

**SHERIFFDOM OF LOTHIAN AND BORDERS AT EDINBURGH
IN THE ALL-SCOTLAND SHERIFF PERSONAL INJURY COURT**

[2018] SC EDIN 17

PN577/17

JUDGMENT OF SHERIFF KATHRINE E C MACKIE

In the cause

Kathleen Sloan 2 Blackness Street, Shawhead, Coatbridge ML5 4NJ

Pursuer

Against

Lindvale Plastics Ltd a company incorporated under the Companies Acts (Company Number: SC042127) having its registered office at 45 Kelvin Avenue Hillington Glasgow G52 4LF

Defenders

**Act: Fitzpatrick; Digby Brown LLP, Glasgow
Alt: Thomson; BLM, Glasgow**

Edinburgh, 20 March 2018

The Sheriff having resumed consideration of the cause finds the following facts admitted or proved:-

[1] The parties are as designed in the instance. The pursuer was born on 26 July 1963. She has been employed by the defenders as a machine operator for about 24 years. She is 1.55m tall. The defenders form part of McAlpine & Co Ltd, manufacturers of plastic components for the plumbing trade. They have premises at Hillington, Johnston, Thornliebank and Coatbridge. The pursuer works in premises in Waverley Street, Coatbridge occupied by the defenders.

[2] Number 5/7 of process comprises 28 photographs of the defenders' premises.

[3] Within various parts of the defenders' premises there are different types of machines for the production of plastic fittings. Some of the machines including those operated by the pursuer are in constant production (automatics) between Monday and Friday. Employees are divided into three shifts, day, twilight and night shifts. The day shift operated from 8am until 4.30pm on Mondays to Thursdays and from 8am to 3.30pm on Fridays. It was the busiest of the three shifts with about 130 employees working in the premises. The pursuer worked on the day shift. The area in which she worked is known as the moulding or machine floor.

[4] Operators of automatics are responsible for up to about 6 machines simultaneously. They do not have the authority to stop the operation of the machine. They are required not to leave their machines unattended. The fittings produced by the machine are disgorged via a conveyor belt into a collection bin. The operators require to check the fittings and, if in order, place them in rigid plastic containers known as Really Useful Bins (RUBs). Jig machines were situated at the end of the manufacturing machine to finish any product while it is still warm.

[5] The RUBs measure 37cm long, 43cm wide and 36cm deep with a capacity of about 84 litres. They are lightweight with a handle at each end. There are also smaller or half-sized RUBs (SRUBs) which are not material to the circumstances of this case. The RUBs have a plastic lid. They are designed to be stacked one on top of another. Number 6/20 of process is an example of an RUB. Dolly wheels, comprising a rigid aluminium frame with a wheel at each corner and being 11.5cm high, facilitate the moving of stacks of RUBs. Number 6/21 of process is an example of a new style of dolly wheels with rubber wheels. Other dolly wheels have plastic wheels. The movement of the plastic wheels caused noise and disturbance to those working in the offices which were situated under the mezzanine floor.

They were also smaller than the new rubber wheels and were prone to catching in uneven surfaces such as gratings on the floor. A stack of RUBs sitting on a dolly wheel is moved by an operator pushing against the RUBs.

[6] Empty RUBs are stacked by employees known as “runners” within the defenders’ premises in various storage areas including against a blue fence near to the automatics for access by the operators, as shown in number 5/7/1 of process. The “runners” do not deliver empty RUBs to the operator. The operator requires to collect RUBs from the storage area. If there are no empty RUBs at the storage area an operator requires to ask a charge hand or Supervisor to instruct a “runner” to locate and bring some for use by the operator. An operator is not to leave their machine without permission from a charge hand or supervisor.

[7] Empty RUBs may be located in various parts of the defenders’ premises including outdoors and within shipping style containers situated in the yard. Filled RUBs are also stacked in various parts of the defenders’ premises, including on a mezzanine level above the moulding floor. Filled RUBs may remain stacked for extended periods of time depending upon demand for the components. Filled RUBs may be stacked on dolly wheels. The height of the stacks varies.

[8] On 30 April 2014 the pursuer commenced her shift with the defenders at about 8.00am. She noticed immediately that there were no empty RUBs or dolly wheels in the storage area against the blue fence or in the vicinity of the automatics to which she had been allocated. There was no Supervisor on duty on the moulding floor. The pursuer advised her charge hand, Linda Gray, that there were no empty RUBs or wheels in the storage area. She was told that the defenders were waiting for a delivery from Hillington. Thereafter one of the runners brought in empty RUBs which he stacked 4 high in the storage area by the

blue fence across from the pursuer's area of work. The RUBs were not stacked on dolly wheels.

[9] When the empty RUBs became available, at or about 9am, the pursuer went to fetch some to accommodate the components being produced by the automatics she was responsible for. There were no dolly wheels available for use near to the pursuer. In the absence of any dolly wheels the pursuer required to push one of the stacks of 4 RUBs across the floor towards her machines. As she pushed them she was able to see ahead of her by looking to the side of the RUBs. The floor was made of concrete with expansion joints. The condition of the joint near to the pursuer's machines had deteriorated and was cracked and uneven. The area between the automatics and the blue fence was marked by white lines as a traffic route along which one or more forklift trucks would pass regularly carrying tools and parts for repairs to machines. The load of the trucks would be about 1 to 1 ½ tons. As the pursuer pushed the stack of RUBs the bottom one caught on the cracked and uneven joint in the floor. The RUBs fell forward. The pursuer fell to the floor. As she did so she struck a table for a jig machine and sustained injury.

