): Howell v Bolton Hospitals NHS Trust
- (1996) 96(1) QR 7, £2,000 (£3,160); Dickson v Bridge Hotel
- (1999) 99(6) QR 7, £2,500 (£3,650); Meek v Lewis, Dec 2001, Kemp R.119: May 2011 C1046, £2,630 (£3,655); Davies v Sunlight Service Group Ltd, Jun 2006, Kemp R.119: May 2011 C1047, £3,000 (£3,690); (A Child) v Arboretum Nursing Home
- [2006] CLY 3078 £2,250 (£2,768); Ratcliffe v Greater Manchester Ambulance Service NHS Trust

- [2006] CLY 3089 £6,000 (£7,380); *Scott Adams v Trackwork Group Ltd*, Mar 2007, Kemp R.114: February 2010 C1057 £2,500 (£2,950). Ratcliffe is the highest of these general damages awards for pain, suffering and loss of amenity. In Ratcliffe the ambulance technician was exposed to the risk of infection from a patient who was actually confirmed HIV positive.
- [38] Counsel for the pursuer argued for a solatium award (principal sum) of £4,000 on the basis that the pursuer noticed his condition improving after 11 months, from July 2012 and on the basis that, on the pursuer's account, his position stabilised after 16 months in about December 2012. Counsel for the defenders argued for a valuation (principal sum) of £1,500 on the basis that the disorder was a mild one which lasted from the date of the accident, 1 August 2011 until November 2011 when the pursuer was dismissed by the defenders. This must be on the view that the dismissal was unrelated to the accident and that the deterioration of the pursuer's psychological state following and because of the dismissal entirely superseded any disorder caused by the accident. The defenders do not, at least in so many words, plead *novus actus interveniens*.
- [39] I do not fully accept the submissions of either counsel. I find that the pursuer was a vulnerable individual because of preexisting stressors. He was not however obviously suffering from an adjustment disorder in the months leading up to August 2011: Professor Freeman FRCPsych reported, I think fairly, that "[the pursuer] seems to have been relatively happy and content in his relationship with Fiona Russell..." The mild disorder from which the pursuer suffered after the needlestick incident was a recurrence rather than an exacerbation and must be wholly attributed to the needlestick without apportionment. I reject the submission for the pursuer that the dismissal and the consequences of the dismissal can be attributed to the needlestick incident (see below). I reject the submission for the defenders that the needlestick trauma was entirely superseded by the trauma of the dismissal. There is enough information to distinguish the psychological effects of the needlestick from the psychological effects of the dismissal. An appropriate assessment is that the consequences of the needlestick should and would have been exhausted after seven months, that is by the end of February 2012, had the progress of that condition not been masked by the supervening effects of the dismissal. Preexisting stressors and the psychological effect of the needlestick
- [40] The preexisting stressors in the pursuer's life were the breakdown of his 7year marriage (13 year relationship) on Boxing Day 2009 reportedly because his wife was having an affair with her previous partner, difficulties over access to the two children of his marriage, finance and child support issues, a road traffic accident in November 2010, the fact that his new partner's younger child was severely autistic and highly demanding, and the fact that his new partner's older child suffered from hydrocephalus for which neurosurgical treatment was required. The pursuer was inclined to excessive alcohol consumption when under stress and this in turn was another stressor. The pursuer told Dr Martin Livingston FRCPsych on 18 January 2012 that "the most significant stress over the last few years has been the breakdown of his marriage".

- [41] The pursuer had a limited history of mental symptoms. In 2001 the pursuer was certified unfit for work because of "nervous debility". In June 2009 his general practitioner noted that the family was under "horrific stress" while awaiting some test results for the pursuer's wife: the pursuer was said to "play his cards extremely close to his chest" and to be "extremely uptight". On 16 February 2010 the pursuer took an overdose of 30 amitriptyline tablets. He attended Stirling Hospital and possibly selfdischarged against medical advice. On 26 February 2010 he was admitted to Monklands Hospital as a psychiatric inpatient after attending in tears at his general practitioner. He was discharged after four days. There was reference to "a depressive episode". He was apparently signed off work with stress or depression from 15 February to 21 April 2010. The pursuer failed to attend two followup outpatient psychiatric appointments and was discharged on 24 June 2010. The pursuer later told Fiona Russell, his new partner, that he had had a "bad breakdown".
- [42] After discharge, the pursuer seems to have had no form of medical attendance, care or treatment for mental symptoms until shortly after the needlestick incident fourteen months later. In October 2010 he moved in with a new partner, Fiona Russell, someone he had known at school and met again on Facebook. By her former partner Ms Russell had two children, child T (15), who suffered from hydrocephalus caused by cystic hygroma, and child M (12), who was severely autistic and difficult to manage. Up to August 2011, according to Ms Russell, the pursuer was happy at his work and had "a lovely relationship" with child M. child T's condition caused strains. Child T was admitted to hospital in, I think, 2011 before the pursuer lost his job, for the insertion of a shunt to drain fluid from his skull. On 18 January 2012 the pursuer told Dr Martin Livingston FRCPsych that there were difficulties between himself and child T which the pursuer attributed to child T's father discouraging child T from becoming involved with the pursuer.
- [43] The evidence about the pursuer's mood between the date of the needlestick incident, 1 August 2011, and the date of the event which led to him losing his job, 25 October 2011, is equivocal. Essentially there is a question about the extent to which events have been telescoped in the memory of those involved. Ms Russell attributed the deterioration in the pursuer's mood to the needlestick incident. She testified that immediately after the incident on 1 August 2011 the pursuer texted her from Ayr Hospital — this may have been an error for BMI Carrick Glen — to say that he was about to go for a shower: she said the pursuer "sounded" panicky — possibly there was a telephone call as well. He told her what had happened and that he was anxious to get home. In the weeks that followed, according to Ms Russell, the pursuer became withdrawn, he started feeling pressure from work colleagues and he wasn't "the same cheery, bubbly person". He started to disappear into a strange quiet mood. Sex was nonexistent.
- [44] The pursuer occasionally had a drink (of alcohol) after the needlestick. After his suspension from work the drinking got quite bad. It was a progressive thing. It was only after the dismissal that the pursuer's drinking created difficulty. When the pursuer got "the all clear" for his blood tests in February 2012 he did not come out of his drinking and his low mood.

