SHERIFFDOM OF LOTHIAN AND BORDERS

IN THE ALL-SCOTLAND SHERIFF PERSONAL INJURY COURT

[2024] SC EDIN 10

PN2422/21

JUDGMENT OF SHERIFF G S PRIMROSE K.C.

in the cause

JAMES NELSON

Pursuer

against

JOHN LEWIS PLC

Defender

Pursuer: Miller, Advocate; Thompsons Solicitors
Defender: Hennessy, Solicitor Advocate; Keoghs Scotland LLP

EDINBURGH, 12 July 2023

The sheriff, having resumed consideration of the proof, finds the following facts admitted or proved:

Findings in Fact

1. The pursuer is James Nelson. He lives at {redacted}. He is 60 years old.

2. The defender is John Lewis Plc. The defender owns and operates the Waitrose store at 38 Comely Bank Road, Edinburgh, EH4 1AW ("the store").

3. On 13 October 2018, the pursuer was employed by the defender as a nightshift worker at the store.

4. The pursuer's duties primarily entailed replenishing stock on shelves. Duties on any particular nightshift were usually assigned by a Team Leader. Team Leaders worked on the shop floor alongside staff.

5. On some nightshifts, a Nightshift Manager was also on duty. The Managers divided their time between the shop floor and other areas of the shop, including the office.

6. In 2018, the defender's only Nightshift Manager at the Comely Bank store was Craig Smith.

7. The pursuer started a shift around 9pm on Saturday 13 October 2018.

8. There was no Nightshift Manager working on the evening of 13 October 2018.

9. The pursuer worked his full shift into the morning of Sunday 14 October 2018. The pursuer also worked a nightshift starting on the evening of 14 October 2018 through to the morning of Monday 15 October 2018.

10. That during the course of the nightshift undertaken by the pursuer on 13 October 2018, at or about 10.30pm, he was struck by a ball which had been thrown by a fellow employee, James Moran.

11. The ball, which had been thrown at the pursuer deliberately, struck him on the back of the head on the right side, also partially striking his right ear.

12. That from at least early June 2018 there had been a history of younger employees at the Comely Bank store engaging in general horseplay and in particular the throwing of balls, around the store during the nightshift.

13. On occasion the balls were thrown either deliberately or carelessly so that they struck fellow employees.

14. The balls thrown were either makeshift balls, made from packaging or similar materials, or balls that were held as items of stock for sale in the shop.

15. From at least early June 2018 employees had complained to the defender's management about the throwing of balls and also about general horseplay by the younger staff members.

16. Complaints had been made about the behaviour of younger staff by various employees, including the pursuer and Paul Thomson.

17. The members of staff about whom complaints were made included James Moran.

18. The defender's management were aware of the ongoing practice of younger employees throwing balls around the store in the period from at least early June 2018 until 13 October 2018.

19. Craig Smith had called a meeting on 6 June 2018 at which he had spoken to a number of employees together regarding the throwing of balls.

20. The meeting took place during the nightshift at the Comely Bank Store, and was held in the area of the tills.

21. The employees in the group spoken to by Craig Smith included the pursuer and James Moran.

22. That the pursuer had only thrown balls on a very few occasions, and when he had done so this had been in retaliation or anger, after he had been struck by a ball thrown by others.

23. Apart from on the occasions mentioned in the foregoing paragraph the pursuer did not engage in the horseplay and the throwing of balls, which happened at the store on an almost nightly basis.

24. James Moran was frequently engaged in throwing balls and in acts of horseplay.

25. At the meeting on 6 June 2018 Craig Smith warned those involved in throwing balls that the practice was to cease, and that if it did not then disciplinary proceedings would be considered.

26. Despite the warning issued by Craig Smith the younger members of the nightshift staff continued to throw balls around the store which occasionally struck other members of staff.

27. The defender was aware, through Craig Smith, that balls continued to be thrown, but took no action to prevent the practice.

28. The defender failed to undertake a risk assessment of the dangers presented to their employees by the throwing of balls and general horseplay which was prevalent in the Comely Bank Store during 2018.

29. The pursuer first reported the incident involving James Moran to two of his managers approximately 2 weeks after 13 October 2018, when he attended at work to hand in a sick note for an unrelated condition. The report of the incident was to have been passed to Craig Smith by the managers to whom the pursuer made the report, but that did not occur.

30. During an Occupational Health telephone call relating to the pursuer's unrelated long term absence in February 2019, Craig Smith became aware that he had suffered an incident at work in October 2018. Craig Smith was not aware of the circumstances. The incident had not previously been reported to him. He approached the pursuer but the pursuer told him he did not want to discuss it. Craig Smith asked two other managers whether they were aware of an incident and they were not.

31. On the pursuer's return from sick leave in June 2019, Craig Smith became aware of the previously unknown incident involving a ball being thrown. By that stage, Craig Smith

was no longer the pursuer's line manager. Craig Smith passed over incident investigation responsibilities to the pursuer's line manager.

32. That on the morning of Saturday 13 October the pursuer woke with unilateral deafness in the right ear and tinnitus in the left ear.

33. That the pursuer consulted his GP practice at Eyre Medical Practice, 31 Eyre Crescent, Edinburgh, EH3 5EU on 15 October 2018 and was seen by Dr Sarah Oliver, a GP trainee, regarding the sudden onset of deafness earlier that day.

34. That the history given to Dr Oliver by the pursuer was that he had woken on the morning of Saturday 13 October with a sudden unilateral deafness in his right ear and tinnitus in his left ear.

35. Dr Oliver mistakenly recorded that the pursuer's deafness had come on four days earlier in her note of the consultation on 15 October 2018.

36. Examination of the pursuer's right ear by Dr Oliver on 15 October 2018 revealed no obvious abnormalities, a clear ear canal and a healthy tympanic membrane.

37. The pursuer had no pain or discharge from his ear at the said examination.

38. That examination of the pursuer's left ear on 15 October 2018 disclosed no abnormality.

39. On the date of the said examination Dr Oliver did not have access to a tuning fork, which she would otherwise have used to ascertain whether the pursuer's deafness was conductive or sensorineural.

40. Dr Oliver contacted the Ear, Nose and Throat Department at Lauriston Building, Lauriston Place, Edinburgh by telephone on 15 October 2018 in order to seek an urgent referral for the pursuer in respect of his deafness and tinnitus.

41. That the ENT Department agreed to see the pursuer urgently and advised Dr Oliver to commence the pursuer on a course of the oral steroid Prednisolone immediately.

42. That Dr Oliver dictated a letter referring the pursuer on to the ENT Department at Lauriston Building, Edinburgh on either 15 or 16 October 2018.

43. The referral letter, dated 16 October 2018 recorded that the pursuer had given a history of wakening on the previous Saturday morning with no hearing on his right side and tinnitus on the left side.

44. That Dr Oliver reported to the ENT Department that examination of the pursuer's left ear was unremarkable and that examination of the right ear revealed no obvious abnormalities with a clear canal and healthy tympanic membranes.

45. On or about 28 November 2018, the pursuer advised the treating clinician(s) who examined him at the ENT Department, Lauriston Building, Edinburgh that he had suffered sudden unilateral hearing loss in his right ear after having been struck by a soft ball.

46. On or around 28 November 2018, the pursuer told his treating clinician at the ENT department that he had experienced some recovery of hearing. The pursuer's audiogram of 28 November 2018 showed improvement in right sided hearing from the audiogram carried out on 17 October 2018.

47. On 6 January 2019, the pursuer underwent cranial MRI which was noted to be unremarkable.

48. The pursuer initially did not attend at follow up consultation at the ENT department. He was seen again on or around 8 November 2019 when it was noted that there had been no further recovery of his hearing.

49. The pursuer was put on a waiting list for a hearing aid. The pursuer was fitted for a hearing aid in his right ear on or around 12 February 2020. The hearing aid was matched to 65dB. The pursuer was noted to have responded well to live voice during the fitting.

50. The pursuer has never used his hearing aid.

51. The pursuer has had no further follow up consultation or treatment with the ENT department and no further GP attendances related to his hearing.

52. Audiogram obtained on instruction by Mr Newton on 13 September 2021 shows a profound hearing loss in the right ear. The audiogram shows a worse level of hearing than is shown in either of the audiograms of 17 October 2018 and 28 November 2018.

53. The audiogram from 13 September 2021 also shows a moderate to severe high frequency hearing loss in the pursuer's left ear.

54. The pursuer's hearing loss was not caused by the incident when he was struck by the ball thrown by his colleague on 13 October 2018.

55. The cause of the pursuer's sudden unilateral hearing loss and tinnitus is unknown.

Findings in fact and law

56. The defender breached its duty to take reasonable care for the safety of the pursuer by failing to act upon and address the complaints of staff members, including the pursuer, about the throwing of balls and general horseplay within the Comely Bank Store. The defender also breached its duty of reasonable care to the pursuer in failing to adequately supervise James Moran following the complaints about his behaviour and the meeting held by Craig Smith on 6 June 2018.

57. The defender breached its duty to take reasonable care for the safety of the pursuer by failing to conduct a risk assessment of the risk to the health and safety of employees

which arose from the climate of horseplay, which included throwing balls, at the Comely Bank Store following the complaints of staff from June 2018 onwards.

58. The defender is vicariously liable for the acts and omissions of Craig Smith and other management to whom the pursuer and other employees complained about the culture of horseplay and throwing balls at the Comely Bank Store.

59. The defender is vicariously liable for the act of James Moran in the throwing of the ball at the pursuer on 13 October 2018.

60. It was foreseeable that if the defender failed to address the concerns of staff about the throwing of objects a staff member could sustain injury.

Findings in Law

61. The pursuer has failed to establish a causative link between the onset of his sudden unilateral deafness and tinnitus and the incident when he was struck by the ball thrown by James Moran on 13 October 2018.

62. Accordingly, decree of absolvitor is pronounced.

NOTE

Introduction

[1] In this action the pursuer, James Nelson, whose date of birth is 19 March 1962, seeks damages from the defender, John Lewis Plc. The defender employed the pursuer at one of its Waitrose supermarket branches at 38 Comely Bank Road, Edinburgh. The defender owns and operates the store. At the time of the incident in respect of which the pursuer complains, 13 October 2018, he was working on nightshift at the store.

Pursuer's case

[2] The pursuer avers that he commenced work at around 9pm on the said evening and that he and his colleagues were assigned different tasks within the premises. Tasks were usually assigned by Team Leaders. On some but not all nightshifts a Nightshift Manager would be present in the store. The manager would divide his time between the shop floor and other areas of the building, including the office. That night the pursuer had been assigned to work in the World Cuisine aisle. Whilst he was kneeling down stacking containers of olive oil he was struck by a football thrown by one of his colleagues, James Moran. It is averred that on the night in question James Moran was "running around the premises throwing soft toys at workers while in the course of his employment and under the control of the defenders." The pursuer pleads that as a result of being hit by the ball, which struck him on the back of his head behind his right ear, he was knocked over and suffered a sudden hearing loss.

[3] It is further averred that prior to 13 October 2018, the pursuer had complained to his manager, Craig Smith, on previous occasions about similar incidents and that other employees had complained. Craig Smith was the only Night Shift Manager employed by the defender at the Comely Bank Store in October 2018.

[4] The pursuer seeks damages in respect of the defender's alleged negligence in failing to act upon and address complaints which had been made about the actions of James Moran in respect of acts of horseplay committed during the course of the nightshift at the Comely Bank Store. The pursuer avers that the defender had failed to adequately supervise employees about whom concerns had been raised and that they had a duty to carry out a risk assessment in relation to the workplace in terms of Regulations 3 and 5 of the Management of Health and Safety at Work Regulations 1999. In addition to these direct

cases of fault, the pursuer also seeks to hold the defender vicariously liable for the actions of James Moran. He pleads that Mr Moran was negligent in throwing the ball, failing which the act of doing so constituted an assault, and that in either case the defender is liable for Mr Moran's actings. By way of an amendment introduced on the third day of the proof, which sensibly was not opposed by the Solicitor Advocate for the defender, the pursuer sought to add a further case of vicarious liability on the basis that *esto* the duties of performing risk assessments, acting upon and addressing complaints about staff and supervising employees about whom complaints had been raised had been delegated to the defenders' managerial staff, they had failed in these respects and the defender was vicariously liable for such failings. I allowed this amendment.

Defender's response

[5] The defender's response on Record to the cases of fault is to the effect that if James Moran had acted as alleged by the pursuer, which is denied, then his actions were of his own volition, without a sufficient connection to his employment to render the defenders vicariously liable, that he was not acting in the ordinary course of his employment and that he had "engaged on a frolic of his own".

Motions for the parties

[6] The pursuer invited the court to pronounced decree for payment in the sum of £129,324.25 with interest thereon from 13 October 2018 until payment, and for the expenses of the action.

[7] The defender moved the court to grant decree of absolvitor and to fix a hearing on expenses.

Losses claimed

[8] The pursuer claims damages in respect of: solatium; inconvenience; necessary services; disadvantage on the labour market; and out of pocket expenses. He avers that he sustained a head injury as a consequence of the accident and that he has developed tinnitus and a permanent impairment to the hearing in his right ear. He now requires to wear a hearing aid in his right ear and can no longer continue his hobbies of making bagpipes as he cannot tune the instruments. He has difficulty crossing roads, hearing on the telephone, speaking to colleagues at work and finds social interactions difficult. His sleep and ability to drive have been affected. He has been inconvenienced as a consequence of having to attend upon his solicitor and medical practitioners in connection with the present court case. He pleads that he has required personal care and assistance from his family and that he cannot help family members with day to day activities in terms of section 9 of the Administration of Justice Act 1982 as a consequence of his injuries. The pursuer pleads that he will incur expenses as a result of the accident, because his NHS hearing aid is insufficient and he will require to purchase a stronger hearing aid system.

The defender's quantum averments

[9] The defender avers that the pursuer had suffered from a "sudden right sided sensorineural hearing loss". It is further averred that an audiogram on 28 November 2018 showed a recovery in his hearing. The defender pleads that the pursuer has a history of sudden onset of hearing loss, having experienced such a condition in 2003. He also had a history of hearing loss and tinnitus in his right ear following an assault in 1999. Reference is made to various medical conditions from which the pursuer has suffered including diabetes

and depression and the defender pleads that the pursuer has previously suffered from a number of conditions that limit his ability to carry out the full range of tasks at work, including picking online shopping and cleaning.

Joint Minute

[10] The parties entered into a Joint Minute agreeing some basic facts, which are reflected in the findings in fact above, and the terms of the medical records.

Witness evidence

Liability evidence for the pursuer

[11] On behalf of the pursuer liability evidence was led from Mr Nelson, Ross McLelland, Adam Kerr and Paul Thomson.

