

SCOTLAND / JUDGMENT

Strange v Wincanton Logistics Ltd [2011] ScotCS CSIH_65a (26 October 2011)

[2011] CSIH 65A

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[2011] ScotCS CSIH_65a [New search] [Help] EXTRA DIVISION, INNER HOUSE, COURT OF SESSION Lord Eassie Lord Brodie Lord Wheatley

[2011] CSIH 65A XA92/10 OPINION OF THE COURT delivered by LORD BRODIE in appeal by JOHN STRANGE Pursuer and Appellant; against WINCANTON LOGISTICS LIMITED Defenders and Respondents:

Act: Middleton; Allan McDougall Alt: B. Smith; Brodies 26 October 2011

Introduction

[1] The pursuer and appellant is John Strange. His date of birth is 4 July 1965 . In this action, raised in the Sheriff Court of Lothian and Borders at Livingston, he sues his former employer, Wincanton Logistics Limited, the defenders and respondents, for reparation for personal injury sustained when moving and stacking wooden pallets while working in the course of his employment at the respondents' warehouse premises at Pyramids Business Park Bathgate on 5 February 2007 . As presented to the sheriff, the appellant's case was one of negligence at common law and breach of the duties imposed by regulation 4(1)(a) or, alternatively, regulation 4(1)(b) of the Manual Handling Operations Regulations 1992. After proof the sheriff made the following findings in fact and law: "1 The task of stacking pallets on which the pursuer was engaged on the day in question was a Manual Handling Operation which involved a risk of injury. 2 It was not reasonably practicable for the defenders to have eliminated Manual Handling as a method of removing and stacking pallets. 3 The defenders reduced the risks involved in the task of removing and stacking pallets to the lowest level reasonably practicable by assessing the risks of the task and instructing the pursuer in safe lifting techniques and safe methods of work. 4 The pursuer's loss injury and damage was not caused by fault on the part of the defenders or by any breach of statutory duty."

- [2] The sheriff therefore assailed the respondents in terms of his interlocutor of 2 June 2010 . The appellant now appeals. He no longer insists on his case of negligence. Accordingly, as far as liability is concerned he takes issue with the sheriff's second and third findings in fact and law and his fourth finding in fact and law but only in so far as it relates to breach of statutory duty. The appellant also has grounds of appeal directed at questions of medical causation and quantification of damages. Manual Handling Operations Regulations 1992, regulation 4
- [3] Regulation 4 of the Manual Handling Operations Regulations 1992 provides: "4.- Duties of employers
- (1) Each employer shall -
- (a) so far as is reasonably practicable, avoid the need for his employees to undertake any manual handling operations at work which involve a risk of their being injured; or
- (b) where it is not reasonably practicable to avoid the need for his employees to undertake any manual handling operations at work which involve a risk of their being injured -
- (i) make a suitable and sufficient assessment of all such manual handling operations to be undertaken by them, having regard to the factors which are specified in column 1 of Schedule 1 to these Regulations and considering the questions which are specified in the corresponding entry in column 2 of that Schedule, (ii) take appropriate steps to reduce the risk of injury to those employees arising out of their undertaking any such manual handling operations to the lowest level reasonably practicable." Circumstances in which the appellant sustained injury
- [4] The circumstances in which the appellant sustained injury are disclosed in the following findings in fact by the sheriff, none of which we would understand now to be controversial: "2 The defenders are a National Warehousing and Logistics Company, the second largest in the UK with approximately three million square metres of warehouse space. The defenders operate, inter alia, warehouses and distribution centres for Asda, Tesco, Morrisons, Somerfield and B&Q. 3 On 5 February 2007 the pursuer was employed by the defenders as a labourer at their warehouse at the Pyramids Business Park , Bathgate. 4 At the relevant time, the defenders operated a warehouse at Pyramids Business Park for Morrisons supermarkets. The warehouse was set out as shown in a plan number 6/4/1 of process. The warehouse was of a standard layout and design with a number of aisles containing storage racking. 5 Goods were delivered to the warehouse on pallets and placed on the racking using high reach fork lift trucks. Moving full pallets of goods was the principal function of fork lift trucks in the warehouse. Goods were collected from different places where they were stored on the racking by 'pickers' who had the task of making up orders of goods according to a computerised order sheet. Pickers used motorised 'pick trucks' to transport the goods which they had collected, and these pick trucks were capable of carrying two pallets. 6 The pursuer's principal duties included keeping the warehouse clean and free from debris, litter and spillages, in order to maintain a safe working environment. In particular, it was a

routine part of the pursuer's job to collect empty pallets from ground floor locations and to remove these to the loading bay where the pallets were stored in order to be re-used. 7 The pursuer started his shift on the night in question at 8.00pm . His supervisor, George Stewart asked him to remove empty blue pallets from an aisle known as the "BA aisle" to another part of the warehouse. There were around forty blue pallets which required to be moved. They were lying on the ground underneath the warehouse racking. 8 Each pallet measured around 1 metre by 1.2 two metres and weighed around 23.5 kilograms. They were made of wood. 9 The pursuer asked George Stewart for assistance with the task of removing the pallets, but no assistance was made available. The pursuer then asked that a fork lift truck operator should be assigned to remove the pallets, but this request was also denied. 10 In order to remove the empty pallets the pursuer made use of a hydraulic pallet truck. His intention was to stack the pallets five high on the pallet truck and then use the truck to remove the pallets to another part of the warehouse. The pursuer was aware that pallets should not be stacked by hand to a height of more than five high. 11 On the night in question the pursuer used the pallet truck to remove the first pallet from underneath the racking. He positioned the first empty pallet on the forks of the pallet truck, and moved the empty pallet out from under the racking, and then parked the truck as close as possible to the racking to allow room for other warehouse vehicles to pass in the aisle. For each of the subsequent four pallets which were to be placed on the pallet truck he dragged the pallet out from under the racking by hand, and then manipulated it on to the stack of pallets. 12 The pursuer was placing a fifth pallet on top of four which he had already stacked on the pallet truck when he felt a terrific pain in his back, and he then collapsed on the ground. A security guard who heard him cry out in pain came to see what had happened. He fetched George Stewart. George Stewart found the pursuer still in the BA aisle he was gasping and in pain. George Stewart gave him an ice pack and arranged for him to go to hospital. The pursuer had twisted his body as he placed the last pallet on the stack." The manual handling operation

- [5] As appears from his first finding in fact and law, the sheriff held that the task of stacking pallets on which the appellant was engaged when he sustained injury was a manual handling operation which involved a risk of injury. The sheriff made the following findings in fact about that manual handling operation and the system of work adopted to carry it out: "15 There were two approved methods of manually removing pallets from the ground floor locations at the defenders warehouse at Pyramids Business Park . The first method is shown being demonstrated in a video no 6/4/3 of process. The second method is described in the Safe System of Work Statement no 5/2/9 of process. The first method was the commonly used, accepted and approved method of manually removing pallets from ground floor locations at the defenders' warehouse. This method could be performed safely by one man. 16 The pursuer was familiar with the method of stacking of pallets as demonstrated in the video no 6/4/3 of process. On the day in question it was essentially that method which he used, with the exception that as he lifted the fifth pallet he twisted or turned his body in the direction of the pallet truck. He did not use the method as outlined in the Safe System as (sic) Work Statement no 5/2/9 of process. The method used by the pursuer is a Manual