His drinking was getting ridiculous. Ms Russell told Dr Martin Livingston FRCPsych on 18 January 2012 that the pursuer "tends to pass out, as she put it, as soon as he comes to bed". It came to the point where Ms Russell could not take any more. She couldn't handle the fact that the pursuer wasn't helping with the children and around the home and that there was no sexual relationship. She resented him being in the house. Ms Russell and the pursuer made a joint decision for him to leave her house in May 2012. By the date of the proof the pursuer's personality was "getting there" and the parties were slowly getting back into a relationship.

- [45] The pursuer testified that in the weeks immediately before the accident he thought his mental state was "fine". After the accident he was worried about having been stuck with a needle. He did not know whether he had HIV or whatever. His character changed. He became argumentative, although he did not lose his temper. He was in a bad mood and irritable. The pursuer stated: "I just had depression and sunk into myself after the accident." It is recorded that he consulted his general practitioner four days after the needlestick incident about sleep disturbance.
- [46] On the other hand the pursuer initially continued at work without interruption. In relation to the services claims, the pursuer said that he did not need any help until after he had lost his job; and that he was unable to give help (in the house and with the children) after he lost his job. It started at the end of November 2011. Paragraph 5.1 of the medicolegal report by Mr MacCallum FRCS (Glas) following an examination on 9 December 2011 confirms that the pursuer had no difficulties with "his normal household duties" as a result of the needlestick. The pursuer told Dr Martin Livingston FRCPsych, who examined him for medicolegal purposes on 18 January 2012, that his relationship difficulties started "several weeks after the accident". In Court, the pursuer also said that his drinking started after he had been suspended: it didn't really start after the accident. When he was working he didn't drink during the week because of his driving job and having to be up early. After his dismissal he was drinking two to twoandahalf bottles of vodka every five or six days.
- [47] Both psychiatrists who gave evidence, Dr Livingston for the pursuer and Professor Freeman for the defenders, offered the opinion that the pursuer had suffered from an "adjustment disorder" in terms of DSM IV for a period from the end of 2009 and suffered from a recurrence or exacerbation because of the needlestick injury and the wait for his blood test results. Dr Livingston thought the condition had been continuous since the breakdown of the pursuer's marriage "with perhaps a degree of recovery at the start of his relationship with his new partner Fiona Russell". Professor Freeman thought that there had been a recurrence and that the condition had been "mild" in the months following the needlestick. There was a significant deterioration in his condition when he lost his job in November 2011. His relationship became unhappy and eventually broke down. The disorder involved symptoms of sleep disturbance, anxiety and depression. When seen by the psychiatrists for medicolegal purposes the pursuer presented as sullen and disgruntled. How long did the needlestick complications last?