[10] At the pursuer's request another employee, Danny McKeown, took a photograph of the cracked and uneven floor where the pursuer's accident occurred. Number 5/5 of process is a copy of that photograph. Following the accident the floor was repaired, the crack filled in and the surface smoothed over as shown in numbers 5/7/9 and 5/7/10 of process.

[11] The pursuer's accident was captured on CCTV. The footage was viewed by the then General Manager, Douglas Elliot, and another employee, Kenny MacDiarmid. Despite the relevance of the footage no copy was retained. The footage showed the accident occurring as described by the pursuer.

[12] After the accident the pursuer was attended by the defenders' first aider and thereafter taken to Monklands Hospital, Airdrie. She sustained a soft tissue injury to her right wrist and received treatment therefor. She was absent from work for two days and upon her return placed on light duties for about 9 weeks. She lost earnings. Services were provided to her by her husband and two sons. The value of her loss, injury and damage was agreed in the sum of £8,500 inclusive of interest to the date of commencement of proof, being 3 October 2017.

[13] There was a shortage of dolly wheels for several months prior to the pursuer's accident. Complaints were made to the defenders by employees about the shortage of dolly wheels. The defenders were aware of employees' concerns that an accident may occur as a result of pulling RUBs in the absence of dolly wheels.

[14] The defenders operated a Health & Safety Committee including representatives of the employees. The committee held meetings on or about a monthly basis. Minutes were taken, recorded and disseminated to the employees by pinning up copies on Notice Boards in various locations throughout the premises. Prior to said meetings a notice of the proposed meeting was put up on a Notice Board inviting employees to note items which they wished to have raised at the meeting.

[15] Number 5/3/4 of process is a copy of a notice inviting a note of items which any employee wished to be raised at the Health & Safety meeting to be held on 30 October 2013. On the notice Geraldine McCusker, one of the defenders' employees, wrote "Wheels needed can't ever get them pulling bins lead to accidents". Her entry is dated "22-11-13". At that time Ms McCusker was a shop steward for the defenders' employees.

[16] Number 5/3/5 of process is a copy of the Minute of the Health & Safety meeting held on 30 October 2013. There is no note of any discussion about dolly wheels taking place at

that meeting. Number 5/3/7 is a copy of the Minute of the Health & Safety meeting held on 18 December 2013. In that Minute it is noted that items raised by employees were discussed including the item entered on the Notice number 5/3/4 of process by Ms McCusker on 22 November 2013. The Minute records that "Regarding more dolly trolleys these have been on order for months now. The supplier has a production problem." Following the meeting Douglas Elliot wrote on the Notice for the meeting on 30 October 2013 above the entry by Ms McCusker the words "On Order".

[17] Number 5/3/9 of process is a copy of the Minute of the Health & Safety meeting held on 15 January 2014. The Minute records that "Regarding the Dolly Trolleys the supplier will be contacted for an update".

[18] Number 5/3/13 of process is a copy of the Minute of the Health & Safety meeting held on 19 March 2014. The Minute records under AOB that:

"Douglas would like all dolly trolleys to be returned to the central storage areas rather than left lying around the factory floor. He would appreciate the assistance of the cleaning operatives with this job...Campbell should arrange this. New dolly trolleys with improved wheels have been ordered and should arrive soon".

[19] Between at least November 2013 and March 2014 the shortage and lack of the availability of dolly wheels was raised at the defenders' Health & Safety Committee meetings. The defenders did not deny that there was a shortage of dolly wheels. They proceeded to order more dolly wheels for the premises.

[20] The defenders did not carry out any assessment of the risk of injury presented to their employees as a result of the shortage of dolly wheels.

[21] Employees including the pursuer understood from the defenders' responses to enquiries that they were waiting for a supply of dolly wheels to arrive from the premises at

Hillington. A lorry from Hillington attended at the defenders' premises on a daily basis to collect and deliver items.

[22] The pursuer received training in the use of the defenders' machines. The training was usually provided "on the job", that is while the pursuer was operating the relevant machine. The trainer would read over a printed sheet which was then signed by the pursuer and the trainer and countersigned by Douglas Elliot. Numbers 6/1/1 and 6/1/2 of process are copies of training sheets relating to the safe method of work for operating jigs. The former is dated 4 March 2013. Paragraph 8 under the heading "Health & Safety" states "Always use wheels with RUBs". Paragraph 9 states "Do not leave the machine unattended". Paragraph 10 states "Report any problems to your Supervisor immediately". The latter is dated 26 April 2014. Paragraph 8 under the heading "Health & Safety" also states "Always use wheels with RUBs". Paragraph 9 states "Do not leave the machine. If you need to leave the machine advise your charge hand or supervisor so that cover can be arranged". Paragraph 10 states "Report any problems to your Supervisor or charge hand immediately".

[23] When no dolly wheels were available employees including the pursuer pulled or pushed stacks of RUBs to their machines to enable them to continue with their job and to deal with the constant production from their machines of the plastic components. Stacks would comprise 3 or 4 RUBs. Had dolly wheels been available on 30 April 2014 the pursuer would have used them to facilitate moving the stack of RUBs.