Handling Operation within the meaning of the regulations. 17 The method used by the pursuer involved part of the pallet being in contact with either the ground or another pallet on the stack at all times. Consequently, the pursuer never required to bear the full weight of the pallet. The weight he had to bear was about half of the full weight of the pallet. At all times the pursuer was using approved lifting techniques. 18 Stacking pallets to a height of five high had always been regarded as a one man job within the Pyramids Warehouse and within the warehousing industry in general. 19 The pursuer had received comprehensive training from the defenders, which included Health and Safety induction, Manual Handling Training, and Training in Approved Lifting Techniques. 20 There were no space constraints or other factors which might have prevented the pursuer removing the pallets by an approved method. The aisle which the pursuer was working at the relevant time was of a standard size in common with the majority of aisles in the defender's warehouse. 21 The defenders had carried out a risk assessment of the Manual Handling Task associated with the handling and stacking of pallets. In addition to the Risk Assessment, the defenders had devised two systems of work or methods for the task of manually removing pallets from the ground floor. The pursuer was using one of these." The consequences of the appellant's injury

[6] The sheriff's conclusions as to the consequences of the injury sustained by the pursuer on 5 February appear from his following findings in fact: "13 At St Johns Hospital it was noted that the pursuer was tender across his lower back, and that his lumbar spine was tender. His range of movement was very limited. The diagnosis was back sprain. The hospital recommended mobilisation and physiotherapy and gave the pursuer pain killers. 22 The pursuer was constitutionally pre-disposed towards experiencing back pain as a result of degenerative changes in his spine. 23 The task of moving the pallets on the day in question was an incident which triggered an episode of back pain in the pursuer's back. Had this particular incident not triggered back pain, another incident would have done so within a period of four to five months from the day in question. 24 The pursuer fully recovered from the episode of back pain by the end of May 2007, at which point his back returned to its pre accident state." Grounds of Appeal

[7] The appellant's Grounds of Appeal are in the following terms: "Liability

1. The learned Sheriff erred in fact and law in holding that it was not reasonably practicable for the Defenders and Respondents to have avoided the manual handling operation being undertaken by the Pursuer, which failing, to have lowered the risk of injury arising therefrom
2. In particular there was insufficient evidence entitling him to find that it was not reasonably practicable for the Defenders to have avoided manual handling, in terms of Regulation 4(1) (a) of the Manual Handling Operations Regulations 1992 by providing the Pursuer and Appellant with mechanical assistance in the form of a fork-lift truck.

3. Further, there was no evidence entitling the Sheriff to find that it was not reasonably practicable for the Defenders to have further reduced the risk of injury, in terms of Regulation 4(1)(b) of the Manual Handling Operations Regulations 1992, by providing the Pursuer and Appellant with additional manual assistance from a second man. In particular, there was no evidence of the costs held to have been associated with same. The Appeal in relation to Medical Causation and Quantum
4. The Sheriff erred in fact in holding that as a result of the accident, the Pursuer and Appellant only experienced symptoms of back pain for a period of 4 to 5 months; and, that, thereafter, his symptoms were attributable to a constitutional degenerative predisposition to back pain.
5. The Sheriff has inadequately analysed the medical evidence and given inadequate reasons for preferring the evidence of Mr James Christie and rejecting that of Mr JNA Gibson. He has relied on epidemiological population studies that were not produced at Proof. There was insufficient evidence to entitle him to reach his conclusions.
6. The Sheriff ought to have made an award of damages in respect of (i) solatium (ii) past wage loss and (iii) loss of employability."

Submissions

Overview [8] Both parties provided full and helpful written submissions, for which the Court is grateful. In their final form the submissions for the appellant appeared as a Revised Note of Arguments for the Pursuer and Appellant (incorporating references to the transcript of evidence). In their final form the submissions for the respondents appeared as a Revised Note of Argument for the Defenders and Respondents dated 5 July 2011 . What follows are summaries of the salient points made on behalf of the respective parties, first on liability and then on damages, with a view to identifying the issues in the appeal. Liability

[9] Mr Middleton, on behalf of the appellant, explained that the appeal on the question of liability was about the term "reasonably practicable" as authoritatively defined by Asquith LJ in *Edwards v National Coal Board*

[1949] 1 KB 704 at 712. The respondents had formally admitted that at the relevant time the appellant was engaged on a manual handling operation in terms of regulation 2 of the Manual Handling Operations Regulations 1992 which involved a risk of injury to the appellant. There was therefore an onus on the respondents, first, to establish that it would not have been reasonably practicable to avoid that operation and, if that were established, secondly that the relevant risk had been reduced to the lowest level reasonably practicable: *Taylor v City of Glasgow Council* 2002 SC 364 at 380. That could only be done if, on a computation balancing risk on the one hand as against "sacrifice" (to use the language of Lord Asquith in *Edwards v National Coal Board*) on the other, carried out prior to the occurrence of injury, it were shown that there was a gross disproportion between them - the risk being insignificant in relation to the sacrifice. It was the appellant's position that there had been insufficient significant and persuasive evidence to

allow the sheriff to conclude that the respondents had satisfied that onus either in respect of avoidance of manual handling altogether or reduction of the risk associated with manual handling. Even if the risk associated with the manual handling operation was "small" or "very low", as the sheriff found it to be, that was not determinative of the issue if it was reasonably practicable to reduce it further: *Hawkes v London Borough of Southwark*, Court of Appeal, (unreported) 20 February 1998 .

- [10] Although the matter was not raised in any of the grounds of appeal, at the outset of his submission that there had been insufficient evidence to allow the conclusion that the onus on each point had been satisfied Mr Middleton contended that the Sheriff had wrongly repelled an objection to evidence concerning reasonable practicability on the ground of no Record. The objection had been taken by counsel for the pursuer on the third day of the proof during the cross-examination of George Stewart to a question as to whether a fork-lift manoeuvring a fork-lift truck in an aisle of the racking in order to remove and stack pallets as desiderated by the appellant as a means of avoiding manual handling, presented in itself a danger (Appendix, volume 4 page 16). Mr Middleton submitted that the respondents' pleadings went no further than an assertion that it was not reasonably practicable to use a fork-lift to move pallets. The respondents did not offer to prove why it would not have been reasonably practicable to do so. The sheriff should have disallowed the line of questioning which brought out the evidence of inefficient use of resources and increased risk due to increased traffic in the event of the appellant's desiderated method of moving pallets being adopted. However, even assuming all the evidence led to have been admissible, there was still insufficient to instruct a finding of reasonable impracticability. At least on occasion it appeared that fork-lift trucks had been used to move pallets. There had been no evidence as to specific costs associated with increased fork-lift traffic. The evidence of increased risk associated with greater traffic was meagre. Evidence had been led to show that measures were taken to ensure the safety of truck traffic. There had also been evidence positively indicative of reasonable practicability. Moreover, while certain aspects of the manual handling operation had been risk-assessed prior to the appellant's sustaining injury, there was no evidence that the balancing exercise required by *Edwards v National Coal Board* had been carried out. None of the witnesses were asked in terms about reasonable practicability. The sheriff was not in a position to conclude, as he had to conclude were he to find in favour of the respondents, that there was a gross disproportion between the quantum of risk and the "sacrifices" involved or, putting it another way, that "the risk was insignificant in relation to [any] cost and inconvenience": *Hawkes v London Borough of Southwark supra* . Mr Middleton submitted that as appears from paras [33] to [35] of his Note, the sheriff misdirected himself. The question was not, as the sheriff's Note would suggest, whether was this a job which should have been carried out by a fork-lift driver but whether it would have been reasonably practicable for it to have been done this way and whether if so doing would have further reduced the admitted risk.