- [48] I gather that normally you would expect mental symptoms consequential upon a needlestick injury to resolve with the reporting of negative infection test results. There is an issue about when the pursuer did know or should have known that his blood tests for hepatitisB and HIV were negative. The diagnostic blood tests were carried out at more or less the earliest opportunity after a four month interval. The results were available within days but the pursuer may not have received them until two months later. Professor Freeman FRCPsych reported: "[The pursuer] said that although that was a great relief he feels that by then the damage had been done." The pursuer claims to have received the test results in February 2012. The question was not answered — indeed the question was not asked — whether things might have been better if the pursuer had got his results two months earlier.
- [49] Immediately after the accident the pursuer was advised by staff at BMI Carrick Glen Hospital to squeeze the puncture wound to encourage bleeding and to shower, which he did. He attended Ayr Hospital accident and emergency department where bloods were taken and stored for future comparison in the event that followup testing were to show infection. The pursuer was given a third, reinforcing dose of hepatitis B vaccine. (He had received two doses in 2008). On the view that there was no evidence of high risk for HIV, the pursuer was not given antiviral agents. The pursuer cut short his collection round and returned to the depot at Cumbernauld where he reported the incident.
- [50] On 5 August 2011 the pursuer attended his general practitioner, Dr William Fisher at Fallin Health Centre. The pursuer gave a history of needlestick injury and of his attendance at Ayr Hospital. The presenting complaint was "sleep disturbed at present". Dr Fisher prescribed "zopiclone tablets 7.5 mg 1 tab at night 10 tabs". If the pursuer took one tablet each night he would have exhausted the sleepingtablet prescription by midAugust. The pursuer did not get a repeat prescription and he did not reattend at the health centre until Friday 9 December 2012, which was after he had been dismissed by the defenders. Also on 9 December the pursuer was examined at Stirling Royal Infirmary by Mr Richard MacCallum FRCS (Glas), consultant in emergency medicine, on the instructions of the pursuer's solicitors, for the purpose of a medicolegal report.
- [51] Mr MacCallum had copies of the pursuer's general practitioner records produced to the pursuer's solicitors under mandate on 26 September 2011. Mr MacCallum reported: "1.5 ... The stored blood is not tested for any communicable diseases unless his followup blood sample, taken 4—6 months after the incident, shows infection. The original stored blood is used to establish whether the any [sic] infection found at followup was due to this needlestick incident, or a preexisting condition... 2.2 ... [The pursuer] has not had his follow up blood tests, but is hoping to get these done soon... He has become mildly depressed and stressed by this event, and this has led to relationship problems and increased alcohol intake. He is currently attending his General Practitioner with this regard... 8.3 Throughout the interview and examination he was anxious and showed signs of mild depression. He is keen to get further blood tests so that this incident can be completed. He finds the ongoing uncertainty unsettling and stressful. 8.4 His General Practitioner will arrange further blood

tests to investigate whether he has received inoculation with any communicable diseases as a result of this needlestick injury." When the pursuer reattended at his general practitioner on 9 December 2011, within hours, I take it, of seeing Mr MacCallum FRCS (Glas), the history of needlestick injury was again recorded and "also poor sleep and drinks 2 1/2 bottles of vodka a week". Dr Fisher made a note to check the pursuer's HIV and hepatitis B status after the weekend, on Monday 12 December. The inference must be that on 9 December Dr Fisher took venous blood samples for testing or arranged for venous blood samples to be taken and sent for testing.

- [52] When the pursuer gave evidence he said that "it took to midFebruary [] to get the HIV test result". His partner Fiona Russell confirmed that the pursuer "got the all clear in February 2012". In Court, the general practitioner, Dr Fisher, said that "the results would have been through sooner than February". Looking at his records the doctor then saw that the test results were reported on 12 December 2011. He thought the health centre would have received the results the next day. There was no record that the result had been relayed to the pursuer. Normally the patient would have been asked to telephone the surgery to confirm the results. I granted a motion made by pursuer's counsel, unopposed, to recall the pursuer to clarify when he had received the test results.
- [53] On recall the pursuer repeated that he had received the results in early February 2012. He believed (at the time) that the test would take a few weeks. The doctor said he would get in touch. The doctor never told him that the results would be available in two to three days. In cross-examination the pursuer said that he got the results in a letter from the health centre. He was surprised that there was no copy letter on file [in the general practitioner records]. He was not told to telephone for the results. He did not chase up the results. The pursuer told me that he did not produce the test results letter to his solicitors. He could not find the letter. (I note that the solicitors recovered the laboratory report by virtue of a court order intimated to Dr Fisher under cover of letter dated 20 March 2012.)
- [54] When the pursuer was examined by Dr Martin Livingston FRCPsych instructed on his behalf on 18 January 2012, he told Dr Livingston that he had not yet received "any results from the blood sampling". On 3 December 2012 the pursuer was examined by Professor C P L Freeman FRCPsych, consultant psychiatrist, instructed by the defenders. Professor Freeman reported: "3.7 [The pursuer] said that one of the things that concerned him was that he never got any results from the blood tests that were taken in August 2011. He said he was left to pursue everything himself and had to have repeat blood tests. He only got the all clear in the spring of 2012. 3.8 He said that although there was a great relief he feels that by then the damage had been done." Professor Freeman quoted the terms of the risk assessment for the pursuer's incident completed by the clinical manager at BMI Carrick Glen Hospital on 1 August 2011. A copy of this document is produced by the defenders. The professor's report also quotes from a letter apparently written on the same day which the professor describes as "to Ayr Hospital": "As confirmed with yourselves by phone [the pursuer] has had 2 previous doses of HepB vaccine in 2008 but has not had his OS 3rd dose of serology check.

Today we have administered a dose of HepB vaccine and arrange [sic] for follow up with yourselves." The letter itself was not referred to in evidence. There is what I take to be the letter or a copy of the letter among the small bundle of Ayr Hospital records within the pursuer's personnel file produced by the defenders [7/15/70]. There is no copy of the letter in the small bundles of otherwise identical Ayr Hospital records recovered direct from Ayr Hospital by the pursuer and the defenders [6/3; 7/19].