Pursuer's evidence

[12] The pursuer gave evidence that he was still employed as a nightshift shelf stacker at the Comely Bank branch of Waitrose. He confirmed that he was at work as a shelf stacker on the nightshift spanning 12 to 13 October 2018, his duties involving him in replenishing the aisles with fresh stock after the day's business. That evening he had started work at around 9pm and had been assigned the task of stocking the shelves in the World Cuisine aisle by his team leader. He was accountable to his Team Leader and the Nightshift Manager during a normal nightshift. On the night in question there was no manager on duty. If he had any concerns about the workplace he would speak to a manager if it was serious or a team leader if it was less serious. Normally the first person he would speak to about any issues would be the team leader. Issues such as lack of stock or the failure of an

earlier shift to complete their allocated tasks would be raised with Team Leaders. Mr Nelson was asked if he had ever had to complain about a particular person in his workplace and he replied that he had required to complain about James Moran. His evidence was that he had required to complain about Mr Moran most nights when they were working together, although occasionally Mr Moran would not be there and it would be quiet then. He said that it was "not a good place to work" when Mr Moran was present. Every night Mr Moran would run around throwing balls at other employees interrupting their work and causing stress. The balls were either hard plastic balls such as dog or cat toys, half sized footballs held as stock or other items, such as polythene packaging, which had been rolled into balls. He described the throwing of balls as constant and spoke to Mr Moran running past other workers and throwing the balls at their legs, buttocks or back. The pursuer described some of the balls as being made of hard rubber of a construction that would "do damage" if someone was struck on the head with one. His evidence was that Mr Moran was aware of this, and thus concentrated on throwing the balls at the lower body of other employees. Mr Moran was part of a crowd of youngsters who would run about and throw balls at each other and at other workers to disrupt their work, an activity which, according to the pursuer, they perceived as fun. On other occasions Mr Moran would come up behind the pursuer and scream to give him a fright. The pursuer described being left constantly anxious and fidgety by these activities, worrying all the time that he would be hit and constantly looking round behind himself. He described being upset and said that he had made clear to both Team Leaders and managers that he was upset and that he found constantly having to turn round to see what was going on "unbearable". He said his anxiety over such activities was "through the roof" and that he had constantly complained to Craig Smith, the Night Shift Manager and to Henry Taylor and anyone in authority who he

thought might be able to do something about the problem. He was unable to say when he first complained but thought that it had initially been nightly and that after nothing was done he accepted the situation but still complained occasionally when he felt "enough was enough". Despite his complaints the throwing of balls and frights occasioned by screaming behind him continued "non-stop" and Mr Nelson felt that Craig Smith did not take the complaints seriously. He thought Mr Smith's attitude was that it was just a bit of fun and that he had failed to grasp the effect it was having on him, despite his complaints that it was happening every night and that it was making him anxious. Having had no satisfaction from his complaints to Craig Smith the pursuer complained to his Team Leader, Henry Taylor, but nothing was done. The pursuer said that he specifically complained about Mr Moran throwing balls. His evidence was that Craig Smith was aware that he had mental health issues, that he was taking medication for this, and that the conduct of Mr Moran and other employees was having a negative effect upon his mental health. He said that he had never seen a risk assessment, either before or after the incident on 13 October 2018.

[13] In respect of the night of the incident, the pursuer was taken to production 6/2/4 which was a print-out of the staff rota for the night of 13 October 2018. He confirmed that he had been working at that time as the rota showed. He further confirmed that James Moran was also on shift, that there was no manager on duty that evening and that the most senior staff member present was Henry Taylor, who was the only Team Leader for that shift. He described how he had been down on his knees stacking the lower shelves with containers of olive oil when he felt a thump on the right side of his head that knocked him off balance and knocked out his headphone. He turned around to see James Moran sprinting off. He had been struck by a ball on the right hand side of his head, behind the ear, but including some

of the right ear. He indicated that the area struck was around 6-7 inches in diameter. The blow was fairly hard and enough to knock him off balance, which he said was not difficult as he was leaning over with two bottles in his hand. He fell to the left down on his knees on the lower shelves. He felt anger and frustration and felt "a fair thump" and a "thumping pain", and thought that James Moran had come in close "for the head shot" before he had thrown the ball. This appeared to be on the basis that the blow felt sorer than when he was normally struck by a ball thrown from a distance. He found Mr Moran, who was with a colleague, Kevin Laing, and remonstrated with him to the effect that he had gone too far and really hurt him, and that this was harassment, not a workplace game. Mr Moran said the ball was only thrown in fun and "for a laugh", but apologised for hurting the pursuer. The pursuer described in evidence how his headphone had been pushed in to his ear before falling out and that later on in the evening, just before going for his break at midnight, he had put his headphone back in to listen to a podcast and found that he could not hear anything other than a rushing sound. Initially he thought that the headphone had been broken in the impact but then realised he could not hear anything at all in his right ear and that "there was no hearing in the right ear at all, it had gone just like that". He described his hearing loss as immediate. He later said that the incident occurred about half past ten or eleven o'clock and that by half past midnight he could hear nothing on the right side. There were no first aiders on shift so he continued to work the remainder of his shift and went home.

[14] On the following Monday he called his GP, Dr Cockburn, at the Eyre Medical Practice in Edinburgh, who advised that the loss of hearing could be temporary in view of his having sustained a blow to the head, that he ought not to worry and he was given antibiotics which he was told should clear any infection. He was later referred to the Ear,

Nose and Throat Department of Edinburgh Royal Infirmary where he was seen by a specialist who administered a hearing test and then advised him that there was little hope of his hearing on the right side returning. In terms of the effect of the accident upon him he described how he was deaf completely on the right side, how he had tinnitus in the form of a constant buzzing or humming noise, which he also likened to a whine, and that these symptoms affected all aspects of his life as he could no longer play or make bagpipes, was anxious about crossing the road, always has to have the volume of the television or radio up so loud that other family members complain. He had purchased a motorbike but could not use it as he could hear nothing through his helmet and had bought a guitar but could not continue to learn to play due to his difficulties. Mr Nelson also gave evidence that he had suffered considerable stress as a result of the bullying and harassment he had suffered, such that he had required counselling for his difficulties. He is no longer able to go to the shops or socialise due to his loss of confidence and hearing difficulties and his daughter now assists him on a daily basis by going to the shops for him or making something to eat. She also prompts him with tasks which are affected by his hearing, for example when he sets an alarm when cooking food, which he fails to hear, and doing administrative tasks such as going to the bank, which he no longer feels comfortable doing for himself. Mr Nelson described in evidence how he has a son who suffers Muscular Dystrophy and that he had formerly gone down to his house and helped dress, feed and bathe him, but he no longer does this as he does not go out.

[15] The pursuer blamed "James Moran and Waitrose", by which he meant the defender, for failing to prevent employees from throwing balls at night and he said that if Craig [Smith] had done more, perhaps by disciplining Mr Moran, his injury would have been avoided.

[16] In cross-examination the pursuer was asked whether he remembered being spoken to as part of a group of employees, including James Moran, who were warned by Craig Smith about throwing mini footballs which were being sold in the store to commemorate the World Cup. He denied this and stated that he was not aware of there being a meeting at one of the checkouts when the throwing of balls was discussed. He denied that he had ever engaged in the game of throwing balls around the shop as other employees did, but admitted to throwing balls back at James Moran in anger on occasion. He did not accept the suggestion that the throwing of balls had been a game or a foolish escapade, on the basis that Mr Moran knew his situation and how this was affecting him, but nonetheless continued to do it. The pursuer accepted that those throwing balls knew that they should not be doing so and that such an activity was nothing to do with why they were at work. He said that on one occasion Craig [Smith] had told him that he could tell Mr Moran not to throw balls, but that he had no control over him when he (Mr Smith) was not at work, to which the pursuer's response was that Team Leaders should be strong enough to address such conduct. The pursuer accepted that one way of dealing with matters was for the manager to warn the employee and escalate the complaint to a disciplinary matter if the conduct did not stop. It was suggested to him that if a manager has warned staff and they continue to carry on the conduct outwith his or her presence, then there was nothing else that can be done. Mr Nelson did not agree with this, replying that the manager should escalate the matter to the next manager and that Craig Smith had either failed to deal with the matter at all or spoken to Mr Moran and thereafter ignored the fact that he was continuing to throw balls in the workplace, despite the warning.

[17] The pursuer was asked about his general health problems and stated that he had last worked at the store approximately 5 months before the proof. His evidence was that ball

throwing had now stopped since James Moran had left the nightshift and gone onto early shifts. He was then asked about the area injured in the incident and said that the ball came from an angle and struck a bit of his ear and the back of his head as well. He confirmed remonstrating with Mr Moran straight after he was struck and denied that he had been laughing about the incident. He confirmed that he had initially noticed a problem with his hearing before his break and gave evidence that he thought that he had mentioned this to Mr Moran after his break had finished. He thought that he had told "everyone" on the night in question that he had sustained a loss of hearing after being struck. He agreed that he had worked the rest of his shift, worked the next evening and only gone to the doctor on Monday, saying that this was because he had thought the problem might be temporary.

[18] The pursuer was then asked about his General Practitioner records, which formed number 5/1 of process, and in particular about the entry pertaining to his first report of the onset of deafness in October 2018, which was on page 28 of the records. The entry related to a consultation on Monday 15 October, and reads as follows:

> "Hearing loss Sudden unilaterla [sic] hearing loss on right side 4 days ago. systemically well no recent corsyal sx or otalgia / discharge from ear. No prev hearing issues except for traumatic perf of right TM 20 years ago (assault with a bottle). Mild tinnitus left ear. O/E left ear nad, right ear – no obv abnormalities. no facical asymmetry, vision normal with no nystagmus, unfort no tuning fork avail. P: urgent ENT ref (incl audiology). Dr Sarah Oliver"

Mr Hennessy suggested to the pursuer that this entry described hearing loss which had come on 4 days previously, that is on 11 October 2018, and did not mention anything about his being struck by a ball. The pursuer's reply was that this was an error of some kind, and that GPs always make mistakes, which he had seen many times with the dates on sick lines. It was put to him that the entry recorded "no otalgia", otalgia being ear pain, and he replied that this was not correct, that he had told the doctor that he was suffering from ear pain and

that this was wrong as well. He said he could remember the doctor asking everything, about how his hearing loss had happened and how much pain there was. He could not remember whether the doctor was male or female. Mr Nelson said that the doctor had asked him what he was experiencing and he said he had described a humming noise in his right ear. He was asked whether he had said he had tinnitus in his left ear and he denied this, saying he did not have tinnitus on that side at the time. He could not remember any of the detail of the physical examination but thought the doctor had asked lots of questions. At the end of the consultation he was referred to an ENT clinic by the doctor. Next the pursuer was asked about an entry in his GP records relating to a consultation on 6 December 2018 which showed that he had actually been prescribed steroids by the GP (rather than antibiotics as he had said in his evidence in chief) and which suggested that whilst his hearing was slow to return on the right ear, recent testing had been promising. It was suggested to him that this showed his hearing had improved somewhat following the initial onset of deafness but that he had said in his evidence in chief that it had completely gone. He replied it did come back "a bit" but that later he was told by Mr Syed, the Consultant whom he eventually saw, that his hearing was "quite bad" and would not return. He was told this on the second occasion that he saw Mr Syed in November 2018. This was around the same time that he stopped playing the bagpipes having found that he could no longer tune the instrument. He thought that he had stopped making bagpipes 3 years before the proof or perhaps a little more than that. He thought that this was 4 or 5 months after the accident. He denied that he had still been making bagpipes in September 2020 but was then shown an entry in his GP records regarding his asthma which recorded:

> "Consultation Asthma review – Covid 19. Works 12 hour shifts at Waitrose in warehouse / stocking up Never smoked has one dog (age 13), never had problems

> with the dog No known trigger factors but makes bagpipes for a hobby. This apparently entails blowing through bagpipes which can be dusty…."

In response to this Mr Nelson denied that he told the doctor that he was making bagpipes but thought that he may have said he had formerly had a hobby of playing the bagpipes and the doctor had picked this up wrongly and thought that making bagpipes could have triggered his asthma.

[19] The pursuer was then asked about the extent to which he was debilitated by his deafness and he confirmed that he required assistance from his daughter to cook as he could not hear an alarm going and might burn food, that he was quite restricted in what he could hear but that he did not use a hearing aid at present because the device with which he had been provided on the NHS was unsatisfactory. He confirmed that he could not hear his daughter talking to him from the kitchen of his home, even if the doors between these rooms were open. He was next asked about an entry in his medical records from 13 May 2021 where he reported to his GP that his sleep was poor due to noisy neighbours, and he was asked how he could be bothered by noisy neighbours given the levels of deafness he described. He stated that he could hear parties and the neighbour and others "thumping above".

[20] The pursuer was asked about an incident in 1999 when he suffered from severe sensorineural hearing loss in his right ear after having been assaulted by being hit over the head with a bottle. He agreed that he had said in his evidence in chief that his hearing had returned to normal after a relatively short time, but was then asked about an entry in his records from November 2003 relating to an examination by an ENT Specialist Registrar at the Royal Infirmary of Edinburgh following the sudden onset of left sided hearing loss in his left ear 4 days previously, accompanied by tinnitus. At that consultation Mr Nelson was

recorded as reporting that his hearing on the right side had returned, but not to normal. When questioned about this he said that his hearing did return to normal at some stage after 2003 and he denied that his hearing loss had continued since 1999 and maintained that it had come back but then disappeared on the right side again after the incident with Mr Moran. Under reference to a letter to his GP from Mr Syed the pursuer agreed that he had told Mr Syed at a clinic on 28 November 2018 that he had some recovery of his hearing, but qualified this by saying it was a "small bit". He then was taken to a note of a clinic visit with Mr Syed on 8 November 2019 in which it was recorded that he had not experienced any further recovery of his hearing and that he was still waiting for a hearing aid. He agreed that he had continued to work without a hearing aid. Mr Nelson was also cross-examined on an Audiologists Journal Entry in his medical records which recorded a visit he had had to an audiologist on 13 February 2020 to be fitted with an NHS hearing aid. In respect of the programming of that hearing aid the audiologist had recorded: "Programs: music prog without SR – pt a piper" and it was suggested that he was still piping and wanted a hearing aid that would allow him to do so. He denied that he had been playing the pipes at this time and his evidence was that he had been asked how his loss of hearing had affected him and he had said that he used to play the pipes in the past and that the audiologist must have picked him up wrongly. Despite the entry on 13 February 2020 being the last entry in his records regarding a hearing aid the pursuer maintained that he had left that meeting without having been fitted with a hearing aid and that he took it home to try it out and, having found that it did not work he had attended a further appointment (which not documented in his medical records) at which he advised the audiologist that the hearing aid he had initially been given was ineffective but was told that if he wanted a more

effective hearing aid he would have to purchase one himself privately at a cost of several thousand pounds.