- [11] Mr Middleton also advanced the contention, which he accepted was not contained in the Grounds of Appeal, that the sheriff had simply considered the degree of risk presented by the generic task of moving a pallet rather than the entirety of the actual task which the appellant had been instructed to carry out, that being the task of moving a total of forty pallets. While it was in any event the submission on behalf of the appellant that the sheriff had not been entitled to conclude that it was not reasonably practicable to avoid manual handling in relation to the generic task, the sheriff's error was in fact more fundamental in that he had entirely failed to consider what the entire manual operation actually would have involved had it been completed: it was not a question of being required to move one pallet, it was a question of being required to move forty pallets. The consequent risk had therefore to be run forty times in the course of the shift.
- [12] As far as reduction of the risk to the lowest level reasonably practicable in the event of manual handling not being avoided, as is required by regulation 4(1)(b), was concerned, Mr Middleton reiterated the pleading point: the respondents had not averred why making two men available to move the pallet would not have been reasonably practicable. The sheriff had found, at para [37] of his Note, that it would have been safer for two men to lift pallets together than for one to lift on his own. He was thus not entitled to find nevertheless that the respondents had reduced the risk to the lowest level reasonably practicable. It was not, as the sheriff had found, self evident that a second man would have involved extra costs and inconvenience. Nor did that conclusion arise directly or by implication from the evidence. While the respondents' expert's assertion that there was nothing further that could be done that was no more than a "bare ipse dixit" which was not "intelligible, convincing and tested" cf *Davie v Magistrates of Edinburgh* 1953 SC 34 at 40, there had been evidence led which pointed to the deployment of two men being reasonably practicable. Again, the sheriff was simply not in possession of sufficient by way of evidence to come to a conclusion on the balancing of risk as against sacrifices. His reference at para [40] of his Note to "extreme measures" displayed an erroneous understanding of reasonable practicability. His conclusion on the reasonable practicability of further reduction of the risk was "plainly wrong": *Clarke v Edinburgh and District Tramways Co* 1919 SC (HL) 35 at 36.
- [13] On behalf of the respondents Mr Smith began by pointing to the fact that the evidence disclosed that there were a total of nine employees present in the respondents' premises during the night shift on 7 May when the appellant sustained injury: three fork-lift truck drivers, four pickers, one hygienist or hygiene operator (the appellant) and one supervisor. It was part of the appellant's job to collect empty pallets from ground level locations as he travelled around the warehouse. He was trained in using a pallet truck for this purpose. The fork-lift trucks were long-reach machines capable of moving full pallets of goods and depositing them at high and low level locations in the racking. The manual handling operation referred to on Record was demonstrated in the video recording which is 6/4/3 of process. That operation had been subject to a risk assessment by the respondents. It was one in which the appellant had been trained and formed part of his normal duties. The forty-pallet case advanced by Mr Middleton was a new one. The point on the objection was also

new. It did not feature in the Grounds of Appeal. However, the sheriff had been right to repel the objection. The defence of reasonable practicability was stated on Record. The question therefore was whether the appellant had had fair notice. The appellant could have had no doubt that the lines foreshadowed in the respondents' expert's report would be pursued. They were advanced in response to the appellant's positive averments. Moreover, the appellant had been making a case at common law which was founded on the restricted space in the aisles of the racking and the risk associated with fork-lift truck traffic. There was in any event no prejudice to the appellant in the evidence objected to being led. It came early in the proof. There was the possibility of adjournment. None was asked for. The objection was limited to the risk associated with the increased use of fork-lift trucks. No further objection was made. All the evidence led was therefore available to the sheriff in considering questions of reasonable practicability. Contrary to what had been suggested by Mr Middleton, the balancing exercise described by Asquith LJ in *Edwards v National Coal Board* was one for the court to carry out, albeit from a pre-injury perspective. In doing so the court was entitled to adopt an impressionistic approach. It was not necessary that the employer had actually carried out precisely the same exercise prior to an injury being sustained. It was sufficient if the measures actually adopted by the employer met the requirements of, in this case, the 1992 Regulations. Counsel for the appellant conflated the statutory obligation on the employer to carry out a risk assessment, whether specifically in terms of regulation 4(1)(b)(i) of the 1992 Regulations or more generally in terms of regulation 3 of the Management of Health and Safety at Work Regulations 1999, with the task of the court in determining whether a particular course of action should be regarded as reasonably practicable. On the other hand, while a failure to carry out a risk assessment did not of itself give rise to civil liability, the fact that an employer had carried out a risk assessment was of relevance in determining whether a reasonable practicability defence has been made out. The respondents were deemed to have admitted that there was risk associated with the manual handling operation described on Record but not to any different risk associated with a forty-pallet operation.

[14] In determining what was reasonably practicable the sheriff required to make a judgment which involved an exercise of balancing on the one hand the nature, gravity and imminence of risk and its consequences and, on the other, the nature and proportionality of the steps by which it might be addressed: *Baker v Quantum Clothing Group Ltd and Others*

[2011] 1 WLR 1003 . This did not, however, require a precise quantification of the elements on either side of the scale. In quantifying risk the sheriff was entitled to have regard to the fact that he had seen the relevant manual handling operation demonstrated in the video recording and that it had been carried out with ease by a 60-year-old witness. He was entitled to have regard to the fact that the appellant had been trained in carrying out the operation in the way demonstrated in the video recording with a view to mitigating the identified risk, that the task had been safely carried out by the pursuer throughout the 18-year period of his employment and that in the industry the task was generally carried out by one man. It was relevant that the method followed established practice in the industry:

Baker v Quantum Clothing Group Ltd and Others *supra* . The sheriff variously quantified the risk as "small" (para [16] of his Note), "absolutely negligible" (*ibid* para [27]), "very low" (*ibid* para [38]) and "very small almost negligible" (*ibid* para [39]). He was entitled to do so. In quantifying sacrifice, the sheriff had heard evidence that there were risks to personal safety associated with increased fork-lift truck traffic. He had also heard that using fork-lift trucks would be an inefficient use of resources. That fork-lift trucks could and occasionally did lift and move empty pallets did not negate the conclusion that it would not be reasonably practicable to avoid the common task upon which the appellant was engaged. This was not a case where the respondents had simply failed to apply their collective mind to how manual handling might be avoided: cf Hall v City of Edinburgh Council 1999 SLT 744, or where there was no evidence of the cost and inconvenience associated with the method which had been put forward as a means of avoiding a manual handling operation: cf McFarlane v Scottish Borders Council 2001 SLT 359 and Davidson v Lothian and Borders Fire Board 2003 SLT 939. As far as reducing the risk in terms of regulation 4(1)(b) was concerned, it was not necessary for the respondents to quantify the costs (in the sense of money, time or trouble) associated with employing a second man to assist in the manual handling operation. The sheriff heard evidence of the number of men working in the warehouse, their respective duties, the available machinery, the nature of the appellant's duties, the frequency with which he was engaged on the relevant manual handling operation and the appellant's earnings. From that he was in a position to draw reasonable inferences with a view to determining that the deployment of a second man would involve material sacrifice proportionate to the appellant's level of earnings. Moreover, the sheriff had heard evidence that the operation had been assessed as a one-man job and could be carried out safely as such. He was therefore able to quantify sacrifice to the extent necessary to weigh against risk for the purpose of coming to a properly instructed conclusion on reasonable practicability. Damages

[15] Mr Middleton submitted, under reference to Thomas v Thomas 1947 SC (HL) 45 at 54, Davie v Mag of Edinburgh 1953 SC 34 at 40, Dingley v Chief Constable of Strathclyde Police SC 548 at 554I to 556H and 624G to 625B and 2000 SC (HL) 77 at 81C to F, Flannery and Anor v Halifax Estate Agencies Ltd

[2000] 1 WLR 377 at 381 to 382 and English v Emery Reimbold and Strick Ltd

[2002] 1 WLR 2409 at paras 19 to 21, that the sheriff had inadequately analysed the medical evidence and given inadequate reasons for preferring the evidence of the respondents' orthopaedic expert over the appellant's expert. The respondents' expert had relied on literature which was not produced and to which he had referred only in a vague and inspecific way. The sheriff ought not to have rejected the appellant's own evidence and he should have preferred the appellant's expert. Causation and damages were thus at large for this court which should find that the appellant's back symptoms, as reported by him, were caused by the relevant manual handling operation; that the symptoms were likely to have persisted for a period of about 18 months meriting an award for solatium of £6000

plus interest: *Adams v The National Insurance and Guarantee Corporation* 2009 SLT (Sh Ct) 871, *Monteith v Scot Tech Furniture Services Ltd* 2009 SCLR 742, *Johnson v Amalgamated Construction Co Ltd* 2006 SCLR 289, and "Minor Back Injuries", Judicial Studies Board Guidelines (10 th edition); that the appellant had sustained past loss of earnings in the agreed amount of £1300 plus interest to date; that the appellant had been disadvantaged on the labour market for a period of about 18 months during which he could only find lighter work which he had left after 3 months; and that an award of £6000 should be made in respect of that.

- [16] It was Mr Smith's submission on behalf of the respondents that the sheriff had been entitled to find the appellant incredible in respect of his account of his symptoms of pain and that he had given full reasons for having done so at paras [4], [46] and [47] of his Note. The appellant had given false or misleading information to a treating physician and to his expert medical witness, Mr Gibson, namely that he had not suffered previous back injury. His evidence was inconsistent. The appellant had accepted that he was pain-free when discharged from physiotherapy on 28 May 2007 and yet when he was seen by Mr Gibson on 7 June 2007 he complained of pain. He attended his general practitioner complaining of pain on 21 August 2007 but there were no records of further attendances until 3 November 2009, shortly before the commencement of the proof. The sheriff was entitled to reject these parts of the appellant's evidence as untruthful or exaggerated. It was the case that opinion was divided as between the appellant's expert and the respondents' expert as to the cause of ongoing symptoms beyond the period of about 4 to 5 months after the accident but neither expert could explain the appellant's report of continuing symptoms as at the date of proof, some three years after his sustaining injury. The sheriff had come to his conclusion after having considered and tested the expert opinion on the questions of causation and ongoing symptoms by reference to the whole evidence in the case. He had considered and analysed the medical evidence and had given his reasons for preferring one expert over the other.
- Discussion and decision Liability

- [17] The appellant now restricts his case to one of breach of statutory duty. It is pled in the alternative. In the first alternative, the appellant's case is that he sustained injury by reason of being required to carry out a manual handling operation involving risk of injury which the respondents were under a statutory duty, imposed by regulation 4(1)(a) of the 1992 Regulations, to avoid, so far as was reasonably practicable; that it would have been reasonably practicable to avoid manual handling by having a fork-lift driver remove the pallets and stack them in piles; and that accordingly the respondents are liable. The second alternative arises in the event that it is held that regulation 4(1)(a) did not require this particular manual handling operation to be altogether avoided. In that event the appellant founds on the duty, imposed on the respondents by regulation 4(1)(b)(ii) of the 1992 Regulations, which required the respondents to take appropriate steps to reduce the risk of injury arising out of undertaking the operation to the lowest level reasonably practicable. Appropriate steps in the form of the appellant being given help by another employee to stack the pallets were not taken. Accordingly, it is the appellant's case that if not liable on the

first alternative, the respondents are liable on the second alternative.

- [18] Prior to the proof the respondents admitted, through the mechanism of a Notice to Admit and Notice of Non-admission that the task of moving and stacking pallets referred to on Record was a manual handling operation which involved a risk of injury to the appellant. It was also agreed by Joint Minute that the appellant suffered back pain as a result of "the accident on 5 February 2007 ". Accordingly if the respondents were to avoid liability for breach of regulation 4(1)(a) they would have to establish, first, that it would not have been reasonably practicable to avoid the operation and, in that event, if the respondents were to avoid liability for breach of regulation 4(1)(b) they would have to establish that they had taken appropriate steps to reduce the risk of injury arising out of undertaking the operation to the lowest level reasonably practicable. It was agreed by counsel that once it was accepted that the task in question was a manual handling operation which involved a risk of injury to the employee engaged upon it, the onus of proving (1) that it would not have been reasonably practicable to avoid it, and (if that onus was discharged) (2) that the relevant risk had been reduced to the lowest level reasonably practicable, lay on the respondents: *Taylor v City of Glasgow Council* 2002 SC 364 at 380, para 19, *Hall v City of Edinburgh Council* 1999 SLT 744 at 748 and *Davidson v Lothian and Borders Fire Board* 2003 SLT 939 at 944, para 23. As Lord Carloway put it in *Taylor* : "Of course, reg 4(1)(a) also includes the qualification 'so far as is reasonably practicable' but it is a well established principle of our rules of evidence and procedure that the onus of pleading and proving such a qualification rests upon the employer. It is an important part of this opinion that it is for the defender, under our current system of pleading, to raise in averment the fact that he maintains that the avoidance of the need for the manual handling of, for example, furniture is not reasonably practicable in order to establish a defence to a case under reg 4(1)(a). If he does not do so then the issue of reasonable practicability need not be considered. If he does, then no doubt he has to explain why avoidance is not reasonably practicable. In that event, a pursuer may go on to rely upon the terms of reg 4(1)(b) by setting out in what way, nevertheless, the employer failed. If he does so, then in determining the issue, for example, of whether the employer took appropriate steps to reduce the risk of injury to the lowest level reasonably practicable, no doubt issues such as the foreseeability and the level of risks may be important."
- [19] This is the context of the objection made by counsel for the appellant on the third day of the proof shortly after the beginning of the cross-examination of the appellant's second witness, George Stewart. The question to which objection was taken was, in effect, whether the manoeuvre of a fork-lift truck in an aisle in the warehouse laying down a full pallet and picking up an empty pallet from the racking would present a danger. The terms in which counsel appearing for the appellant at the proof formulated and advanced her objection; the terms in which counsel for the respondents replied; and the reasons given by the Sheriff have not been transcribed (perhaps because this matter was not formulated as a ground of appeal). However, we were given to understand that counsel for the appellant objected on the ground that the respondents had no record for risk of injury beyond the "bold averment" that it was not reasonably practicable to use a fork-lift, notwithstanding the detailed