- [55] Looking at the terms of the letter as quoted by Professor Freeman in the light of the clinical note and the incident reporting form I have to conclude that the "yourselves" referred to in the letter is "Salus" the "NHSbased" occupational health services provider. I infer that Salus was the occupational health services provider for the defenders: the employee immunisation record produced by the defenders confirms that the first hepatitis B immunisation was administered to the pursuer by Salus on 1 September 2008; and Salus also conducted a newemployee health assessment screening of the pursuer [7/10; 7/15/83]. Accordingly, I also have to conclude that the letter quoted by Professor Freeman was sent, or intended to be sent by Ayr Hospital to Salus.
- [56] Why is there no version of this letter in the Ayr Hospital records recovered by the pursuer and the defenders; and why is the only copy that has been produced in the personnel file kept by the defenders? The letter or copy letter no 7/15/70 of process is handwritten and although addressed to Salus does not include the Salus postal address. Is it possible that the pursuer was given this handwritten note by the specialist registrar at Ayr Hospital to deliver to the defenders so that the defenders could pass it on to Salus? Did the defenders pass it on? The evidence leaves these questions unanswered.
- [57] What I can say is that neither the personnel records produced by the defenders nor the general practitioner records include any reference to any occupational health followup. The pursuer confirmed that the followup with Salus referred to in the Ayr Hospital records did not take place. On the other hand, he also said that he had been offered assistance once — by whom if not by Salus? — but that he did not take it up. The Salus records have not been produced and I cannot exclude the possibility that Salus sent a letter direct to the pursuer's home address.
- [58] The pursuer said that he did not tell anyone how he felt. His partner Fiona Russell believed that "work", meaning the defenders, was "dealing with the medical side", that "they" had taken blood samples and that "it takes a long time to get the results". John McMaster, the defenders' site manager at the Cumbernauld depot, testified that the pursuer did not complain after the accident and did not ask for counselling. Mr McMaster did not ask the pursuer if he wanted support or counselling. In a statement seen by Professor Freeman, Mr McMaster said: "When we discussed [the needlestick incident] immediately afterwards [the pursuer] did seem [sic — I assume the word "not" is omitted] any more concerned than one would normally expect, and he did not raise this as a concern. As far as we were aware [the pursuer] had been talked through the procedure at the hospital and was happy to continue working." Mark Bulloch said that the pursuer never asked for assistance (in

coping with the needlestick incident) and never complained about how he was being treated. The conclusion I have come to is that the needlestick complications should have resolved by, say, at latest the end of February 2012: but the pursuer suffered another adverse lifeevent at the beginning of November 2011, namely dismissal from his post with the defenders which complicates the picture. The pursuer's dismissal

- [59] The circumstances in which the pursuer lost his job are not well explained. In evidence the pursuer said that on 25 October 2011 he was feeling angry and irritable. It had built up since the needlestick incident. He was ready for an explosion. The pursuer had an argument with Mark Bulloch. It started with the letter that Mr Bulloch received from the pursuer's solicitors. This happened in the morning, according to the pursuer, that is before the pursuer took his lorry out. Mark Bulloch shouted at the pursuer: "What the fuck are you putting a claim in against the company for?" The pursuer replied that he didn't know. (The pursuer did not get a copy of the letter till the next day. Is it possible, I wonder, that the pursuer thought that a claim was going to be made against the hospital?)
- [60] According to the pursuer, Mr Bulloch "took the huff": he would not show the pursuer the pursuer's "PPE form". The pursuer came back to the depot after his shift and asked for "his PPE form" again. Mark Bulloch refused. An argument developed during which the pursuer told John McMaster: "I am going to end up kicking his cunt in." The solicitors' letter included this sentence: "At this stage in our enquiries we would expect the undernoted documents to be relevant to this claim." Most of the documents requested did not exist or were irrelevant to the pursuer's situation, for example "Minutes of Health and Safety Committee meeting(s) where accident/ matter considered". I suspect that the pursuer did not necessarily know what documents he was asking for: on his account, he might have been seeking the form confirming issue of personal protective equipment [PPE] to himself or the risk assessment which resulted in the issue of PPE or, on the account given to Professor Freeman, the incident report for the accident on 1 August 2011. Why the pursuer personally should have been asking for documents at all when the matter was in the hands of his solicitors is a mystery.
- [61] Evidence was led without objection from both John McMaster and Mark Bulloch to the effect that the pursuer was an argumentative employee before the needlestick incident, "very difficult" and "very aggressive" according to Mark Bulloch. Mark Bulloch described the pursuer as having "a chip on his shoulder". John McMaster referred to a previous "effing and jeffing" incident. (I have already mentioned Mr McMaster's evidence that the pursuer had been switched to the 7 1/2 ton lorry doing binforbin rounds to minimise his customer contact this seems to have happened in about April 2011, at a time when, according to Ms Russell, the pursuer was happy at his work.) Mark Bulloch accepted that there had been an argument in the morning (of 25 October). He said it was about the pursuer's unauthorised absence on the previous day, 24 October. John McMaster's contemporary note records that on 25 October the pursuer claimed to have taken the previous day off to attend his uncle's funeral. According to Mr McMaster's note the pursuer was also interviewed about a

complaint made by Sanquhar Nursing Home that the pursuer had attended with the radio in his lorry blaring. The pursuer himself acknowledged a complaint about the lorry radio being too loud and another issue about the layout of the bin area which made it difficult to manoeuvre the bins to the lorry, something he raised with the customer's staff. I do not know whether the same customer was involved. The dismissal letter (see below) refers to the pursuer presenting as "rude and aggressive" to the customer about the practicability of collecting the customer's waste. Mr McMaster's note also describes the pursuer's attitude to Mr McMaster as "arrogant and abrupt" and "very angry". Mr McMaster himself was not asked about the interview or his note by either counsel.