[24] Douglas Elliot and Campbell McMoran, Assistant Manager, regularly observed the operations on the moulding floor. Liz Hunt, Supervisor, with responsibility for health & safety, occasionally passed through the moulding floor. The defenders' response to an employee seen moving RUBs without dolly wheels was inconsistent depending on by whom the employee was seen. No employee was disciplined for doing so.

[25] Other than being directed to raise problems with a charge hand or supervisor the defenders' employees were not directed in the carrying out of their duties and in particular in the moving of RUBs in the event of dolly wheels not being available for their use while the machines continued to operate and produce components.

[26] Shortly before the pursuer's accident more dolly wheels were ordered. On 27 February 2014 the defenders ordered 200 dolly wheels for RUBs from Ocean Engineering Solutions Limited Blackburn, 50 of which were allocated to the premises in Coatbridge. Number 6/10 of process is a copy of the order form number 6184. Number 6/6 of process is a copy of a delivery note dated 26 March 2014 for order number 6184. On 27 March 2014 McAlpine & Co Ltd ordered 100 dolly wheels for RUBs, 50 of which were to have rubber wheels. They were to be delivered to Hillington. Number 6/11 of process is a copy of the order form number 965. Number 6/7 of process is a copy of a delivery note dated 6 May 2014 for order number 965.

[27] After the pursuer's accident more dolly wheels were ordered. On 8 May 2014 the defenders ordered 200 dolly wheels for RUBs, 100 of which were allocated to the premises in Coatbridge. Number 6/12 of process is a copy of the order form 6197. Number 6/8 of process is a copy of a delivery note dated 4 June 2014 for order number 6197. On 5 June 2014 the defenders ordered 200 dolly wheels for RUBs, 50 of which were allocated to the premises in Coatbridge. Number 6/13 of process is a copy of the order form number 999. Number 6/9 of process is a copy of a delivery note dated 9 July 2014 for order number 999. Not all dolly wheels ordered were specified to be of the new type with rubber wheels.

[28] Following the pursuer's accident, racks to hold dolly wheels were constructed on behalf of the defenders and located at various points throughout the defenders' premises, including a short distance from the automatics on the moulding floor.

[29] The availability of dolly wheels in the defenders' premises improved after the pursuer's accident.

Finds in Fact and in Law that the pursuer's accident was caused by the fault and negligence of the defenders; grants decree against the defenders for payment to the pursuer of the sum of Eight Thousand Five Hundred Pounds (£8,500) Sterling together with interest thereon at the rate of eight per cent per year from 3 October 2017 until payment; reserves meantime all questions of expenses, assigns a hearing thereon to take place within the Sheriff Court House 27 Chambers Street Edinburgh on 27 March 2018.

Note

Introduction

[1] The pursuer's action for damages proceeds under Chapter 36 of the Ordinary Cause Rules in the All Scotland Sheriff Personal Injury Court. Prior to proof Joint Minutes numbers 19 and 20 of process were entered into whereby agreement was reached in relation to many of the documents produced. At the commencement of proof on 3 October 2017 quantum of damages was agreed in the sum of £8,500 inclusive of interest.

[2] Evidence was led over a number of days. The fact of and the mechanism of the pursuer's accident was not disputed. It was agreed that on 30 April 2014 at or about 9am the pursuer was pushing a stack of 4 really useful bins (RUBs) across the floor of her workplace when the bottom bin caught on a cracked and uneven part of the floor. This caused the RUBs to fall over. The pursuer fell to the ground striking a table containing a Jig machine as she did so. As a result she suffered an injury to her right side and wrist.

[3] It was not disputed that the defenders occupied the premises at Coatbridge, that they comprised a workplace, that the RUBs and dolly wheels were work equipment or that the pursuer was carrying out a manual handling operation. The defenders' position was that the pursuer knew she ought not to have been moving RUBs without them being placed on dolly wheels, that dolly wheels were available to the pursuer and that the accident was her own fault or at least she had materially contributed to it although counsel for the defenders ultimately departed from an argument on contributory negligence.

The Evidence

[4] The pursuer gave her evidence in a straightforward manner without exaggeration or embellishment. She has been employed by the defenders for about 24 years and continues in their employment. Indeed all witnesses, with the exception of the now retired Douglas Elliot, continue in their employment. I formed the impression that the pursuer was a credible and reliable witness. She was described by Douglas Elliot as very conscientious. That appeared to me to be a fair description. She struck me as someone who wanted to do her job to the best of her ability.

[5] The pursuer described her working environment by reference to the photographs of the defenders' premises. It was clear that there had been some physical changes to the premises since her accident such as the introduction of a row of lockers under the clock, an area marked "Keep Clear" and the repair to the area of the floor where the accident had occurred.

[6] The machines which the pursuer was instructed to operate, known as automatics, were agreed to be in constant production, twenty four hours a day from Monday to Friday.

They produced plastic components for the plumbing trade. The components emerged from the machines via a conveyor belt into collection bins. The speed at which they emerged would vary depending upon the nature of the component part. Jig machines were situated at the end of the machines to finish off the components as required. Operators rotated between the automatics and the Jig machines.

[7] On the morning of the accident the pursuer was responsible for about 6 automatics. The machines were already in operation when the pursuer commenced her shift following on from the night shift. Components were being produced and the collection bins were filling up.

[8] The pursuer required to place the components produced by the automatics into RUBs. RUBs were stacked one on top of another. There was no evidence about how RUBs were removed from the automatics once filled by the operators. It is immaterial for the purpose of this case but I inferred that employees known as runners removed them and either they would be processed to leave the premises or would be stored within the premises until required at some later date.