[21] Next the pursuer was cross-examined about the medical reports lodged on his behalf from Mr Jonathan Newton, the Consultant ENT Surgeon instructed on his behalf in the litigation. He said that he appreciated that Mr Newton's report was based on the credibility of what he had told him and that this meant that it had been important to be accurate in his account of events. It was put to the pursuer that Mr Newton had not recorded that he had been knocked over by the force of the blow from the ball or that he had managed to return to work day after the incident and complete a further shift. It was also pointed out to the pursuer that Mr Newton had recorded that he had phoned his GP for advice within a few days of the injury, when in fact he had been to see the GP in person. Mr Nelson replied that he thought he may have made a mistake on some matters or that Mr Newton could have misheard him, that he had been nervous and that it could be difficult to remember everything. Mr Newton recorded the pursuer as having formally reported the incident to his manager 2 weeks after it had happened and it was suggested to him by Mr Hennessy that it was odd that having sustained an injury which was the culmination of "a catalogue of harassment", and having sustained a loss of his hearing as a result of that injury, he did not call one of the defender's managers the next day before starting work and report what had happened. Mr Nelson replied that he had intended to report the incident to one of the Nightshift Managers on the Sunday, but that when he attended work he found that no manager was present that evening. Thereafter he had been absent from work for 2 weeks because of an unrelated health condition (he was awaiting an operation) and decided to wait until he was next at work which was 2 weeks later when he was handing in a sick line, to report the matter fully, which he said he did. When pressed on the fact that he was happy to

wait several weeks before reporting the matter Mr Nelson referred to the other things happening in his life at that time including his daughter's disability, the end of his own lengthy relationship and his caring responsibilities in respect of his son. Mr Hennessy suggested to the pursuer that he had been inaccurate in telling Mr Newton that he had been to the GP twice before he was referred to an ENT specialist and that he had told Mr Newton that he had sought further assistance from his GP because his hearing was not improving, although the medical records showed that there had been an improvement. He agreed that he had only been to the GP once before he was referred on, and explained that he had only experienced a minimal improvement in his hearing after the initial insult and that even with that minimal improvement, he could not hear a phone ring or a normal conversation. Mr Newton had also recorded that the pursuer had advised him that upon being given a hearing aid this was initially helpful, but then became no use after this. It was suggested to Mr Nelson that this contradicted what he had said in evidence in court, which was that the hearing aid had never been of any use. He replied that all the hearing aid had ever done was create a magnified buzzing and did not assist with hearing conversations and that he may have wrongly described this or that he could have "worded it better" or "differently" when recounting the lack of benefit from a hearing aid. He reiterated that he had gone back with the hearing aid he was originally given. It was further pointed out to the pursuer that he been inaccurate when he had told Mr Newton that he had no time off work after the accident as he had an operation the following day when, in fact, he had returned to work for a further shift and the operation had been after that. To this the pursuer replied that "maybe the dates were wrong or Mr Newton misunderstood me, I was on Zoom…" In respect of what he had told Mr Newton about his past medical history, it was put to the pursuer that Mr Newton recorded that following the incident with the bottle in 1999 his hearing had

come back after a few weeks and that this was inaccurate as he was still complaining of some hearing loss on the right side in 2003. Mr Nelson was also challenged on the accuracy of a statement made to Mr Newton that he had never had any hearing loss in his left ear, which was contradicted by the entry from the ENT clinic in 2003, referred to in the preceding paragraph. In response to this Mr Nelson strongly denied ever having had a problem with the hearing on his left side and stated that the incident with the bottle had never affected his left ear and that he had never had any problems with that ear. When asked about the hearing on his left side now, he replied that it was not as good as it had been as he was probably using it more, for example turning up his headphones loud to compensate for the hearing loss on the right, and that when tested by Mr Newton for the purposes of the case, his hearing on the left was reduced.

[22] Mr Nelson was then questioned on the terms of the referral letter which his GP had written to the ENT clinic following upon his consultation with her on 15 October 2018. The relevant passages of that letter read as follows:

> "Mr Nelson describes wakening on Saturday morning with no hearing in his right side and tinnitus on the left side. He was otherwise systemically well with no recent corsyal symptoms or otalgia or discharge from ear [sic].
>
> Mr Nelson has no history of previous hearing issues expect for traumatic perforation of right TM 20 years ago, following an assault involving a blow to the right side of his head with a bottle.
>
> On examination the left ear was unremarkable and examination of the right ear revealed no obvious abnormalities, with a clear canal and healthy tympanic membrane. There was no facial asymmetry. And both his vision and eye movements were normal with no nystagmus. Unfortunately, no tuning fork available to establish his type of hearing loss (sincere apologies)."

Under cross examination Mr Nelson agreed that the terms of the referral letter matched the note of the GP consultation on 15 October 2018 which he said were wrong and contained errors. He agreed that the letter contained no reference to being struck by a ball and no

tinnitus mentioned on the right side, only the left. It was put to him that Mr Marshall, the defender's expert, thought that it was unlikely that such a minor trauma (as being struck by a ball) could have caused his hearing loss and that at paragraph 9 of his supplementary report (5/4/5 of process), Mr Newton commenting on Mr Marshall's views agreed that this it unlikely that minor trauma could cause a degree of deafness, but he had based his conclusion on causation on the credibility of the client, his hearing tests confirming hearing loss on the right side immediately after the accident and his medical records indicating the timing of events. It was suggested to Mr Nelson by Mr Hennessey that, in fact, Mr Newton had wrongly taken him at his word and given him the benefit of the doubt because the referral letter clearly stated that his hearing loss started on Saturday morning and that there was no mention of the incident with the ball in the records. Mr Nelson disagreed with this and replied that he had told the GP about being struck by the ball in response to a question from her about why he had tinnitus. Again he asserted that GPs make mistakes. He continued to say that he could not understand why the record of the consultation said what it did, and that he spoke quickly and he did not know if the doctor had misunderstood him, or not heard what he said and that his anxiety made him very anxious when speaking to people and this resulted in him speaking a lot and that perhaps, on this basis, the GP had misheard him. It was further suggested that the GP had mentioned the lack of a tuning fork because use of such an implement would have enabled her to distinguish between hearing loss caused by trauma and hearing loss arising from other conditions, and she would not have needed to do that if he had explained to her that his hearing loss had come on after being struck by a ball, ie after trauma. Mr Nelson replied that being struck by a ball was the cause of his hearing loss. He denied that his assertion that his deafness had been caused by the blow of the ball was part of a "fantasy" he had constructed around "non-existent

harassment" and that rather than harassment there had simply been horseplay at work, in which he himself had participated, and that he had attempted to "join the dots" after he had become deaf and ascribe the onset of his hearing loss to what had been an innocuous incident at work. Mr Nelson said this was completely incorrect, that he had been struck by the ball thrown by Mr Moran and knocked over, that he was someone who did not tell lies, as a consequence of his Christian beliefs, and that he was truthful although he may have got confused or mixed up at times.

[23] In re-examination Mr Nelson agreed that he was an anxious person, that he spoke fast and that he had never seen his GP records but he had not said that his hearing loss had come on 4 days previously when he consulted his doctor on 15 October 2018. He reiterated that he had been subjected to a campaign of harassment and that the ball throwing was the subject of constant complaints, but that nothing was ever done about this. He said that when he had complained about the noise his neighbours had made this was noise he heard with his left ear and that he had not immediately contacted a doctor on becoming deaf after the incident (leaving this until the following Monday) because he had experienced periods of deafness in the past and thought that this episode would be transient. He was also concerned about family issues at the time and when he went to the GP he usually had a catalogue of issues to discuss and that at such consultations, there was "no medical thing I didn't bring up or speak about it, and the GP can verify that."

Ross McLelland

[24] Ross McLelland, aged 33, also gave evidence for the pursuer on the issues of liability. He was formerly employed alongside Mr Nelson as a nightshift replenisher. He remembered an incident when the pursuer was struck by a ball whilst working at the store.

He was initially unsure as to whether he had been working on the evening of the incident, but later said that he thought that he had been. He did not witness the incident directly, but saw the pursuer "straight afterwards" and he recalled the pursuer saying that someone had thrown a ball at him and that it had struck him on the head. He believed that the ball had been thrown by someone called James, but he could not be sure of this. He also recalled that there had been a delivery of small plastic balls prior to the incident and that these had been getting thrown about the shop at night and that it was sore if one of the balls hit you. His evidence was that the throwing of balls had been happening for days if not weeks and he thought that this behaviour may have gone on for a total of 2 weeks before the balls were either sold or lost. He said that the managers were aware of the situation but that nothing was done about it. He had heard from Mr Nelson that he had complained to his manager Craig, although this appeared to be evidence about a complaint made after the incident on 13 October, as Mr McLelland said:

> "After the incident when James struck him on the side of the head he [Mr Nelson] did speak to Craig. He assured him something would be done but nothing was done and it continued to happen night after night."

He confirmed that the "James" who he thought might have thrown the ball was James Moran and that he had seen him throw balls on previous occasions but that he had never complained about such behaviour. The throwing of balls made him feel on edge, as he was constantly looking to see if a ball was going to come flying over. He had himself been struck by a ball thrown in such a manner on a few occasions. After the incident he recalled that the managers said they were going to deal with the situation but that they did not take any steps to deal with matters and he could not remember ever being spoken to about the problem. He said he had never seen a risk assessment, either before or after the incident involving the pursuer. He confirmed he had never seen Mr Nelson throwing a ball.

Under cross-examination and under reference to the staff rota lodged in process Mr McLelland conceded that if he was not shown as working on 13 October then he would have been absent and that what he knew about the incident on that date must have been gleaned from others telling him about it. He also said that what he recalled, by which I took to mean what he recalled about being present immediately after the pursuer had been struck by a ball, must have occurred on another evening when this had happened to him again, suggesting a second occasion when the pursuer was struck by a ball thrown by James Moran. He did not remember the store stocking small footballs, which were memorabilia connected with the World Cup. He agreed that he had never complained about the throwing of balls and that the workers who were engaging in such conduct had simply been "mucking about" in what they regarded as a kind of game. He agreed further that the workers would have known that they should not have been engaging in such behaviour and said that this had been "taken too far". He agreed that the workers would have avoided throwing balls in front of the manager, but that there were "balls everywhere" and he was not sure why the manager would not question why this was the case. He did not think Craig [Smith] would have stopped the behaviour even if he had seen it and he had not been spoken to by him about throwing balls, which he denied having been involved in. He did not know if the pursuer had been throwing balls but would expect management to have a word with people if they saw this going on and tell them to stop it. He agreed that managers would need to know the conduct was taking place before they could give a warning but thought that the managers were aware of the behaviour. He agreed that whether the workers had been given a warning or not, they would have known that they were not supposed to be throwing balls at work. In re-examination he confirmed that he

knew people had complained about ball throwing so the management would have been aware of the issue.

Adam Kerr

[25] The next witness for the pursuer was Adam Kerr, aged 54. Mr Kerr had known the pursuer for approximately 15 years and had worked with him first at John Lewis and thereafter at the Waitrose in Comely Bank. He had been a nightshift worker responsible for shelf replenishment. He confirmed that if a manager was not present then he would be told where to work by a Team Leader and that there were occasions when there would not be a manager present during the nightshift. His evidence was that some Team Leaders would listen if an employee raised a concern but that some would not. He was asked about an incident on 13 October 2018 and said that he was aware of incident in the shop and then described an incident when, after having been signed off work for a period with sciatica, he had been struck on the lower back by a ball whilst filling a bottom shelf. He described the ball as approximately 5 inches in circumference (he may have meant diameter) and black and white in colour. He was struck forcefully and had to stand up and felt pain as a result of being hit. On another occasion he had been working in an aisle when a toilet roll had been launched in his general direction from an adjacent aisle. On another occasion staff had been involved in squirting water around the shop. Mr Kerr's evidence was that he had complained about the incident involving the ball but that nothing was done about it. He knew James Moran and described him as "young, up for a laugh, liked a carry on" and "mischievous". He also said that Mr Moran liked to throw things about and that nine times out of ten Mr Moran would be at work when the ball throwing occurred, although he had not seen him throw a ball. He recalled that he had found out that the pursuer had been hit

on the side of the face by a ball from another colleague, Paul Thomson. He thought he had spoken to James Nelson about the incident, but it was not clear whether that was on the evening that it had occurred and at that time the pursuer had simply said that he had been hit in the face by a ball. It was only after he had been absent for a period that Mr Nelson told him that as a result of being struck he might need an operation on his ear and mentioned that he had been wearing ear buds at the time of the incident and that one of these had entered into the ear canal. He had never seen a risk assessment and said that there had not been any changes in workplace practices after Mr Nelson was struck. His evidence was that he felt safe in the workplace. His evidence was that Team Leaders basically did the same job as the shelf replenishers and that he rarely saw managers, who would walk about the store checking on the workers occasionally. Under cross-examination, Mr Kerr gave evidence that he had only had a discussion with management about the throwing of balls on one occasion, and that on this occasion he told the nightshift manager that he had been struck by a ball but when the manager heard that he had not seen who had thrown the ball, he was told there was nothing that could be done. He did not remember ever being spoken to in a "huddle" meeting and he could not remember whether the incident during which he was struck by a ball himself had occurred before or after Mr Nelson was struck. He agreed that persons other than Mr Moran were involved in throwing the balls and that ball throwing would happen on occasions when Mr Moran was not working. He agreed further that the workers engaged in such conduct would know that they should not be throwing balls and that this was nothing to do with their job. He also agreed that employees would engage in such conduct when they knew that their managers could not see what they were doing, and if managers did become aware of this, then he would have expected them to tell the employees to stop. He thought that it was fair to say that even if the management had

told the employees to stop throwing items at work, the conduct would have continued anyway. He agreed that he was not working on the night of the incident involving Mr Nelson but may have seen him the following day. He agreed that if he had wanted to contact a manager to raise concerns he could have called the store from 7am onwards when a duty manager was always on shift.

Paul Thomson

[26] The next liability witness for the pursuer was Paul Thomson. Mr Thomson, who was 58 years of age, had also worked as Nightshift Assistant beside the pursuer, whom he had known for between 3 and 4 years. He confirmed that at the start of a shift he would be told where to work by either the Team Leaders or the Nightshift Manager. Team Leaders would normally be on the shop floor for most of the night whilst managers would either be in their office, which was situated in the warehouse, or walking the shop floor. His evidence was that if he ever had concerns about his workplace he would go straight to a manager and that he had done so on an occasion when he spoke to his previous manager, Craig, about horseplay as he was concerned someone would get injured or stock would get damaged and he went to work to do his work, not to carry on. The horseplay involved people throwing footballs about and generally carrying on. This happened quite a few times, and he had made his feelings about this clear to Craig. He named Adam Kerr and an employee called Eric as people who had been struck by balls. He said the footballs were in stock as part of a promotion and were not full sized but such a size that they were easy to lift in your hand and throw and that other members of staff had been picking up balls and throwing them at each other. He had never had a ball thrown at him, but he had heard others shouting after they had been hit with balls. He did not know the names of any of the staff who had been

engaged in this conduct, but thought they were in their twenties and thirties. Being hit with balls could be annoying and could give the person who was struck a shock. His evidence as that when he had spoken to his manager, Craig, about the problem at the end of one of his shifts, Craig had said that he would deal with the matter. He never saw any signs of that being dealt with, such as by management calling the nightshift to a "huddle" meeting and he had never personally been spoken to about the matter, although he had not been one of those throwing the balls. He remembered the incident involving the pursuer and said that he had been working that night although in a different aisle. He heard Mr Nelson cry out when he was hit and had gone round to the aisle to see what was going on and when he spoke to him at break time he was told that he had been hit by a ball on the side of the head around about his ear. He remembered Mr Nelson complaining of having a sore head at that time, but he had not said anything else. He thought that it had been someone called "James" who had thrown the ball and when asked if it was James Moran he said he thought that the name rang a bell, but that he did not know his surname. He had heard other workers say that James Moran had thrown balls on one or two occasions. He thought that Adam Kerr and Eric had both complained about ball throwing, but that the practice continued despite these complaints. He had seen Risk Assessments at work but none of those relating to ball throwing. Under cross-examination Mr Thomson said that he had complained about the practice of ball throwing before the pursuer had been injured and he was definitely sure of that because he had been worried about the risk of injury thus he had gone to Craig. Whilst he did not know the date, he was sure that this had happened before the pursuer's injury. He agreed that the behaviour of the younger members of staff who were participating in the ball throwing was horseplay, conducted when they ought to have been working and that they knew that they should not be doing that and that it had nothing to do with their job.