- [62] According to Mr Bulloch the pursuer returned from his collection round on 25 October at about 15.45 and demanded "the effing dates for my lawyer" the dates of issue of personal protective equipment or risk assessments, I assume, but this could be wrong. Mr Bulloch said he would get the dates in the morning. Mr Bulloch got a tirade of abuse from the pursuer: "he was going to knock my fucking head off, he was fucking sick of me, I was going to get it." The pursuer then sped out of the yard in his car. Mr Bulloch immediately reported the matter to human resources.
- [63] The pursuer was suspended on full pay the next day, 26 October. An investigatory meeting was held on 27 October 2011. A disciplinary hearing was conducted by Matt Briggs, the defenders' district business manager, on 2 November 2011. The outcome was the pursuer's dismissal. Going by the terms of the dismissal notification letter dated 7 November 2011, spoken to by Mr Briggs, the issues were (1) a customer complaint about the pursuer's rude and aggressive conduct, (2) the complaint about the pursuer's abuse and threats of personal violence towards Mark Bulloch and John McMaster and (3) the pursuer's unauthorised absence for supposed attendance at a funeral. The letter alludes to the reason for the confrontation between the pursuer and his managers, without giving any detail, as being something to do with the handling of claims, presumably personal injury claims. According to the dismissal letter the pursuer accepted that his behaviour was "abusive and unacceptable". For what it is worth the letter is of course the defenders' document there is no reference to the pursuer offering "low mood" because of his needlestick injury as mitigation. Mr Briggs found that "the threat and violent nature" of the incident involving Mr Bulloch and Mr McMaster was sufficient to warrant summary dismissal. The pursuer did not exercise his right of appeal.
- [64] The pursuer said that he was "fine" till Mr Bulloch received the solicitors' letter. What happened would not have happened before the accident. If the accident hadn't happened he could usually control himself. The pursuer said that he did not explode again. When, on 19 February 2013, the pursuer was crossexamined about Mr McMaster's note of 25 October 2011, the pursuer said that the reference to a funeral was to a different funeral, it was his brother's funeral that happened "four or five years ago", possibly before he joined the defenders in

2008. (The pursuer told Dr Martin Livingston FRCPsych on 18 January 2012 that "his older brother James died at the age of 55 two years ago".) Fiona Russell told defenders' counsel that the pursuer did not go to the funeral (on 24 October 2011) because he didn't get time off. I am inclined to think that the Court did not hear the truth about this matter from the pursuer.
- [65] Mr Richard MacCallum FRCS (Glas), consultant in emergency medicine, who examined the pursuer on the pursuer's solicitors' instructions for the purpose of a medicolegal report on 9 December 2011, reported that the pursuer "lost his job due to a combination of stress, falling out with his boss and a disagreement with the company". In evidence Mr MacCallum could not say why the pursuer lost his job. Dr Martin Livingston FRCPsych, consultant psychiatrist, who provided a medicolegal report for the pursuer, recounted the following as part of the history given by the pursuer: "He also said that he had lost his job on either the 7 or 9 November last year which he attributed to tension developing between himself and his manager. [The pursuer] said that difficulties had arisen because he had requested paperwork from his manager and this had led to conflict, as a result of which he had been dismissed." On this account alone, apparently, Dr Livingston gave it as his opinion that "... the alteration in [the pursuer's] temperament is likely to have contributed to the breakdown in the relationship with his manager and subsequent loss of his employment."
- [66] In his supplementary report Dr Livingston said, commenting on Professor Freeman's report for the defenders: "... I can accept that there were other factors resulting in the job loss but I do think that [the pursuer's] needlestick injury and its impact on his mental state was a factor." When it came to giving evidence, Dr Livingston affirmed his opinion about causation and job loss. In cross-examination the doctor accepted that he did not know the full circumstances of the pursuer's dismissal. It emerged that Dr Livingston's understanding of the stressful effect of the needlestick injury was based in part on his understanding that the pursuer had been off work from 1 August 2011 until his dismissal (which, of course, was not the case). Consulting his notes in re-examination the doctor said that he had omitted to ask if the pursuer had been off work. Dr Livingston finally said that now, knowing that the pursuer had been at work, he remained of the view that the needlestick injury made a significant contribution to the pursuer's loss of employment.
- [67] Professor C P L Freeman FRCPsych, consultant psychiatrist, examined the pursuer on behalf of the defenders on 3 December 2012. He reported: "[The pursuer] said in early November of 2011 he had a row with his boss at work. He said he wanted to see the paperwork for some safety reports and his boss refused. He said the next day he was dismissed." Professor Freeman quoted from two statements by Mr McMaster in one of which the circumstances of the dismissal were described as follows: "[The pursuer] was dismissed following an incident at work wherein we received complaints from a customer that he had been rude. This complaint was brought to his attention by one of the management team and [the pursuer] proceeded to then threaten physical violence against this member of the management team..." Professor Freeman's assessment included the following: "[The

pursuer's] claims to me that he was badly treated and not given support over the index event are not supported by Mr MacCallum's report or by the statement from his line manager at the Cumbernauld base."