averments on behalf of the appellant that manual handling could have been avoided using reasonably practicable alternatives. The response by counsel for the respondents was - we were told - that it was averred that it was not practicable to use a fork-lift; by asking his questions he was "adding flesh to those bones". The Sheriff, it was said, repelled the objection with the observation that the questions were covered by Answer 4 and that there would be an opportunity to re-examine. The Sheriff was not asked to hear the evidence under reservation. No further objection was made. Answer 4 provided: "Explained and averred that it was not reasonably practicable for the Defenders to avoid the requirement for the Pursuer to manually handle the pallets in removing them from the racking and onto the pallet truck. In particular it was not practicable to use a forklift to remove all pallets from ground floor racking. It was not reasonably practicable for the Defenders to require two operatives to remove the pallets. Further explained and averred the Defenders made a suitable and sufficient assessment of the operation of pallet handling. The Defenders' system of work for removing pallets from ground floor racking reduced the risk of injury to the lowest level reasonably practicable. There were no further steps that could have been taken by the Defenders that were reasonably practicable that would have further reduced the risk of injury. Handling pallets in this manner is commonplace throughout the warehousing industry. Further explained and averred that the Defenders had a system of work in place for the handling of pallets as detailed in their Risk Assessment and Safe System of Work. This reduced the risk of injury to the lowest level reasonably practicable for the handling of pallets. Esto, the Defenders did not make a suitable and sufficient assessment of the risks, which is denied, a suitable and sufficient assessment would conclude the pallets should be removed from the racking in terms of the Defenders' system of work which has reduced the risk to the pursuer to the lowest level reasonably practicable. The report of Jim Garry of Strange Strange and Gardner dated 29 July 2008 is lodged in process and its terms hereinafter incorporated brevity causa ."

- [20] In our opinion the Sheriff was entitled to follow the course that he did. It is true that leaving aside the report by Mr Garry of Strange, Strange and Gardner the averments of the respondents did not go much beyond an echo of the statutory provisions. The Strange, Strange and Gardner report is a long and discursive document bringing together information from a number of sources. Without necessarily adopting all the strictures to be found in the well-known case of *Eadie Cairns v Programmed Maintenance Painting Ltd* SLT 777, the indiscriminating incorporation of a document such as the Strange, Strange and Gardner report is not a practice that we would applaud but, equally, we consider that regard must be had to be the realities of the situation. The report was a lodged production and was specifically referred to in Answer 4 which is where it was to be expected that the respondents' averments on reasonable practicability would be found. No plea was taken to the relevancy of the respondents' pleadings. The report contains a discussion of the issues in the case. Their compass was not wide. The particular objection focused on the risks associated with fork-lift traffic and therefore increased fork-lift traffic in the aisles between the racking in the event of removing and stacking of pallets being carried out using fork-lift

trucks. Broadly speaking, this topic was an element within the factual averments supporting the appellant's common law case which was to do with the restricted space in the aisles and the risks associated with fork-lift truck traffic. It was a matter within the knowledge of the appellant and cannot have come as a surprise to his advisers. If it had, it would have been open to the appellant to ask for an adjournment to consider this unexpected turn in the questioning and take steps accordingly. The evidence was still at an early stage. There were therefore remedies available to the appellant and his advisers if they considered themselves disadvantaged by their reading of the defences. The sheriff was not asked to reserve the objection. It was not renewed in respect of any other question. No adjournment was sought. It may therefore be assumed that the appellant's advisers were satisfied that they were able to respond to the development of the line of defence and that they were not unfairly prejudiced. In these circumstances we do not consider that the sheriff erred in repelling the objection and therefore the answers elicited in response to this line of questioning were available to the sheriff in considering whether it would have been reasonably practicable to have avoided manual handling.

- [21] The further contention, also not contained in the grounds of appeal, that the sheriff misunderstood the nature of the relevant manual handling operation in that he regarded at it simply as the "generic" task of moving pallets rather than the specific task of moving forty pallets, has the look of being an afterthought. It is true that the sheriff found that there were around forty pallets which required to be removed by the appellant on the night when he sustained injury but a forty-pallet manual handling operation was not what had been pled. The Record as reproduced in the Appeal Print refers to the appellant being instructed to remove "approximately 20 blue wooden pallets". The appellant's pleadings then go on to aver (Appeal Print page 5): "The pursuer had stacked 5 pallets onto his pick truck and removed them to storage. He then returned to remove a further 5 pallets. Whilst lifting the tenth pallet the pursuer suffered a shooting pain in his back." It was moving the tenth (not the fortieth) pallet that the appellant blamed for his injury. Critically, at article 4 of condescendence (Appeal Print page 14) and in relation to the 1992 Regulations, the appellant avers: "Moving the wooden pallet, as hereinbefore condescended upon, was a manual handling operation which involved a risk of injury in terms of said Regulations." Consistent with that averment what the respondents were called on to admit in term of a Notice to Admit, no. 14 of process, and what the respondents were deemed to have admitted in response was, as the sheriff records at para [32] of his Note, that: "[the] task of moving the wooden pallet, as referred to on Record, was a Manual Handling Operation in terms of Regulation 2 of the Manual Handling Regulations 1992 which involved a risk of injury to the pursuer." Thus, what was being litigated was a case that moving one wooden pallet constituted a manual handling operation to which the provisions of regulation 4(1) of the 1992 Regulations applied and that as a result of the respondents' failure to comply with these provisions the appellant had suffered injury in the course of moving, or as his pleadings have it, "lifting", one pallet. That is the manual handling operation in respect of which the appellant has the benefit of the respondents' deemed admission and no other. It is the

quantum of risk in respect of that operation that the sheriff was invited to assess and did assess. Not only was there no case pled on record to the effect that the number of pallets to be moved on the evening in question was material, there was also no suggestion in the course of the proof that what was in issue was a manual handling operation which consisted of the moving or lifting of forty pallets or that the complaint was in anyway concerned with the number of pallets. No case was made that the appellant was at risk of repetitive strain or cumulative exhaustion. In any event it is not said that there was any evidence and there certainly is no finding to the effect that the risk associated with moving forty pallets is in any material way different from the risk associated with moving one pallet. It follows that, in our opinion, the sheriff properly understood the nature of the particular manual handling operation on which the pursuer was engaged at the relevant time.