Mr Thomson agreed further that those who were carrying on knew that the management would tell them to stop if they saw them doing so, and that Craig Smith was usually good at dealing with issues. He thought that if there had been evidence that Craig Smith had spoken to people about ball throwing that was likely to be correct, but he himself had never been part of a group that had been spoken to. He thought that one could normally go to Craig about anything and he would deal with it, and that the ball throwing normally occurred when Craig was in the office doing paperwork and not when he was on the shop floor. He agreed with the suggestion that there was only so much that could be done if the management had told people to stop doing something and they kept on doing it.

Defender's liability evidence

[27] Mr Craig Smith, aged 42, gave evidence for the defender on liability. He confirmed that he was employed as a Retail Team Manager with the defender and that he was currently working at the Stirling branch of Waitrose, a post which he took up at the start of 2022. Before that he had been employed as a manager at Waitrose in Comely Bank, Edinburgh, a post he had held for 5 years. He confirmed that Retail Team Managers were also described as Nightshift Managers. He was the only Nightshift Manager at the Comely Bank store in October 2018 and his duties involved overseeing those working on nightshift and carrying out all management duties such as attending to rotas and timecards and ensuring the company's processes and policies were being followed. He agreed Team Leaders were usually on the shop floor whilst managers went between the office and the shop floor. He agreed that the rota forming 6/2/4 of process was a Google File document used by the defender. He confirmed that the rota included the week of 14 October and that this week started on a Sunday. He could verify that Mr Nelson had been working at the

store on the evening of 13 October into 14 October, that he had started at 2100 and finished at 0800, and that Mr Nelson had been scheduled to work the following evening, again from 2100 to 0800. Thereafter he recalled that Mr Nelson was absent from work as he was undergoing an operation on his hand. He was asked about the incident when Mr Nelson was struck by a ball on 13 October and he said that he was aware of this having happened after that date but not at the time it had occurred. His evidence was that he first became aware of the fact that the pursuer had been involved in an incident at work when he had disclosed this at the end of an Occupational Health call in February 2019 which was made to Mr Nelson after he had been off work for a lengthy period. Mr Smith recalled that the pursuer said at the end of the call that he had been involved in an incident at work and that that once he returned to work in June 2019 he had made management aware that the incident had involved him being struck by a ball. He then remembered Mr Nelson mentioning something about 'an incident" prior to this, he thought in December 2022, and Mr Nelson being surprised that he was not aware of the incident on the basis that two of the defender's other managers, Scott Milton and Jamie (Mr Smith could not recall Jamie's surname) did know about the incident. He also recalled that Mr Nelson did not want to discuss the incident at that time. Mr Smith had then tried to speak to the two managers named by the pursuer but they did not know anything about any incident involving him. He also spoke to others who had been working alongside the pursuer, but they were similarly unable to give him any details of any incident involving Mr Nelson. Mr Smith said that thereafter the first opportunity he had to speak with Mr Nelson and get some details about the incident was after he had returned to work in June 2019. It was not until then that Mr Smith became aware that Mr Nelson was alleging that his hearing had been impaired by

the incident. He recalled that the pursuer was saying that he had lost the hearing in his left ear as a result of the blow from the ball.

[28] Mr Smith was then asked about the evidence the court had already heard regarding the throwing of small balls around the Comely Bank Store in 2018. He recalled that in early June 2018 at the time of either the World Cup or the Euros there had been a unit on the shop floor containing these balls and he remembered that a couple of employees (who he did not name) had come to him complaining that other workers were throwing these balls around. He recalled that in response to this, on about the 6 June, he spoke to several employees who had been involved in the practice. He said he recalled this as he had made an unofficial note of it on the rota and that he had spoken to several workers at a check-out area on the shop floor to make clear that this was an "unacceptable practice". He had not personally witnessed balls being thrown. He was able to confirm that it was early June, even if he was not "one hundred per cent sure" of the date, because he recalled one of those who had complained was about to leave the nightshift at that time for health reasons. He recalled that the workers he had spoken to about the practice of throwing balls included Ross, James Nelson, James Moran and Kevin Quinn. It had been reported to him that these employees had been throwing balls back and forward over the aisles and in the aisles. He explained to the group what had been reported to him, emphasised that this was unacceptable behaviour and warned them that he did not expect to hear that it had been going on again or he would have to take formal action. This would have consisted of viewing CCTV, taking statements and thereafter proceeding to formal misconduct action. Mr Smith's evidence was that between the time of him having admonished the employees involved in the ball throwing and Mr Nelson's complaint that he had been injured by a ball, he had not heard any further discussion about the matter. He was not aware of employees

throwing balls after this and was unaware of any further incidents involving balls. There were no further complaints after June 2018 because the balls involved were not available after June as they had been sold at that time. Mr Smith said he did not recall having any conversations with Mr Nelson about being constantly harassed by James Moran throwing balls and said that he would have done something about this if such conduct had been reported to him and this would have included speaking to Mr Moran and taking the relevant action, whether formal or informal. Once he was aware of the allegation that Mr Moran had thrown a ball which had injured Mr Nelson he passed that to the management team and he believed that they tried to get a statement from Mr Moran, who was by then no longer on nightshift, and he asked for support to get a statement from the pursuer, whom he remembered being hesitant or reluctant to give a statement because he did not want to get Mr Moran into trouble. Mr Smith said that he did not feel that he ought to continue to be involved in the investigation partly because he had not been able to speak to James Moran and partly because he "hadn't taken formal action previously" and he felt that this might be relevant to the investigation if his name was brought up. He expanded on that by saying: "I felt I should have taken formal action previously when I spoke to the relevant people but they weren't able to help and nobody knew about the incident". I understood the reference by Mr Smith to his failure to take formal action at an earlier stage as being a reference back to the occasion in December 2022 when he first found out that the pursuer had been involved in an unspecified incident of which he was unaware and which Mr Nelson had been reluctant to discuss. Having found out about this he had asked the two managers whom the pursuer had named as being aware of the incident if they knew about an incident involving Mr Nelson. They did not, and nor did anyone else who had been working with the pursuer. Mr Smith took no further action at that stage. Following that the

next thing he heard was in February 2019 when the pursuer again mentioned an incident in the Occupational Health call, but it was not until June 2019 that he was finally able to get any detail about what had happened. Mr Smith was not cross-examined. His evidence concluded the liability evidence for both parties

The evidence of Dr Sarah Oliver

[29] The next witness to give evidence was Dr Sarah Oliver, who gave factual evidence on the content of the pursuer's GP records, in particular regarding his first visit to his GP following the incident on 13 October 2018. Dr Oliver qualified as a GP in February 2021. Prior to qualifying she had undertaken GP training since 2014. She confirmed she had worked at the Eyre Place Medical Practice, Edinburgh, where she did her ST3 GP training year between Mid-August 2018 and August or July 2019. She had returned from maternity leave in August 2018 and following a few weeks of induction training had started to see patients in about September. Prior to that she had experience of seeing patients face to face for 20 minute appointments for a year whilst an ST1 GP trainee in Haddington, and had been interacting with patients as a junior doctor in a hospital setting since 2011. She was taken to the entry at page 30 of the joint bundle of productions, which was contained within the pursuer's records from the Eyre Place Medical Practice, forming number 5/1/1 of process, and directed to the four entries for 15 October 2018. Her evidence was that the notes appeared to come from the "Vision" electronic note keeping system used by the practice. She confirmed that when she saw a patient it was her usual practice to manually write notes as she was conducting the consultation and then afterwards to type the entries into the electronic system. Sometimes, for example if the purpose of the consultation was simply to issue a prescription, she could type her note directly into the electronic system, but this

would normally not be possible if she needed to carry out an examination as well. She confirmed she had typed the entry of 15 October into the system. She would make a note of what the patient has said and either type out the note whilst they were still there or do so when they had left the room. At the Eyre Place Practice, she had 15 minutes to see a patient and then 10 minutes to either write up the notes or do a referral. She was asked what the purpose of the note was and she replied that it was to have an accurate record of what had been discussed that day or of the symptoms the patient was reporting and also to ensure that there was an accurate record of what had been discussed if another colleague was to see the patient on a different occasion. The note was made for the benefit of the patient and the GP, and was made to ensure there was continuing and accurate care.

[30] Dr Oliver was then taken to the referral letter which she had written following the consultation with Mr Nelson on 15 October 2018, which was at p462 of the joint bundle of productions and formed part of the defender's production 6/1/1, the pursuer's records from the Ear, Nose and Throat Clinic, Lauriston Buildings, Edinburgh which, as discussed at para [19] above, are in the following terms, which I repeat here for ease of reference:

> "Mr Nelson describes wakening on Saturday morning with no hearing in his right side and tinnitus on the left side. He was otherwise systemically well with no recent corsyal symptoms or otalgia or discharge from ear [sic].t
>
> Mr Nelson has no history of previous hearing issues expect for traumatic perforation of right TM 20 years ago, following an assault involving a blow to the right side of his head with a bottle.
>
> On examination the left ear was unremarkable and examination of the right ear revealed no obvious abnormalities, with a clear canal and healthy tympanic membrane. There was no facial asymmetry. And both his vision and eye movements were normal with no nystagmus. Unfortunately, no tuning fork available to establish his type of hearing loss (sincere apologies)."

Dr Oliver explained that by "systemically well" she meant that the pursuer was feeling well within himself and did not, for example, have a fever. "No recent corsyal sx": meant no

recent symptoms of a cold such as a cough or runny nose. "Otalgia" was ear pain and she had recorded that the pursuer had suffered from no previous hearing symptoms except for 20 years ago. "Nystagmus" was twitching of the eye which can be detected when a patient is looking in the horizontal plane and is a neurological sign that something was wrong neurologically. "No facial asymmetry" indicated that there was no abnormal finding of facial paralysis which can occur if a patient has a stroke or tumour, events which can cause sudden unilateral hearing loss. The reference to "no tuning fork" was intended to refer to the fact that there is a particular type of tuning fork, which Dr Oliver thought was a 512 Hz fork, which can be used to test what type of hearing loss a patient was suffering from, the different types being conductive and sensorineural. Whilst Dr Oliver stressed that she was not a specialist in such matters, she understood as a GP that conductive loss was due to an obstruction in, or destruction of, the ear canal and that in that type of hearing loss a doctor could normally, but not always, see something by way of debris, infection or inflammation of the tympanic membrane on examination. Sensorineural hearing loss was more to do with the structures of the inner ear, the cochlea, vestibular nerve or neural pathways between the cochlea and auditory cortex. Dr Oliver was asked whether in terms of possible causes of hearing loss, one could be looking for a traumatic cause and she replied that this was something a doctor would ask about and consider, especially with sudden onset deafness. This would be one of the standard questions that she would ask and when doing the ear examination she would be looking for signs of trauma such as bruising, blood in the ear drum or signs of a small perforation. In terms of Mr Nelson's consultation on 15 October 2018 Dr Oliver said that she had no memory of this and was simply going by what she had written in the notes. When she was describing in evidence what she would do when examining an ear, she was talking about the things she would typically do. She was asked

how she would ordinarily conduct an examination of the ear. Her evidence was that she would first take a history, then examine the pinna, then the outside of the ear behind the mastoid bone, then use an autoscope to look inside the ear canal as far back as the ear drum or tympanic membrane. She was satisfied that she had done all of this when reading her note of the consultation of 15 October 2018. She had described no obvious abnormalities as she would have looked at all the usual spots and would have written something down if there had been any abnormal findings. If the findings are normal then she would write "NAD" (nothing adverse disclosed) or "nothing abnormal".

[31] In terms of the detail of the history that she would take when a patient called or visited reporting deafness, Dr Oliver stated that she would first ask whether the hearing loss was bilateral or in one ear only, as that would determine the urgency with which the matter needed to be dealt with. She would ask about any associated symptoms such as discharge, pain, bruising, or swelling and what might have led to the deafness, for example whether the patient had recently been unwell or if there had been trauma such as from a head injury or the use of cotton buds in the ear. She would also ask about past medical history in respect of whether there had been any previous problems with the ear, and she would look at the patient's notes to see if there were any pre-existing conditions or medication that was being taken that could potentially affect hearing. Dr Oliver would also ask a patient about the impact the hearing loss was having upon them, for example whether they were able to continue working or not. Although she could not remember seeing Mr Nelson, these would have been the standard questions that she would have asked him.

[32] In one of the other three entries which she made in Mr Nelson's notes that day (of which one had nothing to do with hearing loss) Dr Oliver wrote:

> "Telephone encounter. Contacted ENT SHO on-call at SJH. Advised will contact pt to make emergency urgent appoint at conic/audiology. In meantime for 10 days of oral prednisolone 50mg."

She confirmed that Prednisolone is a corticosteroid which would be prescribed to reduce any inflammation that could have occurred in the inner ear or the nerves because of infection and which could affect a patient's hearing. The remaining entry regarding hearing for 15 October 2018 stated:

> "Telephone encounter. Pt contacted. Will pick up prescription for prednisolone today. Pt aware of ENT plan to contact with clinic time"

Dr Oliver stated that this showed that she had contacted ENT for advice, that she had contacted the patient and told him that she had a prescription for him following the advice she had received, and that, as was normal with an urgent referral, she had advised that the ENT clinic would be contacting him directly.

[33] Dr Oliver was next asked in detail about the content of the referral letter dated 16 October 2018 which she had written following her consultation with the pursuer, as referred to above. She advised that she could not remember the letter and that she would have dictated it to a secretary. She was asked where she had got the information regarding Mr Nelson waking on Saturday with no hearing on his right side and tinnitus on the left side. Her evidence was that this would have been part of the history taken from the pursuer at consultation. It was put to Dr Oliver that Mr Nelson had said in evidence that he had told her that he had been struck on the ear by a ball and Dr Oliver replied that whilst she could not remember the consultation it would have been unusual for her to have omitted such a matter and that from her notes she would say that this was not what he had told her. When

asked how that suggestion sat with her letter and her notes she replied that it did not align with either the letter or the action which she took after seeing the pursuer. If there had been a traumatic cause for hearing loss such a case would usually be regarded differently from a case where there had been a sudden onset of hearing loss for which there was no clear explanation. In that instance she would be more worried and would speak to an ENT doctor if it was a case of a more sudden sensorineural hearing loss. She would not omit to mention trauma if she was thinking about hearing loss and that had been mentioned in the history. Her evidence was that trauma would have been "quite important".