[9] In order to obtain empty RUBs the pursuer had to fetch these. They were not delivered to her. There was a storage area for empty RUBs against a blue fence across from her machines. Such training as the pursuer had received, albeit that the documentation referred to, numbers 6/1 and 6/2 of process, related to the operation of Jig machines, appeared to emphasise three things. Firstly that RUBs should not be moved except on dolly wheels. Secondly that machines should not be left unattended. Thirdly that if there was a problem or if she required to leave her machine she should advise her Supervisor or Chargehand. All witnesses were in agreement about these matters.

[10] The pursuer said that when she commenced her shift on 30 April 2014 there were no empty RUBs or dolly wheels anywhere near to her machines. There was no Supervisor allocated to her area of work. Linda Gray was the charge hand. The pursuer said she spoke to Linda Gray and told her there were no RUBs or dolly wheels available. She said Linda Gray's response was that they, being the defenders, were waiting on a delivery from Hillington. This was not an unusual response. In order to get on with her job and deal with the components constantly being produced by her machines the pursuer collected a stack of empty RUBs from the storage area when they appeared there some time later. The stack of 4 RUBs which the pursuer was pushing over to her machines had been placed there by a runner, and was not on dolly wheels.

[11] The pursuer was supported by the evidence of John McCafferty. He has been employed by the defenders for about 14 years. At the time of the pursuer's accident he was one of the operators and also a health and safety representative for the employees. He confirmed that at the time of the accident there had been a shortage of dolly wheels, that it was not unusual for employees to push or pull a stack of RUBs if there were no wheels available, that depending upon the identity of the charge hand or supervisor no issue would be raised about doing so and that the availability of dolly wheels had improved after the pursuer's accident.

[12] Mrs Catherine O'Hara has been employed by the defenders for about 12 years. She was operating the jig machine at the end of one of the pursuer's automatics on the day of the accident. She observed the pursuer pushing a stack of RUBs along the floor and then falling. She confirmed that the pursuer's actions were not unusual and that all employees had done the same. She acknowledged that the RUBs were meant to be moved on dolly wheels but

said that some days it was not easy to find any. Since the accident it had not been a problem to find dolly wheels and there were now racks on which to store them at various locations within the premises. She did not pay much attention to notices but she was aware that there had been complaints about the lack of dolly wheels. She was also aware that some people had been “told off” for pushing RUBs without wheels.

[13] Carol Logan has been employed by the defenders for about 32 years. She was operating a jig machine on the day of the pursuer’s accident. She saw the pursuer pushing a stack of RUBs and observed her fall. She went over to the pursuer to assist. She was not surprised that the pursuer had been pushing a stack of RUBs and said she had also done so. At the time of the accident there had been a shortage of wheels. She was aware the issue had been added for discussion at the Health & Safety Committee meeting. She said the defenders’ response had been to blame suppliers. She said it was not necessary to push RUBs without wheels now because there were sufficient numbers of dolly wheels available including on racks.

[14] Danny McKeown has been employed by the defenders for about 29 years carrying out the same job as the pursuer. He had been a charge hand for about 3 years but did not want to continue in that role. He also confirmed that sometimes there was a shortage of dolly wheels. There was definitely not a glut of wheels. He was aware that the issue had been raised with the defenders at Health & Safety Committee meetings and that it had been discussed amongst the operators. He was not surprised that the pursuer was pushing RUBs without wheels. He said he and others had also done so. He was not aware of anyone being disciplined for doing so. He also confirmed that the safe method of work form number 6/1 of process had been given to him to communicate to employees including the pursuer. He

had gone over the form with the pursuer while she was engaged in operating the jig machine. A similar procedure had been adopted in respect of numbers 6/3 and 6/9 of process. The procedure would have taken no more than 5 minutes. As with others he was aware that a lorry arrived on a daily basis from Hillington. He was uncertain what the lorry brought in. He recalled pallets of dolly wheels arriving some time after the pursuer's accident.

[15] Linda Gray was another long serving employee of the defenders. She has been employed for about 18 years and a charge hand for about 3 ½ years. She was the charge hand for the dayshift on the moulding floor on the day of the pursuer's accident. While asserting that there were dolly wheels available she also said that they were not always available and that sometimes there were none available. She did not say where there were dolly wheels available to the pursuer. She was aware that for some time before the pursuer's accident there had been complaints about the lack of dolly wheels. She was aware that people moved RUBs without wheels. At times she appeared to suggest that it was alright to do so if it was a stack of 3 but not if there were more. She did not remember a conversation with the pursuer about the availability of dolly wheels but did not deny that such a conversation took place. She would not have been surprised to have been asked about dolly wheels if there were none. People did ask for dolly wheels. She would ask someone to get some. She did not remember getting dolly wheels for the pursuer or mentioning Hillington. In cross-examination Miss Gray said that if asked she would have done her best to get some dolly wheels from somewhere.