- [68] Towards the end of his report the professor posed the question, presumably in accordance with his brief, whether the pursuer would have developed an adjustment disorder if he had lost his job without having had the needlestick injury; and he answered that it would have been "a distinct possibility". In addressing this question the professor had regard to Mr McMaster's statement to the effect that the pursuer was a difficult employee about whom complaints had been received before the needlestick incident. (If experts are going to be briefed with witness statements then the statements have to be available to the other side for cross-examination, which they were not in this case.) Professor Freeman's report did not address the question whether the needlestick injury contributed to the dismissal; nor did the professor offer an opinion on that matter from the witness box. According to the professor's report, the adjustment disorder from which the pursuer suffered escalated from mild to moderate in December 2011 and "was in part related to the needle stick injury and his concerns about HIV and hepatitis infection but was much more related to his loss of job in November 2011". It appeared to the professor that after November 2011 the pursuer also developed an alcohol dependence syndrome. Dr Livingston diagnosed an alcohol abuse syndrome. Did the needlestick cause the dismissal and the consequential loss?
- [69] Counsel for the pursuer invited me to accept that the adjustment disorder which was caused by the needlestick injury caused or contributed to the pursuer's loss of his job with the effect that the subsequent deterioration in the pursuer's condition and consequential losses should attract compensation. Counsel talked about the pursuer's "pent up anxiety" which "reached a tipping point" on 25 October 2011. The pursuer accepted that his actions on that day were unacceptable but, said counsel, they were due to his complete change of personality following the needlestick incident. He would not have reacted as he did if it had not been for the needlestick. Counsel for the defenders submitted that the pursuer's evidence was exaggerated; and that Dr Livingston's opinion about the connection between the needlestick incident and the pursuer's dismissal was unreliable.
- [70] Since both psychiatrists agree that the needlestick incident caused or contributed to an adjustment disorder it would be difficult for me to reach a contrary conclusion. There is however a question as to the degree and duration of the disorder. The risk of infection was assessed by the specialist registrar at Ayr Hospital to be low. The pursuer did not take up the offer of assistance which he admits was made. The pursuer was sufficiently motivated to consult a solicitor within three weeks: yet he persisted in expressing an illinformed view about how and when he could expect to learn whether he was infected. He did not chase up the blood test results with his general practitioner. On the pursuer's own account he was not significantly affected until he lost his job.

- [71] As to the connection between the psychiatric disorder and the termination of the pursuer's employment, the pursuer admits that his conduct on 25 October 2011 was unacceptable. It is also the case that the pursuer did not exercise his right of appeal against the dismissal that followed, which is some indication that the decision was fair. I am now being asked in a sense to award compensation for the pursuer's misconduct. Having weighed the evidence I remain unpersuaded that it would be reasonable to attribute the pursuer's dismissal and the losses consequent thereon to the needlestick incident. I think that counsel for the defenders is correct to say that Dr Livingston's opinion on this aspect of causation is unreliable: Dr Livingston laboured under a factual misapprehension; and he had virtually no information about the circumstances of the termination. Dr Livingston reported that "the alteration in [the pursuer's] temperament is likely to have contributed to the breakdown in the relationship with his manager". This conclusion is not evidencebased. It is speculative, even as to the "likelytohave" manner in which it is expressed. What Dr Livingston was actually told by the pursuer was that "tension" or "difficulties" that led to the pursuer's dismissal had arisen when the pursuer requested paperwork; and Dr Livingston was not told about the customer complaint or about the unauthorised absence for a supposed funeral.
- [72] What I am left with is the pursuer's assertion that his loss of temper and threatening behaviour "wouldn't have happened before the accident". Against this I have the evidence that the pursuer had previously exhibited an abrasive manner and, because of this, had been taken off loose waste collections earlier in 2011 to minimise his contact with customers. At the disciplinary hearing the pursuer described his threatening comments as having been made "in the heat of the moment". Yet he had had all day to consider the matter. In the morning he had already been "arrogant", "abrupt" and "very angry" with Mr McMaster; and one of the complaints raised with him then was that he had been "rude and aggressive" to a customer's staffmember some time previously. All of the characters involved on 25 October 2011 struck me as being forceful and roughspoken individuals. The unheralded arrival of the claim letter was bound to lead to a confrontation and harsh words.
- [73] There was no suggestion in the evidence that the needlestick incident had anything to do with the customer complaint and the unauthorised attendance at a supposed funeral which were part of the background to the dismissal. On the foregoing analysis I do not think that the pursuer's dismissal can reasonably be attributed to the defenders' breach of statutory duty. The claim for wage loss as I understand it is argued only on the basis that the loss has been caused by the pursuer's dismissal and that the dismissal was caused (or materially contributed to) by the complications of the needlestick injury. The pursuer earned about £1,250 net per month with the defenders. In final submissions pursuer's counsel valued the wage loss claim, after 50% apportionment, at £7,500 exclusive of interest. On my analysis the claim for wage loss has not been made out. The services claims