[34] Under cross-examination Dr Oliver agreed that the consultation notes which appear in the Vision system electronic GP records were not based on a verbatim record of what the patient had said, but on notes made at the time. Occasionally she might read the previous notes back to the patient if she had not seen them before or there was an ongoing issue. She said she would not type in the notes and then read them back to the patient. Dr Oliver was then asked about the entry on 15 October 2018, in which it was recorded that the pursuer had suffered sudden unilateral hearing loss 4 days ago. She accepted that if 15 October, the date of the consultation was a Monday, then 4 days before would be a Thursday, and that what was noted in the records was that the hearing loss occurred on the Thursday. She was then asked to look at the ENT referral letter at page 462 of the Joint Bundle, part of production 6/1/1, again referred to above. She agreed that in the second paragraph of that letter she had noted that the pursuer had woken up on Saturday morning with hearing loss, and that this was 72 hours previously. The letter said: "…….this 56 year old gentleman who presents with a 72 hour history of sudden unilateral hearing loss on the right side." Dr Oliver was asked whether she agreed that "the records were inconsistent with the notes themselves", by which I understood counsel to mean that 72 hours referred to in the ENT

referral letter was a different period from the 4 days referred to in the Vision notes and she assented to that proposition. In re-examination, Dr Oliver was asked if her estimate of time since onset of symptoms (72 hours) was to be counted back from the date of the referral letter, 16 October 2018. She said that she was not sure about this, and it would depend on whether the letter had been typed that day or not. If the letter had been typed on 16 October, then the 72 hours would be from that day, but she did not know when she had dictated the letter or when it had been typed.

The expert medical evidence

[35] Following the conclusion of the liability evidence the parties led their respective medical experts. The pursuer led Mr Jonathan Newton FRCS, a Consultant ENT surgeon. Mr Newton was 51 years of age and had been a ENT Consultant for 12 years. He was a general ENT surgeon and saw patients who had hearing problems on a daily basis. He had previously trained as a GP. He undertook both NHS and private work at Forth Valley and Kingspark Hospital and also undertook medico-legal work and had considerable experience in this area, particularly in cases involving industrial hearing loss and tinnitus. He would typically deal with 150 medico-legal cases in one year. He was clearly very experienced in his field and well qualified to give evidence. Mr Newton spoke to the medical report he had prepared for purposes of the litigation following an examination of the pursuer over Zoom on 7 September 2021. He adopted the terms of the report, which formed number 5/3/3 of process. He also spoke to the terms of a supplementary report which formed number 5/4/5 of process, which he had prepared in response to the expert opinion of Mr John Marshall FRCS, the defender's consultant ENT surgeon. In addition to seeing the pursuer over Zoom, Mr Newton also had the benefit of an audiogram, which had been undertaken by an

audiogram technician. He confirmed that the history he recorded in his report of how the pursuer had come to be injured at paragraph 3.1 had come from Mr Nelson. This paragraph confirmed that the pursuer had been stacking shelves at Waitrose when he was hit by an object thrown from behind by a colleague. He was hit on the back of the head on the right side and it was quite a hard blow. Roughly 15 minutes later he thought that his right headphone was not working and within 60 minutes he was aware that 80% of his hearing had vanished. He continued to work his shift and was then absent from work for 2 weeks because of an unrelated condition. When he returned to work he reported the incident to his manager. He phoned his GP within a few days and was given treatment in the form of steroids and antibiotics for his right sided hearing loss.

[36] At paragraph 6.1 of his report he recorded the progression of the pursuer's injuries, the pursuer having told him he had not had any problems with his hearing before the incident, although 20 years ago he had been hit over the head with a bottle and his hearing had disappeared but returned within a few weeks. After the incident in Waitrose his hearing had gone to 80% of what it was before completely disappearing. He now has no hearing on the right side despite wearing a hearing aid. It has not improved and if anything has worsened. He denied having tinnitus before the accident, but experienced it within a few hours of that. It was present all day and kept him awake. Nothing helped it. At paragraphs 7.1 to 7.8 of the report Mr Newton detailed the problems the pursuer had in daily life as a result of his hearing loss including difficulty crossing roads, with social interactions, playing the bagpipes, which he cannot tune, and making bagpipes which he said he did significantly less than he previously had. Again this was because he could not tune the bagpipes.

[37] Mr Newton was taken to the audiogram which was replicated at paragraph 10.2 of his report and his evidence was that this showed that the pursuer had unilateral right-sided profound hearing loss. At paragraph 9.1 he rehearsed the content of the entry in the GP records from 15 October 2018 regarding the sudden onset of unilateral hearing loss on the right side 4 days previously (although he misquoted the entry as being in respect of a telephone consultation). Mr Newton was asked if he had considered this entry and he replied that he had and that it appeared to corroborate the pursuer's history of a sudden loss of hearing in the right ear along with an urgent referral to a specialist ENT surgeon for a hearing assessment. He was asked whether he was troubled by the fact that Mr Nelson had reported to him a hearing loss that had started on 13 October, but that the entry referred to a loss of hearing starting 4 days before 15 October and he replied that it did not because, firstly, whenever patients describe the onset of symptom there was frequently an inaccuracy about exact timing of when these came on. Secondly, the fact that there was a two or three day inaccuracy in respect of when the hearing loss came on, which a GP or a trainee GP was documenting, often dictating in retrospect, did not concern his or change his conclusion. When asked to expand on this he said that, in his experience, the timing of any symptoms is often reported differently to two different doctors and patients often do not recall when the symptoms came on, and the second factor was when the doctor actually documented the symptoms as coming on, which he implied could be done incorrectly. Both of these factors could lead to inaccuracies. He did not consider the reference to left-sided tinnitus in the same entry as having any bearing on his conclusion because tinnitus is a very poorly understood symptom by both ENT experts and patients and was such a subjective symptom that patients often reported it in different ways on different occasions. Additionally, it is quite significantly affected at times of stress and by the fact that the patient might be under a

stressful situation. Mr Nelson was about to have cancer treatment in a limb so he would not consider this to be hugely relevant. He also said that additionally, when it comes to right or left sided symptoms being recorded by practitioners this can also be inaccurate. The fact that the tinnitus was actually on the other side was not relevant to overall causation and prognosis. Mr Newton was referred to paragraph 9.4 of his report, where he had recorded an entry from ENT records from 28 November 2018, which stated:

> "This man was recently seen in the emergency ENT clinic when he sustained a sudden loss of hearing in his right ear caused by an injury with a soft ball. He had a similar injury 18 years ago with complete recovery of hearing. He said he has had some recovery of hearing. He had an audiogram done today which showed a slight recovery in hearing…."

Mr Newton thought that this was "obviously a very important entry" as there had been an assessment carried out by an ENT specialist who has come up with same diagnosis as he did and that there had been a sudden loss of hearing in R ear which was clearly documented. Mr Newton also noted that the fact that the pursuer had sustained a similar injury 18 years before with complete recovery of hearing was clearly recorded and that this was what was reported to him and what he had seen in the records. He felt that the fact that the audiogram showed that there had been a slight recovery in hearing after the index incident which was quite in keeping with the causation of trauma. Mr Newton thought that the reference to the similar injury was relevant because if it had said that he had sustained a similar injury 18 years ago and had required a hearing aid after that, then this would have been highly significant. Mr Newton clarified that this was relevant as it demonstrated that the pursuer had made a complete recovery after the earlier incident. Mr Newton was then taken to the opinion and prognosis section of his report and asked to explain the factors which he thought relevant in respect of his opinion on causation. His evidence was that the important factors were the history that he had been given by Mr Nelson, particularly its

relevance to the blow he had received to the R side or the back of his head, the fact that he had been knocked to the ground by the blow, the fact that the incident was noteworthy enough for him to report it to his manager or supervisor and, the medical evidence from the notes regarding the consultations with the GP trainee, which showed that this doctor had referred Mr Nelson immediately to ENT surgeons due to R sided hearing loss in the aftermath of the index incident and, finally, ENT records which confirmed his profound hearing loss on R hand side. He considered that these factors explained why an otherwise fit and well man would develop a sudden deafness in one ear, and in the absence of other causative factors, he came to the conclusion that the blow to the head which the pursuer had sustained had caused his deafness. His evidence was that head injuries were frequently the cause of deafness, and whilst this was an uncommon mechanism for an injury, in the absence of any other causative factor, on the balance of probabilities, this was what had caused Mr Nelson's deafness. He did not consider there was any clear correlation between the force of impact and injury because in some instances a patient could sustain an extensive skull fracture but have no damage to their hearing and on other occasions there could be a head injury with no fracture which still caused a hearing loss. Mr Newton considered that the tinnitus of which Mr Nelson complained had been caused by the same mechanism. As well as damage to hearing there was likely to have been a soft tissue injury to the skin and scalp which may or may not have been in the hairline. Mr Newton considered that the pursuer suffered from a profound hearing loss, which he defined as being at a threshold of over 80 decibels. There was no possible surgical treatment for such hearing loss as it was nerve related. At paragraph 11.3 of his report Mr Newton considered that the pursuer might benefit from specialised treatments which can benefit patients with one sided deafness. The pursuer could benefit from the fitment of a bone-anchored hearing aid, which

would be fitted to the skull, or a "CROS" hearing aid. These two highly specialised hearing aids effectively transmit sound from the affected ear using a microphone to send these to the other ear. A BAHA system would cost £6000 with a recurring cost of £1000 per annum thereafter. A CROS aid would cost £3000, and would need to be replaced every 5 years. These estimates were based on Mr Newton's experience of what such devices cost, and he said that he worked with audiologists on a daily basis and that he would always take advice from specialist colleagues or from a hearing aid dispenser, and that this is what he had been told the cost of these treatments would be. He did not think there would be any recovery in the pursuer's hearing but considered that he could benefit from such devices. He did not give any evidence as to which of the two potentially helpful hearing aids would be most beneficial to the pursuer. In terms of the pursuer's tinnitus, Mr Newton considered him to suffer from severe tinnitus based on the McCombe grading scale. Whilst in his report he had described the pursuer's symptoms as bilateral, this was an error, and he clarified that Mr Nelson only had right-sided tinnitus. The treatment Mr Newton had suggested for the pursuer's hearing loss in terms of hearing aids would assist his tinnitus and he did not require any further separate treatment for that condition.

[38] Mr Newton was then taken to the terms of his supplementary report, number 5/4/5 of process. Again he adopted the terms of that report as his evidence. This supplementary report was Mr Newton's response to the report prepared by Mr Marshall, the defender's expert ENT surgeon. In that report and in evidence Mr Newton explained why he did not think that anything in Mr Marshall's report led him to change his mind about the causation of the pursuer's deafness. He explained that he was not troubled by Mr Marshall's observation that the contemporaneous GP notes stated that the hearing loss occurred 2 days before the date of the incident in work. He explained that two entries that he saw in the GP

notes stated quite clearly two different time periods as to when hearing loss occurred. One stated 72 hours previously and then a subsequently entry dated the onset of the hearing loss 5 days previously, but he thought that the slight inaccuracy in the GP's records reporting the onset of symptoms was not hugely relevant to his theory of causation. He also disagreed with the statement made by Mr Marshall that the GP note from 15 October 2018 did not link the onset of the pursuer's hearing loss to any incident at work. This was because firstly because all the GP records that he had seen seem to date the onset of the hearing loss at two different periods which were 48 hours apart (the same point made above), and secondly the lack of a mention of the incident at work in the GP records did not make any difference to his causation theory as he had considered the state of mind that Mr Nelson may have been in with regards to a possible cancer diagnosis in the near future (which was what the biopsy he was going to undergo was for) and thus, the fact that the incident at work was not mentioned in the GP records did not change his opinion. He was then asked about Mr Marshall's opinion to the effect that a relatively mild injury which caused no significant trauma to the skin or tissues behind the ear or to the ear canal itself and no significant head injury could be the cause of hearing loss to this degree. Mr Marshall also observed that even with significant trauma and with injuries involving much more force resulting in head or ear trauma, hearing loss does not result. Examples of injuries that could cause hearing loss were given by Mr Marshall as including barotrauma due to diving, "slap" injuries when a sudden pressure wave bursts the ear drum or severe head injuries such as a skull fracture with associated inter-cranial bleeding and fractures through the petrous bone. Mr Newton's response was that he agreed to an extent, but as he had stated previously a force applied to the head can lead to damage to a patients hearing even without damage which would be obvious to a medical practitioner. In the absence of a skull fracture or damage which can be

seen on imaging, there can still be hearing loss and the list of injuries which had been provided by Mr Marshall was not exhaustive and another possible cause of hearing loss could be being knocked to the ground at work, particularly if the blow was noteworthy enough to result in it being reported. Mr Newton was then asked about Mr Marshall's next observation which was that, on the balance of probabilities, it would be unlikely that trauma from a ball could cause hearing loss and professional footballers heading balls for years repeatedly do not report hearing loss. He agreed with the conclusion that footballers head ball without evident causation of loss to their hearing, but said that they use a completely different part of their head (to that which Mr Nelson allegedly sustained damage) and were trained to head in a particular way. He was also not aware of any studies that showed that footballers were not at risk of hearing loss later in their lives. In response to Mr Marshall's observation that damage caused by a blow from a ball that was sufficient to cause hearing loss would have been immediate, such as trauma to the ear canal or associated ear pain, would have resulted in conductive hearing loss, and would have shown clear evidence of eardrum perforation on examination, Mr Newton responded by repeating that such a blow would not cause a perforation on every occasion and it was possible to have an eardrum perforation which could not be seen immediately. He fundamentally disagreed with the suggestion by Mr Marshall that a minor blow such as that sustained by the pursuer could not cause hearing loss and reiterated that a blow that was enough to knock someone to the ground, was noteworthy enough to be reported to superiors and to a doctor straight away and to have confirmed sensorineural hearing loss in the immediate aftermath, was certainly an accident that could have caused the hearing loss described by the pursuer. He repeated that he considered the pursuer's hearing loss to be permanent, as was his tinnitus.