[16] Marilyn Cumming has been employed by the defenders for about 12 years and is one of their Supervisors. She did not witness the pursuer's accident, did not remember if she

had any responsibility for the pursuer at the time of her accident and thought that Linda Gray was the charge hand for the pursuer's area of work. Her position was that there were always dolly wheels in the premises and that if there were none on the racks they would be brought in from outside. She did not know how many there were. She denied that there was a shortage of wheels and said that they were always available. She was unaware of any complaints about shortage before the pursuer's accident and was unaware of the notice number 5/3/4 of process containing the entry by Ms McCusker. She believed that if management were ordering more dolly wheels it was to avoid taking stored RUBs off wheels. Employees should not be pushing RUBs without wheels. Although she could not say if it did happen or not she claimed to have spoken to two people who had been doing so. She agreed in cross-examination that the concern about a shortage of dolly wheels was well known because it had appeared in notices and minutes of the Health & Safety Committee, that it was at least contributed to by the fact that filled RUBs in storage were sitting on wheels in various parts of the premises and that after the pursuer's accident the position improved because more wheels were brought in.

[17] Douglas Elliot retired as General Manager of the defenders in March 2017 after 30 years employment with them starting as an operator. His principal duties included health and safety. He was not directly involved in training employees but signed off on what was carried out by others. In 2014 he said he was out on the floor on a daily basis carrying out a walk around to ascertain what if any issues there might be. The day shift was the busiest of the three shifts operated. Numbers 6/20 and 6/21 were examples of newer models of RUBs and dolly wheels. He said it was very important that RUBs were put on wheels to move them. Despite being on the floor on a daily basis he did not see anyone not using wheels.

Filled RUBs were taken off the dolly wheels in the loading bay, hung on racks which had been specially made by a blacksmith and then returned to the factory. He claimed that the racks for dolly wheels had been available for several years before 2014. These were available near to the entrance to the gents' toilets which were near to the blue fence. He said that there was a constant recycling of RUBs and wheels and that there was a "glut" of wheels in the premises. Immediately after the pursuer's accident he issued a notice, number 6/2 of process, reminding employees about the number of RUBs in a stack when being moved and that the RUBs must be on wheels or a sack barrow. He said a previous notice had been issued in 2012. He had viewed CCTV footage of the pursuer's accident almost immediately after it had happened. Initially he denied he had viewed it with anyone else but later admitted that he had viewed it with Kenny McDiarmid. He had seen the pursuer pull out RUBs from beside the blue fence and then push them towards her automatics. When the RUBs got to an expansion joint the bottom bin stopped because it was not on wheels. The RUBs went forward and the pursuer fell to her right hitting her right hand off one of the benches. In Mr Elliot's opinion the principal cause of the accident was that the pursuer was not using dolly wheels to move the RUBs and also that the RUBs had stopped on the raised edge of filler material over the expansion gap. Mr Elliot explained that in 2014 his assistant manager, Cameron McMoran, had been authorised by him to order new dolly wheels. He said that the numbers ordered would be divided amongst the various premises in Glasgow and Coatbridge. The reason for the orders was because the defenders were improving the quality of the wheels. He claimed that on his tours of the premises he saw no problem with the availability of wheels. He had carried out an exercise at some unspecified time after the accident, along with an unidentified person from the weighing area, to estimate, roughly, the number of dolly wheels available within the premises. He had done so by estimating the

number of RUBs and dividing that by a figure which had resulted in the averment "At the time of the accident there were approximately 1000 dolly wheels in use." After the accident he did not carry out any investigation to ascertain whether dolly wheels were in fact available to the pursuer.

[18] At the end of his evidence Mr Elliot accepted that he knew about the concerns of employees arising from a shortage of dolly wheels because of the complaints made to the Health & Safety Committee. He knew of the terms of Ms McCusker's note in number 5/3/4 of process raising the likelihood of an accident when pulling RUBs because of a lack of availability of wheels.

[19] Elizabeth Hunt has been employed by the defenders for about 24 years. At the time of the pursuer's accident she was one of the supervisors with a responsibility for training in health and safety. Until about 2013 she had been a Production Supervisor. She was promoted in September 2017 and is now a Production Manager for the holding company based at Thornliebank. When at Coatbridge she had an office in what is referred to as the "new" building and spent the majority of her time there. She passed through the moulding floor on her way to the Training room but did not spend long periods on the floor. She was not aware whether operators were requesting wheels on a regular basis. It was contrary to training to push RUBs not on wheels. These could be dolly wheels, a sack barrow or a larger barrow. If there were no wheels an operator should ask their charge hand or supervisor. They could lift the RUBs one at a time while waiting for wheels to become available. She had spoken to persons seen pushing RUBs without wheels. She was familiar with the notice number 6/2 of process and said there had been a previous notice although she could not say what the wording had been or when it had been put up. She had a limited recollection of

what happened at the time of the pursuer's accident. She was not involved in any investigations arising from the pursuer's accident. She was not involved in any decisions such as the instruction to repair the broken area around the expansion joint. The responsibility for health and safety rested with Mr Elliot. She was involved in preparing training sheets in relation to trips, slips and falls. She was unable to say when racks for dolly wheels were introduced into the premises. She asserted that there were dolly wheels in the premises but could not say how many or where in relation to the pursuer. She was aware that concerns about a shortage of wheels had been raised at Health & Safety Committee meetings. She did not attend those meetings unless requested to do so by management. She was critical of the pursuer because by pushing RUBs she was not following procedure and was putting herself at risk. She said there was always an alternative such as moving the RUBs one at a time. She claimed that there were sufficient wheels available and that more were being ordered because management wanted to have all stacks of RUBs on wheels. She acknowledged that if there was a shortage of wheels a change in working method needed to be addressed.