- [22] Having thus rejected the contentions that the sheriff wrongly repelled the objection and that he misunderstood the proper scope of the manual handling operation, the submission that we therefore have to consider on behalf of the appellant is that the evidence which the sheriff heard was insufficient to allow him to come to the conclusion that he did.
- [23] The method used by the appellant to carry out the manual handling operation was essentially what the sheriff in finding in fact 15 describes as the "first method". It is shown being demonstrated in a video recording which was lodged as 6/4/3 of process. It was devised by the respondents as one of two methods of removing pallets, following a risk assessment of the manual handling of pallets. The appellant was familiar with this method. He had received comprehensive training from the respondents which included training in approved lifting techniques. In his finding in fact 15 the sheriff finds the first method to be a commonly used, accepted and approved method which could be performed safely by one man. The respondents had nonetheless conceded that the manual handling operation which the appellant had been carrying out was one involving a risk of injury but that that risk was, as the sheriff explains at para [16] of his Note, small or, as he puts it later at paras [27] and [39], negligible. As appears from his Note, the sheriff had a basis in the evidence for that assessment: the appellant only required to support approximately half of the 23 kilogram weight of the pallet, the respondents' expert had carried out the operation and described being able to do it "with ease" which was consistent with the sheriff's impression watching the operation being demonstrated on the video, the appellant's orthopaedic expert considered that the pallet could be lifted without pain by an average man using proper techniques, and the respondents' orthopaedic expert described the risk as absolutely negligible. Moreover, the sheriff had heard evidence which, as appears from para [18] of his Note, which satisfied him that; "... the operation has been carried out routinely by many employees, including the [appellant], over many years, both in the Pyramids Business Park and indeed almost universally in the warehousing industry."
- [24] The sheriff's quantification of the relevant degree of risk was not challenged. Mr Middleton submitted however, under reference to the judgment of Aldous LJ in *Hawkes v London Borough of Southwark*, that even if the risk associated with a manual handling operation is

small that does not, of itself, determine the issue. In principle, that is no doubt correct. The effect of regulation 4(1)(a) of the 1992 Regulations is to prohibit any manual handling operation unless the employer can show that its avoidance is "not reasonably practicable". Parties were agreed that "reasonably practicable" was authoritatively defined by Asquith LJ in *Edwards v NCB* supra at 712 where he said this: "The construction placed by Lord Atkin on the words 'reasonably practicable' in *Coltness Iron Co v Sharp*

[1938] AC 90, 94 [1937 SC (HL) 68] seems to me, with respect, right. 'Reasonably practicable' is a narrower term than 'physically possible' and seems to me to imply that a computation must be made by the owner, in which the quantum of risk is placed on one scale and the sacrifice involved in that measures necessary for averting the risk (whether in money, time or trouble) is placed in the other;' and that if it be shown that there is a gross disproportion between them - the risk being insignificant in relation to the sacrifice - the defendants discharge the onus on them. Moreover, this computation falls to be made by the owner at the point of time anterior to the accident." Mr Middleton and Mr Smith were at one that the sheriff had to carry out the balancing exercise described by Asquith LJ in order to determine whether the respondents could escape liability under regulation 4(1)(a) and then, in that event, whether they avoid liability under regulation 4(1)(b). Given this common approach as between counsel for the parties, we proceed on the basis that the formulation adopted by Asquith LJ is the one to which we should have regard, but we note that its correctness appears to be put in question by Lord Mance in *Baker v Quantum Clothing Group*. At para 84 of his opinion Lord Mance said this: "A further aspect of ... [the leading judgment appealed against] ... is the suggestion that 'there must be at least a substantial disproportion' before the desirability of taking precautions can be outweighed by other considerations. This theme was developed ... But it represents, in my view, an unjustified gloss on statutory wording which requires the employer simply to show that he did all that was reasonably practicable." Mr Middleton suggested that it was for the employer, here the respondents, to show that he had actually carried out such an exercise prior to any accident giving rise to a claim for breach of the regulation. We do not consider that suggestion to be sound. Rather, as Mr Smith submitted, while the fact that the employer has carried out a risk assessment is of relevance and may assist the court in determining whether the employer has discharged his onus, the balancing exercise is ultimately a forensic one. It is for the court to carry out after the event, not the employer before the event, albeit that the court must put itself in the position of the employer before the event, informed by such evidence as to risk and sacrifice as the court considers relevant.

[25] As appears from the terms of para [32] of his Note, the sheriff well understood that where manual handling involved a risk, however small, it was for the respondents to establish that, notwithstanding that risk, it was not reasonably practicable to avoid the relevant operation. He understood that determining reasonable practicability was a task for the court, balancing risk against "sacrifice". At para [33] of his Note he summarises the evidence on sacrifice. He states his conclusion as to the reasonable practicability of avoiding manual handling and

therefore the appellant's case under reference to regulation 4(1)(a), at paras [34] and [35]. It is in these terms: "[34] The conclusion which I reach on the above evidence is that while it would, of course, be perfectly possible for a fork lift truck driver to remove empty pallets from where they lay in order to stack them, the overwhelming preponderance of the evidence is that this would be an inefficient use of resources as fork lift trucks can and ought to be used for other tasks, and in addition the considerable manoeuvring which a fork lift truck would have to do in order to stack the pallets would create its own, and not inconsiderable, risks.

- [35] The [respondents] have accordingly proved, in my view, that the only practicable way for the pallets to be removed and stacked was by hand." Contrary to what Mr Middleton submitted, in our opinion there was sufficient evidence before the sheriff to allow him to conclude that there was, in the language of *Edwards v NCB*, a gross disproportion between the quantum of risk and the sacrifices involved or, as it was put rather more accessibly in *Hawkes v London Borough of Southwark*, that "the risk was insignificant in relation to [any] cost and inconvenience". The risk was small. It could only be avoided, as the sheriff assessed the matter, at significant cost. We do not accept, as Mr Middleton suggested, that it was necessary for the sheriff to have detailed information about the economics of redeploying the three available fork-lift truck drivers and their trucks, the primary purpose of which was stacking loaded pallets, to the location of single empty pallets, removing them from the racking and then serially stacking them one upon the other. Nor do we accept that the sheriff was not entitled to find that the increased traffic of fork-lift trucks in the restricted aisles of the racking would have introduced additional dangers. On this latter point, it appeared to us that Mr Middleton's emphasis on the various steps taken to reduce the risks associated with the current level of traffic was double-edged in that it served to underline what we would see the sheriff as being entitled to conclude as a matter of overall impression, that increased truck movements inevitably meant more risk to persons on foot. We would add this: the sheriff notes that the relevant operation had been carried out routinely by many employees, including the appellant, over many years, both in the respondents' immediate premises and almost universally elsewhere in the warehousing industry. That in our opinion was a powerful consideration pointing to the conclusion that it would not have been reasonably practicable for the respondents to adopt the alternative method averred by the appellant. Use of a fork-lift truck was no doubt possible, but for the reasons explored in the evidence and accepted by the sheriff it was not reasonably practicable. In this connection we would again refer to Lord Mance's opinion in *Baker v Quantum Clothing Group Ltd* supra. That case was concerned with claims in respect of hearing loss caused by exposure to noise at work founding on common law negligence and breach of section 29(1) of the Factories Act 1961. A primary issue case was whether safety was a relative concept, evolving over time in the light of experience and developing knowledge, as had been the view of the judge at first instance, or whether it was absolute and therefore independent of what was current thinking from time to time as reflected for example, by a code of practice, as had been the opinion of the Court of Appeal. The majority

of the Supreme Court held that safety was relative; to be judged according to the general knowledge and standards of the time, by reference to what might reasonably have been foreseen by a reasonable and prudent employer. In so doing it doubted the correctness of *Robertson v RB Cowe & Co* 1970 SLT 122 and *Mains v Uniroyal Englebert Tyres Ltd* 1995 SC 518 (and *Larner v British Steel plc*