[39] Under cross-examination Mr Newton agreed that the accuracy of the history provided by the pursuer was fundamental to his opinion. He reiterated that he was not troubled by what may have caused the inaccuracy regarding the number of days since the onset of the pursuer's symptoms as recorded by the GP on 15 October, and he agreed that this could be due to a typographical error. He agreed the note taken that day suggested that a physical examination had taken place, and that what was recorded regarding history would have been taken from the pursuer himself. He accepted that the findings suggested there had been an examination with an autoscope and he thought that the comment regarding the absence of a tuning fork was recorded as a tuning fork can be used to ascertain whether hearing loss is sensory or conductive. He did not accept the suggestion that an object striking the ear would be expected to cause conductive hearing loss and his evidence was that such an event could cause either conductive or sensorineural loss. He did not suggest that there was any significance in Dr Oliver being a trainee GP. He could not remember whether he had seen the referral letter dated 16 October 2018 that Dr Oliver had sent to the ENT department at St John's Hospital following the consultation with the pursuer the previous day and said that it was "possible that he might have". Mr Newton agreed that the credibility of the pursuer was crucial to his opinion and that he would review his opinion if he was wrong to consider the pursuer to have been a credible historian although he qualified that comment by saying that it would have to be something "very substantial" before he would review his opinion. An example of that, he agreed, would be if there was an alternative explanation for Mr Nelson's hearing loss, and he agreed that the case was complicated, unusual and uncommon, although he frequently saw things that he had never encountered before in his career. He agreed that sudden onset sensorineural hearing loss was not uncommon and that unexplained sensorineural deafness was certainly

seen, although Mr Newton considered that there was usually an explanation for such a condition. He thought that this was usually caused by an upper respiratory tract infection and the lack of such an infection in the present case was something that caused him to consider the diagnosis he had made, that is, that in the absence of any other causative factor, the blow from the ball had caused Mr Nelson's deafness. Mr Newton accepted that in his supplementary report he had recorded that sudden onset sensorineural deafness without a causation is relatively frequently seen in the urgent ENT clinic, but said that these patients had not been knocked to the ground by a blow to the head in the days before the onset of the deafness. He also accepted that in Mr Nelson's case, the blow to the mastoid bone was relatively less than that seen as a frequent cause of hearing loss, so that he would agree with Mr Marshall that this was a relatively minor injury and a pretty severe hearing loss and that this was an unusual situation.

[40] Mr Newton was then asked about paragraph 9 of his report, in which, he commented on Mr Marshall's conclusion that "the minor nature of the trauma could not have caused a severe hearing loss of this nature". In response to that Mr Newton had written:

> "I agree that it is unlikely but in my opinion it could have occurred. I have based my conclusions on causation here on the credibility of the client, his hearing tests confirming hearing loss on the right side in the immediate aftermath of the index accident and his medical records documented in my original report indicating the timing of events."

He agreed by the term "unlikely" he meant a less than 50% chance and that he had based his conclusion by taking at face value everything he had been told by Mr Nelson about the contemporaneous connection between the incident he had been told about and the onset of the hearing loss. His evidence was that he had been told about a "very significant event" that had been reported to a superior and which was probably a "once in a career type incident" which occurred followed by an immediate onset of right sided sensorineural

hearing loss confirmed on a hearing test and immediate presentation to a medical advisor. He agreed further that if the timings changed then he would have to change his opinion. He stated that he found the pursuer to be credible and that his general practice when doing reports was to take the patient as credible and unless there was a reason to doubt the account given, to give the patient "the benefit of the doubt". He was then taken to a number of entries in the medical records for his comments. Mr Newton did not know that the pursuer had returned to work the day after the incident before then being off for his operation, although this did not change his view about the pursuer's credibility. He was asked whether he did not think it strange that given the significance of the event to Mr Nelson that he did not report it to management the following day. His response was that he had understood there were two different managers involved and that whilst this may have caused some complexity, he had no doubt that Mr Nelson had reported the matter to one of his supervisors at the time and then more formally once he had received the more important treatment for "his most important problem", namely his potential cancer diagnosis.

[41] Mr Newton accepted that he had understood the pursuer to have sustained his accident at around 10pm on Saturday 13 October 2018. He was then taken to the letter written by Mr Nelson's GP referring him on to ENT after the consultation on 15 October 2018, to which he had made no reference in his report, and which he did not know if he had seen before. It was put to the witness that the reference in that letter to the pursuer wakening on Saturday morning with no hearing in his right ear and tinnitus on the left side was a description of events which bore no resemblance to what the pursuer had told him had happened. In response Mr Newton replied that he agreed to the extent that there was no mention of trauma. He agreed that it would be important for a doctor to mention trauma

but went on to say the most important point in this situation was the patient's hearing loss and whilst he understood that "this GP trainee" appeared to have taken a reasonably thorough and adequate history, there was no reference as to whether or not there had been head trauma, but when the pursuer was eventually seen by a more experienced ENT expert this was what was mentioned as being most important by that clinician and he thought that what had happened was that a different history had been taken by two different medical practitioners. When he was asked how he could possibly know what the most important point was for the treating ENT specialist, Mr Newton replied that this was based on how it had been documented in the referral for a scan (the patient developed right sided hearing loss after a head trauma), which indicated that it was a relatively important consideration. He agreed that this was not what the pursuer had told the GP nor what was in the referral letter. Mr Newton also agreed that the Dr Oliver's referral letter was fairly thorough, but then stated that he found it interesting that the entry on 15 October documented a hearing loss which had come on 4 days earlier, whilst the referral letter seemed to refer to hearing loss coming on 3 days before that and he then observed that "practitioners at trainee level might not be one hundred percent accurate" and that it was difficult to pin down exactly when the sensorineural loss first happened as its onset had been reported in a different way 48 hours apart. The one thing that was not in doubt was that the pursuer had suffered the sudden onset of the condition. He accepted that if the court were to find that the hearing loss came on earlier on 15 October 2018, and before the incident at Waitrose had happened, he would have to change his opinion. He agreed that in that case, what would be left in Mr Nelson's case would be a sudden onset of unilateral hearing loss of unexplained origin, which is a recognised phenomenon.

[42] In re-examination Mr Newton expressed the view that if one was comparing sensorineural hearing loss of an idiopathic causation as opposed to hearing loss caused by a head injury, trauma would be a more common causative factor.

[43] The defender then called Mr John Marshall, Consultant ENT surgeon, to speak to the terms of his report. Mr Marshall, who was 62 years of age, was mainly based in the Queen Elizabeth University Hospital in Glasgow but also worked in some of the other hospitals in Glasgow. He had a private practice at the Ross Hall Hospital and the Glasgow Nuffield, which included carrying out medico-legal reports. He confirmed that he had prepared the defender's report, which formed number 6/1/3 of process. His CV detailed that he had been a Consultant in ENT since 1998, mainly in Glasgow, and that he had been Clinical Director for ENT for Glasgow, the largest ENT unit in the in UK, for 9 years and a specialty adviser for ENT to Chief Medical Advisor to Scotland for 1½ years. He had followed a speciality interest in otology for twenty 2 years. He adopted his report in evidence. He had examined the pursuer at the Glasgow Nuffield hospital. He reviewed the two audiograms from 17 October 2018 and 28 November 2018 which were in the pursuer's medical notes and found that these demonstrated that there was a sensorineural hearing loss affecting right ear and of the two tests 11 days apart the first test was more significant. Both tests showed a significant hearing loss, but this seemed to have improved between the first and second tests. He had also seen the audiogram of the hearing test undertaken for the purposes of Mr Newton's report, which he had seen subsequently after prepared his report. Whilst somewhat incomplete, the test showed that Mr Nelson had moderate hearing loss in the left ear and severe to profound hearing loss in the right ear, with no recorded hearing at highest frequencies in the right ear.

[44] Mr Marshall described the history as narrated by the pursuer that he had been working stacking shelves on a Saturday night when he had been struck from behind by a small ball thrown by a work colleague whom he described as having been messing about. From the pursuer's description the ball seemed to have hit him behind ear but not on the ear itself. Mr Nelson described that 15 to 20 minutes later he could not hear so well and that he had progressive hearing loss over an hour or so. He had been wearing ear pods and initially thought that the right device was not working properly. The pursuer described to Mr Marshall that he had contacted his GP surgery and had an appointment on Monday morning which was an in person appointment and the GP examined his ears and referred to him to the ENT department in Edinburgh. Mr Marshall had seen the pursuer's history and knew that there had been two previous episodes of hearing loss, one 20 years previously when he had been struck by a bottle outside a night club resulting in a perforated right eardrum and bleeding and subsequent sensorineural hearing loss which had initially been severe but spontaneously returned to normal. Then, in November 2003, he had suffered deafness and tinnitus in the left ear but it was recorded on that occasion that his previous right-sided hearing loss from 1999 had not fully returned to normal levels.

[45] Mr Marshall's evidence was that for post-traumatic hearing loss one would expect that the hearing would either stay low or return to normal or partially improve after 2 to 3 months but beyond that one would expect it to be stable and not to further progress or improve after that. If hearing loss was present in 2003, then this was either related to that earlier injury, from which there had been an incomplete recovery, or to some other cause. Regarding the significance of the audiogram performed in September 2021 for the purposes of Mr Newton's report, he would interpret that in one of two ways, either the hearing test is not an accurate representation of what hearing was at that time, or he was demonstrating a

progressive hearing loss in L ear and possibly in the right R ear in the period between 2018 and 2021. The explanation for that could be that the deterioration in both ears was not related to the index incident, and hearing does deteriorate with age for a number of reasons which are often unknown. In terms of hearing tests potentially being inaccurate, there could be various reasons for this.

[46] In terms of his assessment of the pursuer's right-sided hearing loss, Mr Marshall did not administer an audiogram test of the pursuer on the day of his examination, because he was aware that there was a recent test in the medical notes. In terms of the GP notes for 15 October 2018, Mr Marshall thought that the history was consistent with sudden onset hearing loss although he thought the dates were inconsistent with a history given to him as if this had come on 4 days prior to 15 October that would be 11 October and the index incident was 13 October, so the notes were describing an onset of hearing loss 2 days before that suggested in the present claim. He also made the observation that usually when people link two events, in medical notes GPs almost always comment on that, so it was surprising that the notes do not say that the pursuer noticed a hearing loss after an incident at work. The GP note did not accord with what Mr Nelson told him as he clearly linked the onset of his hearing loss to the incident at work which occurred on the thirteenth. The entry suggested that the pursuer had not felt the ear particularly painful after the incident and he did not describe bleeding or damage to the ear, just a loss of hearing, not pain particularly. Whilst the note mentioned mild tinnitus of the left ear, Mr Marshall did not recall the pursuer mentioning tinnitus in the left ear but this is a common symptom and if he had some mild tinnitus at time of onset he would not find it surprising that he has not mentioned this. In terms of what the examination would have consisted of, Mr Marshall would have expected the GP to have examined the ear with an oroscope and there was

mention of a possible tuning fork test, which was not done, and routinely the GP would look into the ear to see if wax or fluid was present or there was any blockage or infection. A tuning fork test would sometimes be done if the hearing loss is conductive, that is to say a blockage of hearing rather than sensory loss. The test was traditionally done but was unreliable. Mr Marshall explained that sensory hearing loss occurs usually at cochlea, the organ which transmits sound energy into electrical nerve impulses. Conductive loss is any blockage of sound before it gets to the cochlea. If fluid was physically blocking sound getting to the cochlea then this would be a conductive type loss and one would not expect the cochlea to be working normally. To detect which type was present involved a combination of approaches, the audiogram is the key test, but one might suspect a conductive loss if the ear was fully blocked with wax or an infection or if there was a perforation to the ear drum that might imply a conductive element. If the ear looked completely normal then the hearing loss is likely to be sensory in nature. Conductive loss was fairly easy to see when the ear was examined. Trauma that causes conductive hearing loss would be visible on inspection of the ear. The ear could be full of blood. There could be swelling around ear canal or perforation of the ear drum. When the pursuer was struck by a bottle in 1999 there had appeared to be some external injury. In respect of the hearing loss in 2018, which the pursuer linked to being struck by a small ball on the ear, Mr Marshall thought that it seemed to him to be unlikely that from the description of the mechanism a blow from a ball like that would cause any visible problem with the ear. If there had been a direct blow to the ear itself, then that could happen, but with a blow landing behind the ear you would expect there to be no visible damage in the ear canal. If the ball was thrown with significant force, then you might expect visible signs in the form of blood or a perforation.

[47] Mr Marshall's evidence was that the pursuer was prescribed steroids by his GP and these are often given when there has been a sudden sensory neural hearing loss in the hope that these increases chance of some recovery by reducing inflammation. Mr Marshall was also asked to consider the referral letter dated 16 October 2018 from the Eyre Place Medical Practice to the ENT clinic. He noted that the letter referred to hearing loss coming on 72 hours earlier and that if the letter had been dictated and sent on the same day, that would be a reference to 13 October 2018. Regarding the letter recording Mr Nelson wakening on Saturday with no hearing on the right side and tinnitus on the left side, that did not accord at all with the description he had given Mr Marshall, which was the hearing loss coming on after an event on Saturday evening. The report of tinnitus on the left side appears to indicate there was an issue on both sides but tinnitus alone without hearing loss is not of significance as stress can cause this, and Mr Marshall said that a lot of people might experience that. However the description of the timing of the hearing loss was significantly different from what had been explained to him. He was surprised that the letter did not mention being struck by a ball because this was a clear part of the history and this constituted the link between hearing loss and the incident. Mr Nelson describing hearing loss when wakening in the morning before the index incident seemed to place the timing of the hearing loss as coming on before the incident being attributed as the cause.
Mr Marshall's evidence was that sudden loss of hearing in one ear was not an uncommon event and for probably 85 - 90% of cases involving a loss of hearing in one ear no cause is found. It is postulated that causes of such deafness could be viruses or vascular incidents, but generally these episodes occur "out of the blue" for no apparent reason. Mr Marshall said that because they are not associated with pain, if that sort hearing loss occurs during sleep, it won't necessarily wake someone up and a substantial proportion of patients first

notice there is a problem when they wake up. A third of cases of those who develop this kind of deafness might occur during sleep and therefore only be noticed upon wakening. This was a figure based on a mixture of clinical experience and reading statistics of sudden onset hearing loss. It was a common referral in ENT to have someone who had lost their hearing in one ear suddenly. When asked how the referral letter to ENT, dated 16 October 2018, accorded with the entry in the GP notes for 15 October 2018 Mr Marshall's evidence was that the entry in the notes also does not mention hearing loss after trauma, so that was consistent, and whilst the date of onset might be out by a day or two and not quite tie up, in context of GP letters it was consistent and the description of the pursuer wakening with hearing loss is quite clear in the referral letter and he would take that as fairly strong evidence that this is what had happened.

[48] Mr Marshall was then asked about the pursuer's evidence that there had been an improvement after the insult to his ear. Mr Marshall agreed that the pursuer had said to him that he had originally thought there was some improvement and that this was evident in the second test he had Edinburgh after the incident, but that the pursuer had then said that he had tried a hearing aid and felt that his hearing got worse over a much longer period of time. Mr Marshall did not have an explanation for there having been a progression from an improvement to deterioration and said that hearing can deteriorate for number of reasons and if the hearing loss had occurred either spontaneously in the middle of night or due to trauma, he would think that if there had been a significant improvement between the first and second tests he would then expect subsequent tests to be either a little better or similar to the second slightly improved test, but he did not think that any subsequent deterioration in Mr Nelson's hearing could be attributed to the first event, whether that was trauma or spontaneous loss of hearing in the night. He would expect hearing loss would be fairly

stable, but hearing does get worse with time and there could be lots of reasons why that can happen.