- [74] If the exacerbation of the pursuer's condition which took place because of the termination does not sound in damages then there are no relevant claims for services because, on the pursuer's own account the question of services arose as a matter of fact only with and because of the deterioration of his mood after he lost his job. In any event the defenders' counsel has taken a legal objection to the claims for section 8 and section 9 services, which I think is a good one.
- [75] The Administration of Justice Act 1982 as amended s. 7 provides that liability to pay personal injury damages includes liability to pay damages in accordance with section 8, headed "Services rendered to an injured person", and section 9, headed "Services to an injured person's relative". The pursuer claims section 8 damages for "additional household tasks including cooking, cleaning and washing" and "additional emotional support" rendered to the pursuer by his partner Fiona Russell as a result of the pursuer's "low mood and lethargy". Following an amendment to the summons which I allowed on the third day of the proof the pursuer claims section 9 damages for the services that the pursuer was unable "as a result of his low mood and change in temperament" to render by way of care for child M. Section 8 refers to "services rendered by a relative"; and section 9 refers to "services which the injured person... might have been expected to render gratuitously to a relative". The primary issue of construction is whether Fiona Russell and her son child M are shown to be, on the evidence led, "relatives" within the meaning of the statute.
- [76] Before I deal with the primary issue I have to dispose of a distinct and interesting question of construction raised by counsel for the pursuer in a thirdspeech response. Counsel submitted that section 9 is not actually restricted to services which, but for the injury, would have been rendered to relatives. Section 9, unlike section 8, simply refers to services of a kind that are ordinarily rendered to relatives and when rendered to relatives are expected to be rendered gratuitously. The submission was not further elaborated. Counsel is quite correct that the text of section 9 does not say in so many words that the section is concerned with services which are or would have been "rendered to a relative". On the other hand subsection (4) does make it clear that, except in death claims, "the relative shall have no direct right of action", which clearly implies that section 9 is about services to relatives and only to relatives. If doubt persists, clarification can legitimately be found in the heading of section 9 which refers to "Services to injured person's relative" [*R v Montila*
- [2004] 1 WLR 3141 at §§ 31–37]. If still further clarification were required reference might be made to the Scottish Law Commission Report which talks about services rendered to "members of the family group" and to "a defined class of relatives" being those relatives with title to sue for damages on death [Scottish Law Commission Report No 51 on Damages for Personal Injuries (1) Admissibility of Claims for Services, (2) Admissible Deductions (HMSO, Edinburgh, 1978), §§ 34–44]. The scope of what constitutes relationship has been widened by amendment over the years: but the principle that awards apply where services are rendered to and by relatives remains intact. I reject this submission for the pursuer.

- [77] So, coming back to the meaning of "relative", the question as put to me is whether on the evidence Fiona Russell was a person living with the pursuer "as his wife" in terms of section 13. The *punctum temporis* at which the matter falls to be assessed is the date of the accident. At the date of the accident the pursuer had been living in Ms Russell's house, eating — I assume in the absence of evidence to the contrary — at her table and sharing her bed for up to nine months. The pursuer was separated from his wife. There is no evidence that he and his wife were divorced. Counsel for the defenders argued that there could be no claim for Ms Russell's services while the pursuer was still married. This submission assumes that the legislative intention was that the categories "wife" and "quasi wife" should be mutually exclusive, which I suppose could possibly be correct, or possibly not. The argument was not developed. I do not know whether, for example, death claims can be pursued simultaneously by both spouses and quasi spouses. I reserve my opinion on this point.
- [78] On the whole I have come to the conclusion that the relationship in this case is not demonstrated to have been more than a provisional one at the material time, as indeed it turned out to be subsequently. The legislation extends the common law liability of defenders and has to be construed in a reasonable way and in a way that keeps in view the need for symmetry with the statutory provision for "relatives" who can make death claims. I suspect that the concept of "living with" someone "as her husband" or "as his wife" or now, following amendment, as "his/ her civil partner" is already an outmoded one: but, still, it must mean something more than simply "living with" someone, that is, in a sexual relationship. Ms Russell did not take the pursuer's name; and there is no evidence of an exchange of rings not that these things are essential, I hasten to add. There is nothing in the evidence about financial support, shared bank accounts, shared hire purchase commitments, or anything of that kind. This head of claim would have benefited from evidence like the naming by the pursuer of Ms Russell as the pursuer's nextofkin in health and employment documents and her nomination by the pursuer as his preferred beneficiary under an employers' contributory insurance scheme. (These are examples I have gleaned from the personnel file and the medical records produced in the case.) There is nothing of that sort. Looking solely at the documents put in evidence, I can say positively that the pursuer did not declare Ms Russell to be his nextofkin when he registered with Dr Fisher, general practitioner, on 8 March 2011, even though he gave her home as his address; nor was Ms Russell recorded as the pursuer's nextofkin when the pursuer attended Ayr Hospital on 1 August 2011 although, to be fair, the specialist registrar used the nextofkin box for what was possibly a more pressing purpose namely to record contact details for Salus and the defenders. I conclude that the evidence falls short of demonstrating that Fiona Russell was living with the pursuer as his wife within the meaning of the statute at the time of the accident. In any event the claim for section 8 services is very small: the evidence was almost negligible; and the sum sought at the end of the day is £200 inclusive of interest which in itself argues against the existence of a mutually dependent quasi conjugal relationship.