- [1993] ICR 551). Lord Mance gave the leading majority opinion. At paras 9 and 10 of that opinion he quoted two statements of principle in relation to common law negligence: "9 The test of an employer's liability for common law negligence is common ground. In *Stokes v Guest, Keen and Nettlefold (Bolts and Nuts) Ltd*
- [1968] 1 WLR 1776, 1783, Swanwick J described the position as follows: 'From these authorities I deduce the principles, that the overall test is still the conduct of the reasonable and prudent employer, taking positive thought for the safety of his workers in the light of what he knows or ought to know; where there is a recognised and general practice which has been followed for a substantial period in similar circumstances without mishap, he is entitled to follow it, unless in the light of common sense or newer knowledge it is clearly bad; but, where there is developing knowledge, he must keep reasonably abreast of it and not be too slow to apply it; and where he has in fact greater than average knowledge of the risks, he may be thereby obliged to take more than the average or standard precautions. He must weigh up the risk in terms of the likelihood of injury occurring and the potential consequences if it does; and he must balance against this the probable effectiveness of the precautions that can be taken to meet it and the expense and inconvenience they involve. If he is found to have fallen below the standard to be properly expected of a reasonable and prudent employer in these respects, he is negligent.' 10 Mustill J adopted and developed this statement in another well known judgment in *Thompson v Smiths Shiprepairers (North Shields) Ltd*
- [1984] QB 405, 415-416, when he said: 'I shall direct myself in accordance with [this] succinct and helpful statement of the law, and will make only one additional comment. In the passage just cited, Swanwick J drew a distinction between a recognised practice followed without mishap, and one which in the light of common sense or increased knowledge is clearly bad. The distinction is indeed valid and sufficient for many cases. The two categories are not, however, exhaustive: as the present actions demonstrate. The practice of leaving employees unprotected against excessive noise had never been followed "without mishap." Yet even the plaintiffs have not suggested that it was "clearly bad," in the sense of creating a potential liability in negligence, at any time before the mid-1930s. Between the two extremes is a type of risk which is regarded at any given time (although not necessarily later) as an inescapable feature of the industry. The employer is not liable for the consequences of such risks, although subsequent changes in social awareness, or improvements in knowledge and technology, may transfer the risk into the category of those against which the employer can and should take care. It is unnecessary, and perhaps impossible, to give a comprehensive formula for identifying the line between the

acceptable and the unacceptable. Nevertheless, the line does exist, and was clearly recognised in *Morris v West Hartlepool Steam Navigation Co Ltd*

[1956] AC 552. The speeches in that case show, not that one employer is exonerated simply by proving that other employers are just as negligent, but that the standard of what is negligent is influenced, although not decisively, by the practice in the industry as a whole. In my judgment, this principle applies not only where the breach of duty is said to consist of a failure to take precautions known to be available as a means of combating a known danger, but also where the omission involves an absence of initiative in seeking out knowledge of facts which are not in themselves obvious. The employer must keep up to date, but the court must be slow to blame him for not ploughing a lone furrow. 'An employer following generally accepted practice will not therefore necessarily be liable for common law negligence, even if the practice involves an identifiable risk.' At para 82 of his opinion Lord Mance gave consideration to what was relevant in determining reasonable practicability, the obligation imposed by section 29(1) of the 1961 Act being to make and keep safe every place at which any person has at any time to work, "so far as is reasonably practicable". He said this: "The criteria relevant to reasonable practicability must on any view very largely reflect the criteria relevant to satisfaction of the common law duty to take care. Both require consideration of the nature, gravity and imminence of the risk and its consequences, as well as of the nature and proportionality of the steps by which it might be addressed, and a balancing of the one against the other. Respectable general practice is no more than a factor, having more or less weight according to the circumstances, which may, on any view at common law, guide the court when performing this balancing exercise: see *Swanwick and Mustill JJ's* statements of principle, set out earlier in this judgment, and also *Charlesworth on Negligence*, 12th ed (2010), chapter 7, 'The Standard of Care', both generally and especially at para 7. 38. It would be strange if the Court of Appeal was right in suggesting that, under the statutory formulation, this one factor is irrelevant, when the whole aim of the balancing exercise must, in reality, be to identify what is or is not acceptable at a particular time." Thus, albeit as one factor among others, the fact that an employer has followed general practice in the industry weighs significantly in the balance against the conclusion that it would have been reasonably practicable for him to do more.

[26] The appellant also contends, under reference to regulation 4(1)(b), that if the respondents were taken to have established that it was not reasonably practicable entirely to avoid manual handling, then they required to take appropriate steps to reduce the risk of injury to employees such as the appellant to the lowest level reasonably practicable. This, the appellant contends, the respondents had not done in that they could have allocated a second man to assist the appellant with the relevant operation.