[49] Mr Hennessy asked Mr Marshall what he thought could be the cause of Mr Nelson's hearing loss and he said that, as many people have, he had experienced a sudden onset of hearing loss which had occurred spontaneously. The cause is not known and for the majority of people who have such a loss of hearing, no cause is found and whilst one can postulate viral infections or sometimes vascular events in the form of problems with the tiny blood vessels in the ear as the cause, in the majority of cases the cause of the hearing loss is not known.

[50] Mr Marshall's assumption from the evidence was that the pursuer had experienced a spontaneous sudden hearing loss which was not related to the incident in question, by which he meant the throwing of the ball. He was taken to the opinion section of his report where he observed that the contemporaneous notes expressed the view that the hearing loss occurred 2 days before the incident at work and that he did not link the hearing loss to that event. He was of the view that it was unlikely that a relatively mild injury which caused no significant trauma to skin or tissues behind the ear or to the ear canal itself could be cause of hearing loss of this degree.

[51] Mr Marshall explained that he would expect that traumatic hearing loss would be correlated to the force that was imparted by the impact of an object. Traumatic hearing loss does occur but in such instances the trauma is significantly greater. If trauma has caused hearing loss then he would expect the degree of hearing loss would be related to the degree of force of the traumatic incident. In such cases one would really need to assume that there is a significant amount of force imparted to cochlea such as to cause hearing loss. The type of ball described was of a type children play with all the time, and if being hit on the head

with balls of that nature could cause this type of hearing loss, then he would expect that this would be more well recognised problem. In Mr Marshall's experience, the type of trauma necessary to cause that level of hearing loss would be significantly more substantial and he would have expected a loss of consciousness, attendance at A & E with a head injury, even if minor and there would have to be some other reason to think there had been significant force connected with the incident. He agreed that with a significant amount of force he would expect pain and evidence of trauma. He gave examples of the types of trauma which could cause deafness and these all involved considerably more force than that to which the pursuer had been subjected to. The examples included "slap" type pressure wave injuries where the ear drum is burst, barotrauma caused by diving and severe head injuries resulting in skull fracture, intra-cranial bleeding and fractures of the petrous bone (in which the ear is located).

[52] Finally, Mr Marshall was asked what comment he would have on Mr Newton's evidence that the description provided by the pursuer that he sustained sensory hearing loss by this ball was unlikely but possible. Mr Marshall replied that he would say very unlikely. Whilst anything is possible, he had never seen anyone with a convincing hearing loss of this nature related to such a trivial blow. He would not describe a small ball hitting the back of a patient's head as an injury. Whilst he would not want to say anything is impossible, and as mitigation Mr Nelson did have an unusual history of hearing loss after much more significant trauma when he was hit with a bottle, he would struggle to see how that sort of blow could cause damage to cochlea that would be needed to cause that level of hearing loss. The description of improvement after the event, followed by subsequent deterioration did not tie in with traumatic hearing loss either. He would have expected a moderate

improvement in hearing after a week or two and then no further deterioration thereafter. This concluded Mr Marshall's evidence, and he was not cross examined.

Submissions for the parties

[53] The pursuer's counsel submitted that the pursuer had proved on the balance of probabilities that he had sustained loss, injury and damage in consequence of a breach of a duty of care by the defender and its managers. The common law duty was to some extent informed by Regulation 3 of the Management of Health and Safety at Work Regulations 1999. It was further submitted that the pursuer had proved that he had been injured by the actions of Mr Moran. It was clear on the evidence that the throwing of projectiles in the workplace was causing distress and anxiety to other members of staff and that this had not been properly dealt with. The fact that Craig Smith had said that he had wished he had done more about the behaviour in his evidence demonstrated that the conduct was more than a game, and that such actions were entirely distinguishable from mere horseplay. The question of whether something ought to be factored into a workplace risk assessment had to be decided on the facts of any given case, and the decision in *Chell* v *Tarmac Cement and Lime Limited* 2022 EWCA Civ 7, was not authority for the proposition that horseplay can never constitute a foreseeable risk. It was an over-generalised statement to assert that horseplay could never constitute a foreseeable risk for the purposes of the law of delict. The evidence in this case demonstrated that there was a foreseeable risk of harm due to the specific risk of employees throwing projectiles and that steps ought to have been taken to address that risk. The conduct of Mr Moran was an assault as defined in Gordon, *Criminal Law*, 3rd Edition, Volume 2, Chapter 33. The test for whether an employer was vicariously liable could be found in the judgement of the Supreme Court in *Wm Morrison Supermarkets Plc* v *Various*

Claimants [2020] UKSC 12 and *Grubb* v *Shannon* 2018 SLT (Sh Ct) 18. On the evidence in this case the movement of stock fell within the remit of the nightshift workers, and this included moving toys. Thus it would be fair to hold the defender liable for the actings of the employees who had engaged in throwing the balls because this was an activity which was closely connected with the duties they were engaged to perform. The distinguishing feature of this case was that the defenders knew that the horseplay was going on, and yet had failed to take action, thereby normalising the activity. This distinguished the present case from the facts of case such as *Wilson* v *EXEL UK Ltd* [2010] CSIH 35, *Vaickuviene* v *J Sainsbury PLC* [2013] CSIH 67, where an employee had been on a frolic of their own. Mr Nelson's case was much more in line with cases such as *Mattis* v *Pollock* 1 WLR 2158. On the topic of causation no evidential weight should be attached to Dr Oliver's evidence because she could not recall her consultation with the pursuer and gave evidence on the basis of what her practice would have been based on what she does now. All inferences to be drawn from her evidence would necessarily be speculative. On the expert evidence, Mr Newton ought to be preferred to Mr Marshall and he had explained why Mr Marshall's theory that the accident did not have sufficient force to cause deafness was flawed. Ultimately Mr Marshall had agreed that the causal mechanism proposed by Mr Newton was unlikely but not impossible. It was submitted that the pursuer had proved the link between the wrongful acts of the defender and his injuries. Mr Newton offered a plausible and medically sound explanation for the onset of the pursuer's deafness. There could be no weight placed on the suggested inconsistencies in the medical records as to when the pursuer had reported his deafness commencing. The records themselves were inconsistent and Dr Oliver could not remember the consultation with the pursuer. She could not offer an explanation for the inconsistency in the records on this point and she conceded that the notes were not a verbatim transcript

of what a patient had said. Inconsistencies about the level of hearing the pursuer still had could be explained by the fact that he still had hearing in his left ear. Even if causation was not proved the pursuer had established that he had sustained a painful injury and he had succeeded to that extent, which would be relevant in any subsequent question of expenses.

[54] For the defender it was submitted that there were a significant number of inconsistencies in the pursuer's account of the accident both in evidence and in respect of what he had told the various experts. This included omitting to tell Mr Newton that he had been knocked over by the impact of the ball, whether he had pain at all after the impact of the ball and when, on the night of the accident, he had told others that he had noticed his hearing was damaged. The pursuer had failed to demonstrate that he had reported the practice of ball throwing and Mr Smith, his manager, had dealt with any complaints that he had received. The pursuer's evidence as to when his hearing loss had come on was contradicted by the evidence in the medical notes. The pursuer's evidence about the severity of his hearing loss was inconsistent and was contradicted by references to him being a piper, making bagpipes and his complaints about noisy neighbours. The pursuer was also inconsistent in relation to the level of deafness he had experienced in his left ear. He had never used the hearing aid he had been supplied with on the NHS. On the whole, the pursuer's evidence was incredible and unreliable and he was evasive and, at best for him, a poor historian. Dr Oliver was a credible and reliable witness and her evidence deserved considerable weight, particularly in respect of when and how the pursuer first said his hearing loss had come on. Regarding the experts, Mr Marshall ought to be preferred to Mr Jonathan Newton, the pursuer's expert. Mr Newton had failed to refer to the crucial letter of 16 October 2018 and he had accepted that if the pursuer's account of how he came to have hearing loss was not accepted, then he would have to revise his opinion. He was, it

was submitted, neither credible nor reliable and generally evasive and stubborn. This was illustrated by the fact that he was unwilling to make even the most basic of concessions. Mr Marshall, on the other hand, had given clear and balanced evidence and ought to be preferred. He could not reconcile the history as it appeared in the referral letter with what the pursuer had said had happened and his evidence that this was an instance of sudden onset hearing loss rather than trauma induced hearing loss should be accepted. Under reference to *Chell* v *Tarmac Cement and Lime Limited* [2020] EWHC 2613, the defender submitted that Mr Moran's conduct was an act of horseplay which did not need to be included in a risk assessment, and that it was unrealistic to expect the defenders to have in place a system to deal with such acts. There was, in any event, no evidence about what would have amounted to adequate supervision and no witness was asked about any measures which, if taken, might have prevented the accident. The defender ought not to be held vicariously liable for what had happened applying the principles from *Morrison Supermarket Plc* v *Various Claimants* [2020] AC 989. It was clear that the actions of Mr Moran were not closely connected with the duties entrusted to him and it would not be fair and just to hold the defender liable for such acts, see *Christopher Sommerville* v *Harsco Infrastructure Ltd* [2015] SC Edin 71 and *Vaickuviene Sainsbury Plc* 2014 SC. Reference was made to *Chell supra* and it was submitted that Mr Moran was on "a frolic of his own" when he threw the ball. In any event, the pursuer was bound to fail on causation as the factors which Mr Newton had relied upon when coming to his opinion had all been seriously undermined by the evidence that had been led, particularly in respect of the pursuer's account of when he had first noticed his hearing loss.

[55] Both counsel made detailed submissions on the evidence, including submissions on the credibility and reliability of the individual witnesses. I do not propose to rehearse those

submissions in detail here, but I have taken them into account in reaching my conclusions on the witnesses and the salient facts are all as set out above and below.

Decision

[56] The first matter that I must decide is whether the pursuer has proved on the balance of probabilities that he sustained an injury as a consequence of a breach duty of care by the defender, either directly, or as a consequence of the actions of Mr Moran, its management or as a result of the actions of Craig Smith. This involves consideration of whether the pursuer has proved that he was struck by a ball thrown by Mr Moran whilst at work on 13 October 2018 and whether the defender was aware of the practice of employees throwing balls and engaging in general horseplay whilst at work prior thereto.

Mechanism of the accident

[57] I accepted the pursuer's evidence that, whilst at work on the evening in question, he had been struck on the back of the head, in the area behind his right ear, and that the blow partially caught his right ear, although I find that the impact was mainly to the back of his head. I found the pursuer to be both credible and reliable on the topic of the mechanism of the accident. His account of how he was struck whilst kneeling and leaning over, the impact causing him to be knocked off balance sounded to me to be both plausible and truthful. I did not consider that the factors relied upon by the defenders as undermining the pursuer's credibility in respect of the accident mechanism could be afforded the weight that Mr Hennessey suggested, and matters such as whether the pursuer's headphone was knocked out, whether he was in pain immediately after the incident, whether or not he had told Mr Newton, his expert, that he had been knocked over and whether he had complained

of an immediate hearing loss directly after the accident did not cause me to doubt the pursuer's account of how he was struck by a ball thrown by Mr Moran to the extent that I considered that on the balance of probabilities it did not happen. Some of these matters, however, have greater significance in terms of the question of causation, as I mention below. I accepted that the impact of the ball hitting Mr Nelson was sufficient to knock him off balance and onto the lower shelves in the area where he was working. The pursuer's account of the accident was corroborated to some extent at least by Mr Paul Thomson, the only other witness led who had been at work on the night of the accident. Mr Thomson gave evidence that he had been working that night although in a different aisle. He had heard Mr Nelson cry out when he was hit and had gone to the aisle where he was. At break time he had spoken to Mr Nelson, who advised he had been struck by a ball on the side of his head around about his ear and that his head was sore. He believed that the ball had been thrown by someone called "James" but he could not be sure. Mr Thomson was not challenged on the evidence of what had happened on the evening of the accident and I find that his evidence supports the testimony of the pursuer as to having been struck mainly on the back of the head and partially on the ear by a ball thrown by Mr Moran. Ross McLelland also spoke to being aware that the pursuer had been hit by a ball thrown by someone called "James" and Adam Kerr confirmed that James Moran was often involved in the practice of throwing balls in the aisle. All of this evidence supported the pursuer's claim that James Moran was frequently involved in the sort of conduct which led to his injury. Accordingly, I reject the suggestion by the defender that the pursuer has failed to prove that the accident occurred in the manner averred and spoken to in evidence by him.

Reporting of complaints

[58] The next question that I require to address is whether the defender was aware of a practice of throwing balls, general horseplay and "carrying on" conducted by employees in in the Comely Bank store prior to the accident to the pursuer, such that it ought to have taken steps to prevent such actions on the part of staff before he was injured.

[59] The pursuer's evidence was that he had complained about Mr Moran on most nights that they were working together and that "every night" Mr Moran would run around throwing balls made of hard rubber or rolled up balls of packaging at other employees. On other occasions he would come up behind the pursuer and scream. Mr Moran was part of a group of younger staff members who would engage in this sort of conduct to disrupt the other workers in what they saw as fun. The pursuer's evidence was that this behaviour was not welcome and that he found constantly having to be on the look-out upsetting and "unbearable". His evidence was that he had constantly complained to Craig Smith the Night Shift Manager and to his Team Leader Henry Taylor and to anyone in authority who he thought might be able to do something about the problem. He described the frequency of his complaints as nightly and eventually, after nothing was done, he accepted the situation. He said that Craig Smith regarded the behaviour as a bit of fun and that nothing was done, despite Mr Smith's awareness of his poor mental health, the effect that the behaviour was having upon him and the fact that he was on medication for his mental health. The accident came after he had complained on numerous occasions.

[60] Ross McLelland spoke to the throwing of balls happening for days if not weeks and thought that the behaviour may have gone on for a period of about 2 weeks until the balls were all either sold or lost. The throwing of balls made him feel on edge as he was constantly having to keep a look out for such projectiles. He said that managers were aware

of the situation but that nothing was done in this respect. He said he had heard from Mr Nelson that he had complained to Craig Smith after the incident, and that Mr Smith had assured the pursuer that something would be done, but that nothing was in fact done as the practice continued to happen "night after night". He had seen balls thrown on previous occasions (by which I assumed he meant occasions prior to the incident to the pursuer), but had never complained. His evidence on when complaints to management were made was vague, and it was unclear to me whether his evidence about management being aware of the situation but doing nothing was a reference to a time before or a time after the pursuer's injury. His later comment to the effect that after the complaint made by Mr Nelson to Mr Smith the management said they would deal with the situation but failed to do so, tended to suggest that his evidence about knowledge on the part of the management of the behaviour referred to the period after the pursuer was injured, and not before. Whilst I found Mr McLelland to be both credible and reliable, his evidence was of limited assistance on the matter of the history of complaints.