- [79] In closing submissions pursuer's counsel quantified the section 9 claim, inability to provide child care for child M because of the accident, at £2,800 plus interest. The question is whether at the time of the accident the pursuer "accepted [child M] as a child of his family". Pursuer's counsel submitted that the pursuer had a very active and nurturing role and had crossed the line to become child M's " de facto stepfather", giving me, in the latter connection, a reference to the case of McGibbon [McGibbon v McAllister
- [2008] CSOH 4 , 11 January 2008, Lord Brodie]. Counsel for the defender submitted that there is no evidence of financial support and, generally, that there is no evidence that the pursuer had "accepted" child M. Counsel submitted that McGibbon is a very different sort of case.
- [80] I have since read the case of McGibbon in which Lord Brodie allowed a proof before answer in a death claim by a man who claimed to be the " de facto stepfather" of the deceased youth, construing the Damages Act 1976 as it stood at the date of death in 2004 — that is before the 2006 amendment which added Schedule 1 para 1 (ca). Lord Brodie opined that on ordinary principles of construction a de facto stepfather would not have had a claim. Lord Brodie said [my emphasis added]: "It is true to say that in recent years the legislatures, both in Westminster and Holyrood, have introduced a number of measures which have tended to reduce the differences as between the consequences of, on the one hand, being married and having children of that marriage, and, on the other, living together and accepting the child or children of the other partner as the child or children of the family constituted by the fact of cohabitation. That does not have the result that the fact that a couple have married or entered into a formal civil partnership falls to be ignored for the purpose of determining parties' rights or that for every purpose the members of an unmarried cohabiting couple are to be regarded as if they were married. Equally, it does not have the result that anyone cohabiting with the natural parent of a child, becomes, by virtue of the fact of cohabitation, the parent of that child. It is no doubt true that cohabitation and the consequence that adults live in households with their partners' children have become very common as social phenomena. I do not see that as having yet impacted on the ordinary meaning to be attributed to the word "parent" or the way in which a statutory provision which uses that word should conventionally be interpreted." Lord Brodie, however, was ultimately persuaded to construe the statute in a way which was said to be compatible with article 8 ECHR (respect for family life) and concluded: "... I see no reason why, in order to render the provision compatible with the Convention, the meaning of "parent" where the word appears in paragraph (b) cannot be extended to include someone who, to a material extent, as a matter of fact fulfilled the roles usually associated with parenthood."
- [81] The provision I am concerned with talks about accepting a child as a child of the family as if it envisages that the family unit preexists the acceptance of the child: but equally I suppose, in real life, the acceptance of a child could itself be the act that constitutes the family unit. We are now taught that there is no template for "families"; and that "respect for family life" means something very different from "respect for family values" [Pawandeeep Singh v Entry Clearance Officer (CA)

[2005] QB 608 at §§ 59 and 6266 per Munby LJ]. Still, if I may say so, I agree with Lord Brodie that there are certain "roles usually associated with parenthood".

[82] In the present case there is the pursuer's evidence that he would "watch" child M two or three times a week when Ms Russell went out. Fiona Russell said that the pursuer would make child M's supper, shower him and take him through his bedtime routine. The pursuer would play rough, tactile games with child M, which was good because child M's body required stimulation. How often these things happened, I don't know. Ms Russell could not estimate the amount of time the pursuer spent with child M. There is no evidence about financial support. There is no evidence that the pursuer acted as a parent for child M in educational or health settings, made decisions for child M or otherwise took responsibility for him. On the evidence such as it is I cannot think that the pursuer would have seen himself as having any responsibility for alimenting child M following the separation or as having a right to insist on contact with him. The pursuer's relationship with child M may have been avuncular: but child M was not on the evidence accepted by the pursuer "as a child of his family" within the meaning of the statute. Decision and award

[83] In my opinion the pursuer is entitled to an award of solatium for pain, suffering and loss of amenity enduring for seven months. I have debated with myself whether there should be some reduction for the pursuer's failure to chase up the diagnostic blood test results. I have ultimately come to the view that it would not be reasonable to make a reduction. The award has to take account of the pursuer's anxiety about contracting a bloodborne infection, which operated on his comparatively fragile psyche. It also has to reflect his anxiety about passing on any infection and the fact that, as a result, unprotected sexual intercourse between the pursuer and Fiona Russell was interrupted at a time when they were settling into a new relationship with each other. I accept that there must have been some tension as a result. The pursuer had to give, I believe, four blood samples and he had to receive one injection. Defenders' counsel suggests an award of £1,500 for a period of almost three and a half months. In my view a principal sum of £3,500 would be reasonable for period of seven months. The award has to include interest on the whole amount at the rate of 8% a year from the halfway point, which I take to be 15 November 2011, to the date of decree, a period of about 22 months. The total amount inclusive of interest will be around £4,000. I shall reserve all questions of expenses. BAILII: Copyright Policy | Disclaimers | Privacy Policy | Feedback | Donate to BAILII URL: <https://www.bailii.org/scot/cases/ScotCS/2013/2013CSOH157.html>

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