- [27] As with regulation 4(1)(a), so also under regulation 4(1)(b), the onus was on the respondents and involved establishing that in deploying one man to carry out the manual handling operation and training him in the first method, they had taken all appropriate steps to reduce the risk of injury to the appellant to lowest level reasonably practicable.
- [28] The terms of paragraph [37] of the sheriff's Note, and its relationship to the succeeding paragraphs were the subject of discussion before us. The first two sentences read: "In connection with this statutory case, I should say at the outset that it is clear to my mind that the pursuer has established on the evidence that it is safer for two men to lift pallets together than for one to lift on his own. While the use of two men brings about its own risks, namely that there is then the risk of one man dropping his end causing the other man to jolt his back (as set out in detail in the report by the defenders' expert at page 16), I am persuaded that overall it is clear that it is safer to use two men." It is not wholly clear what the sheriff intends in that passage. On the face of matters, the advantage of having two men, rather than one, lift an object is that the weight is shared. That will no doubt be so when a pallet is lifted free of the floor or any other subjacent support. But the method shown in the video for handling a pallet did not involve lifting the pallet free of any subjacent support; the pallet rested at least in part on the floor or another pallet, thereby - as the expert evidence explained - reducing the load which the operative required to move to approximately half of the pallet's 23kg weight, ie 11.5kg. It was not, we think, suggested that any significant enhancement in safety resulted from sharing between two men a modest weight of 11.5kg. Be that as it may, notwithstanding his assessment of a two-man lift over a single-man operation, the sheriff concluded that the respondents had satisfied the onus upon them to reduce the risk of injury to the lowest level reasonably practicable. We consider that he was entitled to do so. The obligation imposed by the regulation 4(1)(b)(ii) is not to eliminate all risk whatsoever. As Lord Mance put it in *Baker* , at para 82, in the context of section 29
- (1) of the Factories Act 1961, "some degree of risk may be acceptable, and what degree can only depend on current standards." Here the risk associated with the relevant manual handling operation was small. In that the same operation had been carried out routinely by many employees, including the appellant, over many years, both in the respondents' immediate premises and almost universally elsewhere in the warehousing industry, the risk associated with it might be taken be acceptable. As the sheriff noted, the risk had been reduced by appropriate training in a method which the sheriff characterised as safe. The further step of adding a second man, assuming, as the sheriff appears to have been prepared to do, that this would have introduced some element of additional safety, would have introduced the additional costs associated with the deployment of the second man. Following *Edwards v NCB* , that had to be placed in the balance. Mr Middleton submitted that these additional costs had not been proved. As a matter of precise figures that may be so although, as Mr Smith pointed out, the sheriff had heard evidence about the appellant's wages and therefore was aware in broad terms of the cost of employing an extra man. As Mr Smith also pointed out, it was implicit in the evidence of the staffing levels on the shift that the respondents would require to employ an additional worker at the appellant's grade if the desiderated

assistance of a second man were to be supplied. Having heard the whole evidence as to the nature of the respondents' operations, the numbers employed on the night shift and the nature of the appellant's duties, in our opinion the sheriff was well entitled to conclude as a matter of impression that the cost (using that expression in its most general sense) of deploying an additional man on the relevant manual handling operation with a view to supplying some no doubt small additional element of safety to further reduce the already very small risk was sufficiently large as to be disproportionate. On that account deploying a second man was not reasonably practicable.

- [29] In our opinion the sheriff was entitled to come to the conclusions that he did. The appeal, insofar as directed at the question of liability, therefore fails. Causation and quantification of damages
- [30] Given our decision on the question of liability the question of damages does not arise but in deference to the arguments of counsel we would add this.
- [31] Had he found the respondents liable to make reparation to the appellant for the injury he sustained on 7 May 2007 the sheriff would have awarded damages in respect of solatium in the sum of £1500 (exclusive of interest) and what was an agreed sum of £1300 (again exclusive of interest) in respect of past wage loss. He would have made no further award. In particular, he would not have made an award to reflect consequent disadvantage on the labour market. As appears from the sheriff's findings in fact 22 and 23, and as explained at paras [44] to [50] of his Note, this is upon the basis that the appellant was constitutionally pre-disposed towards experiencing back pain as a result of degenerative changes in his spine and that the task of moving pallets had done no more than trigger an episode of back pain, a similar incident being likely to have occurred within a period of four or five months. Any continuing pain that the appellant may have experienced beyond May 2007 was therefore attributable to his underlying condition rather than the relevant incident. However, were he to be wrong in that view, the sheriff explains at para [50] of his Note that he could not accept the appellant's evidence of continuing symptoms beyond that same date.
- [32] In our view, the sheriff's conclusion as to the credibility of the evidence given by the appellant, on these matters, effectively puts his conclusion on quantification of damages beyond challenge in this appeal. The appellant averred that as he was engaged on the manual handling operation he had felt pain in his back, stumbled backwards and fell to the floor. He felt numbness in his leg. He was taken to hospital and diagnosed with "back sprain and had limited spine movement". His averments continue: "The [appellant] continues to suffer pain and stiffness in his back. ... He is suffering and will continue to suffer a disadvantage in the labour market." That the appellant had suffered back pain as a result of engaging in the manual handling operation was admitted by the respondents. The issue therefore was how long that pain, in other words pain attributable to the manual handling operation, continued. In their averments the respondents put forward the propositions that the appellant had a long-standing pre-existing degenerative condition of the lower spine and that any on-going symptoms being experienced by him were attributable to that pre-existing

condition. Given their previous averment that the appellant had reported to his physiotherapist that by 28 May 2007 that "he had 100 per cent recovered", the reference to "ongoing symptoms" may be taken to be to symptoms reported as continuing beyond the end of May 2007. Mr Middleton was critical of the quality of the evidence given in support of the respondents' averments by their orthopaedic expert, Mr Christie. However, before the sheriff came to evaluate what Mr Christie had to say about the causation of symptoms beyond May 2007, it was for the appellant to satisfy the sheriff that he had in fact experienced such symptoms. In his evidence the appellant said that he had experienced symptoms after May 2007 and indeed that he was still experiencing symptoms at the date of proof. However his expert, Mr Gibson, did not support the claim that symptoms continued at the date of the proof; in his report, no. 5/1/1 of process, Mr Gibson agrees with the diagnosis of "back sprain" and explains that, in the normal course of events, acute symptoms from a sprain to the ligaments supporting the spine and/or a muscle strain generally settle within six to eight weeks but that it is not uncommon for lesser discomfort to persist for up to eighteen months. "To some extent", Mr Gibson goes on, "this has been the pattern in this instance." It is this eighteen month period of lesser discomfort that Mr Middleton invited us to find established and to award damages accordingly.

- [33] As he makes clear at para [50] of his Note, the sheriff did not find the appellant to have established an eighteen month period of discomfort consequent upon his engaging on the manual handling evidence. That was because he did not find the appellant's own evidence to be persuasive and that in turn was because, as the sheriff assessed it, the evidence on symptoms was untruthful or exaggerated (Note para [47]). The difference of opinion as between Mr Gibson and Mr Christie, both of whom the sheriff described as experienced, careful and impressive witnesses, was therefore academic. The appellant had first to be believed by the sheriff when he said that his symptoms continued after the end of May 2007 before any question as to the probable cause of his symptoms arose. The sheriff did not believe the appellant. The question of causation of symptoms did not arise. We therefore do not consider it necessary to discuss Mr Middleton's submissions further. The legal propositions on which he founded were undoubtedly sound and applicable to cases where sharp issues of a highly technical nature requiring elucidation by expert evidence arise. Whether this was truly such a case may be questionable. Both Mr Gibson and Mr Christie impressed the sheriff with the relevance of their experience and the care with which they approached their task but, for all the witnesses' evident expertise, the appellant's signs and symptoms did not appear to lend themselves to other than a fairly broad sort of discussion. The sheriff rightly saw nothing to criticise in that.

Conclusion

- [34] We shall therefore refuse the appeal. In the course of his submissions Mr Middleton drew attention to the fact that the sheriff had contented himself, in his interlocutor of 2 June 2010, with granting decree of absolvitor without specifying which the respondents' pleas-in-law had been sustained. We shall recall the interlocutor of the sheriff and pronounce it of

new with the addition that the seventh plea-in-law for the respondents is upheld. BAILII:
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CASE PAGE <https://chat.esheria.ai/case-law/scotland/strange-v-wincanton-logistics-ltd-2011-scotcs-csih-65a-26-october-2011>

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