Discussion

[20] In not rehearsing in detail the careful submissions of counsel I intend no disrespect. Both Mr Fitzpatrick and Mr Thomson assisted in providing written submissions which now form numbers 21 and 22 of process. However as the submissions of Mr Thomson progressed it became apparent that the issue for determination was a narrow one. Mr Thomson very fairly accepted that there was evidence that dolly wheels were not always available, that the lack of availability had been brought to the attention of the defenders in

about November 2013, that it was immaterial whether there were 3 or 4 RUBs in the stack being pushed by the pursuer and how frequently employees might push or pull RUBs without wheels. It was also accepted by Mr Thomson that there had been a significant amount of evidence which was irrelevant. In short he accepted that if the defenders allowed their employees to push RUBs along the floor without wheels this would amount to negligence. The issue was whether the evidence of the pursuer was preferred to that of Linda Gray about the conversation alleged to have taken place prior to the accident. If the pursuer's account was preferred then Mr Thomson accepted that there could be no argument on contributory negligence. I would observe that it is regrettable that notwithstanding the involvement of two very experienced counsel it apparently took until the close of submissions to recognise the foregoing.

[21] As indicated above I formed the impression that the pursuer was a credible and reliable witness. I did not detect any exaggeration or embellishment of her evidence. She appeared to be an efficient and long standing employee who knew the job and just wanted to get on with it to the best of her ability. That all the witnesses, with the exception of Mr Elliot who has retired, continue in the employment of the defenders, or in the case of Miss Hunt the holding company, is worthy of note. It could not be, and indeed was not, suggested that the pursuer or any of her witnesses carried some grievance against the defenders and had tailored their evidence accordingly. In contrast I noted that the evidence of those who held a supervisory role with the defenders, leaving aside Mr Elliot, was often vague, more cautious and indeed at times defensive. Each of Miss Gray, Miss Cumming and Miss Hunt were anxious to assert that there were dolly wheels available for the pursuer to use, although Miss Gray was prepared, albeit hesitantly, to acknowledge that on

occasions there was no availability. No specific basis for their assertions of availability was brought out in evidence. It may have been accurate to say that there were dolly wheels within the defenders' premises but the issue was whether any were available to the pursuer for her use in moving a stack of RUBs at or about the time of her accident. Even Miss Gray who was the charge hand for the moulding floor and was on duty in the area on the day of the accident did not give any evidence about the actual availability of dolly wheels near to or in the vicinity of the pursuer at or about the time of her accident. The most she was able to say was that, if asked, she would have done her best to get some from somewhere. It appeared that prior to and at or about the time of the pursuer's accident getting dolly wheels involved a search of the premises both inside and outside, including storage containers, and the possible removal of stacks of filled RUBs to release the dolly wheels on which they were sitting. In saying that dolly wheels were available it appeared to be more in hope than expectation.

[22] No witness other than Mr Elliot volunteered that dolly wheels were available on racks specially made and that these were located outside the gents' toilet near to the pursuer's automatics. Miss Hunt despite her responsibility for health and safety matters could not say when these racks were introduced. It was not put to the pursuer that she could and indeed should have gone to these racks for dolly wheels. From the evidence of the pursuer and her witnesses I concluded that these racks were introduced after the pursuer's accident. No documentation was produced to show when the construction of the racks was instructed or payment made therefor.

[23] During the evidence, with the exception of Mr Elliot's, I noted the presence of a gentleman in the public benches who was taking notes. It became apparent during the

evidence of Mr McCafferty and was subsequently explained by Mr Thomson that this person was Mr Scott the current General Manager of the defenders. It was said that he was present only to “understand the court process and what the witnesses had to say”. His presence was noted by the witnesses. Whether the defensive manner of those mentioned above or their apparent anxiety to adhere to the defenders’ line that dolly wheels were available, notwithstanding evidence to the contrary, was influenced by his presence is difficult to say with any real certainty. If I was conscious of his presence and the fact that he was taking notes the witnesses could not fail to be similarly aware. In the course of her evidence Miss Gray said she had been spoken to by Mr Elliot about her being called as a witness but he had not spoken to her at the time of the accident. Although Mr Thomson advised that the intention of Mr Scott to sit in court had been discussed with him and he had seen no difficulty with it and of course the proceedings were conducted in public I was left with the impression that Mr Scott’s presence had had an unquantifiable influence upon those witnesses named above. His absence during Mr Elliot’s evidence was not explained.

[24] I would observe that Miss Hunt was less defensive in her evidence but from her demeanour and some comments about the pursuer which she did not elaborate upon I formed the impression that she was rather dismissive of the pursuer. Whether of her as an individual or of her claim in these proceedings was not clear. However, I found her evidence to be of limited assistance. She was not present when the accident occurred, had no direct knowledge of its circumstances and limited recollection of any dealings with the pursuer. It was more than a little surprising that, as a Supervisor with responsibilities for health and safety, she was not involved in any investigation of the accident, she was not involved in any investigation or consideration of the employees’ complaint about shortage

of dolly wheels and the potential implications from such a shortage, she was not involved in any regular inspections of the state of the floor of the premises, she did not attend Health & Safety Committee meetings unless requested to do so by management and was not present when the issue of potential accidents from the absence of dolly wheels was being discussed. It appeared that she had a very passive and limited role in relation to health and safety.

[25] I formed the impression that the defenders had a “tick box” approach to health and safety. They had identified a risk of harm in employees moving a stack of RUBs if not on dolly wheels and instructed them not to do so. No one was disciplined for not adhering to the instruction. When it was made known to them that there was a shortage of dolly wheels and that employees were pulling or pushing stacks of RUBs and this was likely to lead to an accident no steps were taken to assess the situation and if necessary instruct employees in alternative methods of working. They continued to rely on the instruction not to move RUBs without dolly wheels despite being aware of their lack of availability. Miss Hunt’s suggestion that the RUBs could have been transferred one at a time might appear to be an obvious alternative. However it does not appear to have been suggested at any time, far less directed. Indeed all instructions and notices appear to imply that a stack of RUBs whether of 3 or 4 is envisaged as being moved at any one time.

[26] I would say that I found Mr Elliot to be an utterly unimpressive witness who appeared to be prepared to say anything to cast himself and his management in the best light. His position was clearly that he wished to blame the pursuer for doing something that she knew she ought not to do. He relied upon the instruction given to employees not to move a stack of RUBs without them being on dolly wheels. However I did not find him at all credible. Indeed, he had to admit to lying to the court about whether he had watched the

CCTV footage of the pursuer's accident with anyone. To say that his explanation for failing to save a copy of the footage was weak and incredulous would be an understatement. He asserted that he was meticulous about keeping records but the documents produced to the pursuer's agents and then to the court would suggest otherwise. He appeared to me either to have been selective in the documents produced or that documentation that might have been expected to be produced simply did not exist. The accident report number 6/3 of process was said to have been completed in part on the basis of a report from the First Aider who attended to the pursuer. No such report was produced. Mr Elliot admitted that he had not carried out any investigation and in particular he had not inspected the area where he maintained there would have been dolly wheels available. He was aware that the floor deteriorated around the expansion joints but there was no evidence of any regular inspections or maintenance programme. Miss Hunt was the only witness who spoke about regular visual inspections of the floor but did not detail by whom they were carried out, other than that she did not do so, or how frequently. Mr Elliot produced a notice after the accident which was said to be a copy of a notice that had been issued in 2012. He did not produce a copy of that notice. He did not produce stock records of the number of dolly wheels in the premises. Instead he said he made a rough estimate from the number of stacks of RUBs. That exercise was said to have led to an averment on Record whereby the defenders offered to prove that at the time of the accident there were about 1,000 dolly wheels in use. His estimate was carried out some time after the accident and could not have related to the time of the accident. In any event the number of wheels in use would not reflect the availability of wheels to the pursuer at the relevant time. If they were "in use" including for the storage of stacks of filled RUBs as appeared to be the case from the evidence they could not be available to the pursuer at the relevant time. It was not clear

when Mr Elliot was supposed to have carried out this exercise but I inferred that since it was information provided to the defenders' solicitors, if it was in fact carried out, it was more than likely after the raising of these proceedings. Accordingly the numbers obtained from such an exercise could not relate to the numbers at the time of the pursuer's accident. At best it appears to me that Mr Elliot misled those acting on behalf of the defenders. I did not accept his evidence either about the carrying out of the exercise or the number of dolly wheels which were said to be in the premises.

[27] Mr Elliot's assertion that he saw no issue with the availability of dolly wheels and that in fact there was a glut of them was astonishing and totally self-serving in light of the complaints made by the employees through the Health & Safety Committee meetings and the absence of any such response when the issue was raised at those meetings. He appeared to try but eventually could not pretend ignorance of the employees' concerns and the warning issued by them that there was a risk of an accident which did eventually occur. The records of the Health & Safety Committee meetings as produced undermined yet again Mr Elliot's claim to be meticulous in record keeping. Although there was said to be a system of notices before the meeting for employees to mark up any issues they wanted raised at monthly meetings of the committee only one such notice was produced, number 5/3/4 of process. It is clear that the notice was intended to be dealt with at the October meeting but remained in place with items being noted thereon in November. No minute of any meeting in November was produced and the minute dated 6 February 2014 is more a note of instruction of new health and safety representatives than a record of any substantive meeting. While it was recorded in the December minute that "more dolly trolleys [had] been on order for months" no documentation or copy order forms were produced dating

prior to February 2014. Even if, as suggested, it had proved necessary to change suppliers the original order forms should still have been available. It was inaccurate to aver, no doubt again relying upon information provided by Mr Elliot, that in February 2014 200 dolly wheels were ordered when, as the defenders well knew, only 50 of that total were to be delivered to the defenders' premises. Mr Elliot's and Miss Hunt's evidence tending to suggest that the obtaining of more dolly wheels was just part of a process of improvement is not borne out by the minutes of the Health & Safety Committee and the response to Miss McCusker's complaint and expression of concern.

[28] I found the evidence of Mr Elliot and the other witnesses for the defenders in relation to the availability of dolly wheels, in the sense of being available for her to use at or about the time of her accident, and the reason for ordering more, to be disingenuous. It was acknowledged by the pursuer and the other witnesses that dolly wheels were to be used to move stacks of RUBs. If they were not available a charge hand or supervisor should be told. There was no evidence of any assessment carried out by the defenders following receipt of the complaint by Miss McCusker and knowledge that employees were pushing or pulling stacks of RUBs without wheels because of a lack of availability. There was no evidence that arrangements were being made to systematically remove any wheels from below stacks of filled RUBs to make them immediately available pending the arrival of more wheels. No change in the method of work appears to have been considered. A reasonably prudent employer will conduct a risk assessment in connection with its operations so that it can take suitable precautions to avoid injury to its employees. The duty, whether statutory or otherwise, to carry out such an assessment is to determine what precautions, if any, a reasonable employer would have taken in order to fulfil his common law duty of care. That

the defenders took no steps to carry out any assessment of risk following notice of a potential risk of harm appears to be a clear breach of their duty of care.

[29] The defenders relied upon their instruction to their employees not to move a stack of RUBs unless on dolly wheels. The pursuer having done so they asserted that any accident must be her sole fault for not following those instructions. However as Mr Thomson conceded, if the defenders did not provide the pursuer with the equipment which they had determined was necessary, and particularly following her request for same, and instead allowed her to push a stack of RUBs without wheels they, and only they, must be liable.

[30] Where there were differences between the evidence on behalf of the pursuer and the evidence on behalf of the defenders I preferred that led on behalf of the pursuer. In particular, I preferred the evidence of the pursuer and accepted that she had spoken to Linda Gray about the absence of RUBs and dolly wheels and that she had been told that they were waiting on a delivery from Hillington. In these circumstances and in order to get on with her job of dealing with the parts constantly being produced by the automatics for which she was responsible and which could not be switched off by her she pushed a stack of RUBs without wheels. The stack had been placed, without wheels, by other employees in a recognised storage area from where it was known that operators such as the pursuer would retrieve them. That the pursuer would speak to Linda Gray about the absence of RUBs and dolly wheels was consistent with instructions issued to employees in the course of training and was consistent with the evidence of practice from other witnesses. Other than speaking to a charge hand or supervisor there were no instructions by the defenders as to what an operator should do if no dolly wheels were available. That the pursuer would not go off looking for dolly wheels in other parts of the defenders' premises was consistent with the

instructions not to leave her machine unattended and the fact that the machines were constantly producing components which had to be dealt with. If trimming or sealing was required this needed to be done while the product was still warm. In these circumstances it would be natural, if there was no equipment available, to speak to someone who had the authority to obtain it. The pursuer's evidence about Miss Gray's response was consistent with the evidence from Douglas Elliot and the minutes of the Health & Safety committee meetings that additional dolly wheels had been ordered and that delivery was awaited. It was also consistent with the evidence from other witnesses and Linda Gray that a lorry from Hillington arrived each morning. While there was no evidence from anyone who worked in the loading bay it was understood by the employees who gave evidence that the lorry collected and delivered items including RUBs and dolly wheels. Miss Gray agreed that it was not uncommon to receive requests about obtaining RUBs and or dolly wheels. In contrast to the pursuer's clear and confident recollection about a conversation in which the pursuer asked her about obtaining RUBs and dolly wheels Miss Gray was vague and uncertain. Significantly she did not deny that such a conversation had taken place.

Decision

[31] In my opinion, for the foregoing reasons, the defenders failed in their duty to take reasonable care for the safety of their employees, in particular the pursuer. They had identified a danger in moving stacks of RUBs if they were not on dolly wheels and had instructed employees not to do so. They knew that there was a lack of dolly wheels available to employees, that as a result employees were moving RUBs without the assistance of dolly wheels and that there was a risk of harm from such an action. They took no steps to assess the level of that risk arising from the lack of availability of dolly wheels or to consider

what precautions might limit the risk of injury. They failed to provide the pursuer with the equipment, namely dolly wheels, which they had determined was necessary for the safe movement of a stack of RUBs. They failed to provide the pursuer with a safe place of work by allowing the floor to deteriorate and become a hazard. I did not accept that any failure to keep clear a traffic route was relevant to the circumstances of the pursuer's accident.

[32] It is sufficient for the pursuer to succeed that the defenders have failed in their duty at common law to take reasonable care for her safety. For completeness I should say that the circumstances of the accident also comprised a breach of the defenders' duties in terms of section 2(1) of the Occupiers Liability (Scotland) Act 1960, Regulations 5 and 12 of the Workplace (Health Safety and Welfare) Regulations 1992 and Regulation 4 of the Manual Handling Operations Regulations 1992. I did not accept that the circumstances of the accident comprised a breach of Regulation 12 of the Provision and Use of Equipment Regulations 1998. The duty in Regulation 12 is regarding the suitability of work equipment provided. As in the case of *Elphinstone v Shetland Islands Council* [2013] CSOH 96 the pursuer's accident was not caused by work equipment which was not suitable but by the failure to provide the equipment.

[33] I was referred to various authorities as undernoted which I found largely to be of no assistance given that the case turned on the credibility and reliability of primarily the pursuer and Miss Gray.

Expenses

[34] I was invited to reserve the question of expenses, certification of skilled witnesses and sanction for the employment of counsel. The pursuer having been successful one might

anticipate that an award of expenses would follow in the normal course. Unless parties are able to reach agreement a hearing will be necessary.

Authorities

Kennedy v Cordia (Services) LLP (2016) 1 WLR 597

Kennedy v Chivas [2013] CSIH 57

Baker v Quantum Clothing Group Ltd (2011) 1 WLR 1003

Brown v Rolls Royce Limited (1960) SC (HL) 22

Elphinstone v Shetland Islands Council (2013) CSOH 96

Monkman on Employers' Liability 16th Edition at page 59

Redgrave's Health and Safety 9th Edition at pages 568, 963 and 989

Occupiers Liability (Scotland) Act 1960

Workplace (Health, Safety and Welfare) Regulations 1992

Provision and Use of Work Equipment Regulations 1998

Manual Handling Operations Regulations 1992