[61] Adam Kerr spoke to having been hit by a ball and having complained to management, specifically a nightshift manager, but could not recall whether this was before or after the pursuer had been struck by a ball. He had complained about other incidents of horseplay, including being squirted with water, but again the timing of such complaints in relation to the incident to the pursuer in October 2018 was unclear.

[62] The evidence of the next witness who gave evidence on liability, Paul Thomson, was of more assistance in relation to the timing of any complaints. I found Mr Thomson to be wholly credible and reliable and I did not regard him as evasive in his answers as suggested by the defender in submission. He said he had spoken to his manager, Craig Smith, about horseplay at the Comely Bank store, which involved the throwing of balls and generally

"carrying on", as he was concerned that the behaviour was at a level that someone could get hurt or stock could be damaged. Under cross-examination he said that he was sure that he had complained about the practice of throwing balls before the pursuer had been struck because he was concerned about the risk of someone being injured, so he had gone to Craig. Despite this, nothing had been done. He reiterated that although he could not say what date he had complained on, he was sure this was before the pursuer had been hurt. I accepted this evidence.

[63] Craig Smith, the former Nightshift or Retail Team Manager at the Comely Bank store spoke to the issue of complaints. He gave evidence that he had been aware of an issue involving the throwing of balls around the store in about June 2018. At that time a major football tournament was being held and the store had taken in a stock of small commemorative footballs into stock. He remembered that a couple of employees had come to him and complained about the practice of throwing these balls around the shop and that, as a result, he had required to speak to several employees who had been involved in the practice. He had spoken to them and made clear this was unacceptable behaviour. Those spoken to included Mr Nelson (although he denied this and that he had ever been involved in throwing balls other than on occasion in anger). Mr Smith had made clear that formal action would be taken if the conduct did not cease and that after this he heard nothing more about the throwing of balls until June 2019 when the full details of the incident the pursuer first mentioned, apparently with some reluctance, in December 2018, were known.

Mr Smith said he did not recall any conversations with the pursuer about being harassed by James Moran, and that if he had been so aware, he would have taken steps to deal with the matter. I accepted the evidence of the pursuer that he first reported the incident involving James Moran to two of his managers approximately 2 weeks after 13 October 2018, when he

attended at work to hand in a sick note for an unrelated condition. I also accepted that the report of the incident was supposed to have been passed to Craig Smith by the managers to whom the pursuer made the report, but that this did not occur.

[64] During an Occupational Health telephone call relating to the pursuer's unrelated long term absence in February 2019, Craig Smith became aware that he had suffered an incident at work in October 2018. Craig Smith was not aware of the circumstances. The incident had not previously been reported to him. He approached the pursuer, but the pursuer told him he did not want to discuss it. Craig Smith asked two other managers whether they were aware of the incident, and they were not.

[65] Having regard to this evidence, I find that the defender's management were aware, prior to the pursuer's injury, that there was a culture of horseplay, throwing balls and general "carrying on" as described by Paul Thomson. I accepted the evidence of Paul Thomson and the pursuer that they complained to Mr Smith about the behaviour. I also find that in response to a complaint from staff Mr Smith took the action he described in evidence by speaking to those involved in what was described as a "huddle" meeting at the tills on or about 6 June 2018. However, I also find that the throwing of items and general high-spirited behaviour continued after Mr Smith issued his warning. The weight of evidence was that despite complaints to management, and to Mr Smith specifically, the behaviour continued. Mr Thomson spoke to nothing having happened to halt the behaviour after he had complained to Mr Smith (which was before the injury to the pursuer) and Mr Kerr spoke to a general climate of "carrying on" with balls being thrown and water being squirted, with the ball throwing often involving Mr Moran. He himself had been struck by a ball, although he could not recall whether this was before or after the pursuer's injury. I accepted the pursuer's evidence that he had complained about such matters to

Craig Smith and Henry Taylor on several occasions, but that nothing was done and the evidence of Mr Kerr and Mr Thomson generally supported his position on this matter. I did not, however, accept the pursuer's evidence that he had made Mr Smith aware that his mental health was being affected by the conduct of Mr Moran nor that he was constantly being harassed by Mr Moran. I do not accept that if such a complaint had been made, Mr Smith would have ignored that, as this would have been a matter of considerable gravity and Mr Smith would have been unlikely to have ignored such a serious complaint, particularly as a manager in a large organisation like the defender, although I do accept that after trying to deal with the matter in June 2018 Mr Smith did nothing further despite ongoing complaints. Whether that was because, as the witnesses said, he came to regard what was going on thereafter as just "a bit of fun" or for other reasons was unclear. I find that Mr Smith was either mistaken or had forgotten the detail of these events when he said that he had not heard anything about ball throwing after he held the meeting in 2018. And on this topic I found his evidence to be unreliable and I did not accept it.

[66] The question then arises as to whether, in view of its knowledge of the ongoing practice of throwing balls and general horseplay, the defender ought to have done more to ensure such behaviour ceased. Much of the defender's submission was concerned with the question of whether the act of horseplay perpetrated by Mr Moran could be regarded as falling within the scope of his employment or not. In this regard reference was made to case of *Morrison Supermarkets Plc* v *Various Claimants* 2020 AC 989, in which the test for vicarious liability was restated. In *Morrison* the defendant company, which operated a chain of supermarkets, was requested by its external auditors to provide them with a copy of its payroll data. Accordingly, a copy of the data was transmitted to one of the defendant's employees, an internal auditor, for the sole purpose of passing it onto the external auditors.

Because of a grudge that he held against the defendant arising from a minor disciplinary matter, the auditor carried out the task but also unlawfully copied the data and uploaded it onto a publicly accessible website, intending to cause harm to the defendants. On the day when the defendant's financial results were due to be announced, the internal auditor also sent the data to a number of national newspapers. The claimants, who were employees of the defendant, whose personal data had been disclosed, brought claims against the defendant for damages for breach of confidence and misuse of personal information on the basis that the defendant was vicariously liable for the internal auditor's wrongdoing. The judge at first instance allowed the claims, holding that what the internal auditor had done in disclosing the data was so closely related to what he had been employed to do that he had committed the acts in the course of his employment. The Court of Appeal upheld the decision, holding that it was irrelevant that the internal auditor's motive had been to harm the defendant. On the defendant's appeal the Supreme Court allowed the appeal, holding that the test which generally applied in deciding whether an employer was vicariously liable for wrongful conduct of one of its employees was whether the wrongful conduct was so closely connected with the acts that the employee was authorised to do that, for the purposes of the employer's liability to third parties, it could fairly and properly be regarded as having been done by the employee while acting in the ordinary course of his employment; that, in applying that general principle to the circumstances of any case, guidance was to be derived from decided cases concerning comparable situations; that in the cases most closely comparable to the present case, which concerned employees who had deliberately inflicted harm on third parties for personal reasons, the employer had been found not to be vicariously liable, on the basis that the employee had not been engaged in furthering the employer's business but had been pursuing his own interests; that it followed

that the internal auditor's motives had not been irrelevant, since they were material to whether he had been acting on the defendant's business; that, on the facts, it was clear that the internal auditor had not been engaged in furthering the defendant's business when he committed the wrongdoing in question but, rather, had been pursuing a personal vendetta against the defendant; and that, accordingly, the defendant was not vicariously liable for the internal auditor's actions. At para [25] of the decision Lord Reed PSC, delivering the judgment of the court, and referring back to the earlier Supreme Court decision on vicarious liability in *Mohamud* v *Wm Morrison* [2016] UKSC, which had led to some confusion about the correct test to be applied to determine liability in such situations said:

> "…..Lord Toulson JSC summarised the present law in paras 44-46 of his judgment in *Mohamud* [2016] AC 667. 'In the simplest terms', he said the court had to consider two matters. The first question was what functions or 'field of activities' had been entrusted by the employer to the employee. In other words, as Lord Nicolls put it in *Dubai Aluminium*, at para 23, it is necessary to identify the 'acts the….employee was authorised to do'. Secondly, Lord Toulson JSC said at para 45, 'the court must decide whether there was sufficient connection between the position in which he was employed and his wrongful conduct to make it right for the employer to be held liable under the principle of social justice which goes back to Holt CJ'. That statement, expressly put in the simplest terms, was more fully stated by Lord Nicholls *in Dubai Aluminium* [2003] 2 AC 366, para 23; in a case concerned with vicarious liability arising out of a relationship of employment, the court generally has to decide whether the wrongful conduct was so closely connected with acts the employee was authorised to do that, for the purposes of the liability of the employer, it may fairly and properly be regarded as done by that employee while acting in the ordinary course of his employment. That statement of the law, endorsed in *Mohamud* and in several other decisions at the highest level, is authoritative."

[67] At para [32] Lord Reed went on to say the following in relation to how the test should be applied in *Wm Morrison Supermarkets*:

> "The question whether Morrisons is vicariously liable for Skelton's wrongdoing must therefore be considered afresh. Applying the general test laid down by Lord Nicholls in *Dubai Aluminium* [2003] 2 AC 366, para 23, the question is whether Skelton's disclosure of the data was so closely connected with acts he was authorised to do that, for the purposes of the liability of his employer to third parties, his wrongful disclosure may fairly and properly be regarded as done by him while acting in the ordinary course of his employment".

[68] The defender in the present case also made reference to the recent case of *Chell* v *Tarmac Cement and Lime Ltd* [2022] EWCA Civ 7. In *Chell* the claimant was a subcontractor working at a site operated and controlled by Tarmac. He worked alongside fitters who were direct employees of Tarmac and there were tensions between the two groups caused by apprehension on the part of the Tarmac employees that they would be replaced by the subcontractors. The tension between the two groups was known to management on the site and, on the day in question, one of the direct employees played a practical joke on the claimant, hitting two pellet targets on a workbench with a hammer when the claimant was bending down nearby. The pellet targets had been brought to the site by him and were not part of his employer's equipment. The resultant explosion caused the claimant to develop noise induced deafness and tinnitus. It was held that there was no foreseeable risk of the direct employee behaving as he did and the mere fact that heavy and dangerous tools were available did not of itself create a risk of foreseeable injury. It was further held that the trial judge had not erred in holding that there was not a sufficiently close connection between the act that caused the injury and the work of the direct employee so as it make it fair, just and reasonable to impose vicarious liability.

[69] I consider that a distinction has to be drawn between the facts of cases such as *Chell* v *Tarmac Cement and Lime Ltd*, *Wm Morrison Supermarkets Ltd* and the facts of the present case as I have found them proved. The cases referred to by the defender all concern isolated acts of conduct that could not have been foreseen by the employer. In the present case I consider that because the defender was aware of complaints about the throwing of articles and general horseplay well before the pursuer's accident and was also aware that such conduct continued up until the time of the injury to Mr Nelson, despite the warning issued by

Mr Smith in June 2018, I do not consider the actions of Mr Moran to be unforeseeable. The defenders knew such acts of horseplay, particularly by Mr Moran, were relatively common and that they continued on the nightshift. It was also foreseeable that injury could be caused to an employee by these acts. Mr Thomson said so to Mr Smith when he complained about the conduct. When an employer is aware that an employee is repeatedly engaging in horseplay or is repeatedly making a nuisance of himself, then it can be liable for not taking proper steps to put an end to the misconduct if injury to another employee then results. This proposition is vouched by the decision in the case of *Hudson* v *Ridge Manufacturing Co* [1957] 2 Q.B. 348. In *Hudson*, the defendant's employee had been known to persistently make a nuisance of himself by tripping up other employees and "skylarking". He had been persistently warned by his foreman, who had warned that he would hurt someone. Eventually whilst engaging in what is described as "horseplay" in the report of the case, he tripped up the plaintiff and injured him. The plaintiff claimed against the defendants on the basis that they had failed to maintain such discipline among their employees as would protect him from dangerous horseplay. It was held that as this potentially dangerous misbehaviour had been known to the employers for a long time, and as they had failed to prevent it or remove the source of it, they were liable to the plaintiff for failing to take proper care for his safety. Streatfield J. said the following at page 351 of the case report:

> "Here is a case where there existed, as it were in the system of work, a source of danger, through the conduct of one of the defendant's employees, of which they knew, repeated conduct which went on over a long period of time, and which they did nothing whatever to remove, except to reprimand and go on reprimanding to no effect. In my judgement, therefore, the injury was sustained as a result of the defendant's failure to take proper steps to put an end to that conduct, to see that it would not happen again and, if it did happen again, to remove the source of it. It was for that reason that this injury resulted."

[70] Streafield J was careful to draw a distinction between the facts of *Hudson* and the facts of cases such as *Smith* v *Crossley Brothers Ltd* (1951) 95 SJ 655, in which there had been a one off isolated incident of horseplay which had never happened before and which the employers could not anticipate. I agree with the submission for the pursuer that the fact the defenders knew about the acts of horseplay in the present case, but did nothing about that, takes it out of the realms of cases such as *Wilson* v *EXEL Ltd* [2010] CSIH 35 and *Vaickuviene* v *J Sainsbury Plc* [2013] CSIH 67.

[71] It was submitted by the defender in the present case that even if the court decided that there had been a failure on the part of the defender to deal with complaints about Mr Moran, the pursuer had failed to establish a breach of duty because his case as pled was a failure to adequately supervise employees about whom concerns had been raised, and no evidence had been led as to what would amount to adequate supervision such that it would have prevented the accident and that it was never put to Craig Smith that he could have taken any particular steps which, if followed, would have prevented the accident. Whilst it is true that no such direct evidence was led, I do not consider this to be a valid criticism. On the basis of the evidence that was led, it was obvious what adequate supervision would have amounted to. Mr Smith himself said that he had told the perpetrators of the ball throwing when he spoke to them in June 2018 he would have to take formal action if the matter continued. In cross-examination the pursuer accepted that if staff had been warned about such conduct and despite such a warning had subsequently carried on behaving in an inappropriate manner one way of dealing with the matter would have been to escalate the complaint to a disciplinary matter. Mr Nelson himself said that if conduct continued despite a warning from a manager then the manager concerned should escalate the matter to the next manager. In my opinion such steps are obvious, and did not require to be the subject of

direct evidence. I find that, on balance, had such steps been taken, they would have led to the cessation of the dangerous conduct, as it was clear employees knew that they should not have been throwing balls and I consider it established that a more serious warning than that administered in June 2018, perhaps with the threat of disciplinary action, would have been effective. In any event, the pursuer has also pled that the defender had a duty to act on and address complaints and concerns raised by employees as to their health and safety. This case of fault, which is separate to the duty to take reasonable care to supervise, is in itself sufficient to establish a breach of duty, as it was clear on the evidence that I have found proved that the defender did not adequately act on or address the employees' complaints, as the conduct which I have found the pursuer and others complained of continued, even after the complaints. At the very least an obvious step which could have been taken would have been the issuing of an instruction to all staff that objects were not to be thrown in the store on the nightshift, and that any such further conduct would be a disciplinary matter.

[72] On the basis that the defender knew of conduct which could potentially cause injury to its employees, I consider that as part of its duty to take reasonable care, the defender ought to have carried out a risk assessment of the risks posed to the safety of their employees by horseplay and the throwing of objects by those on the nightshift. The pursuer founds upon Regulations 3 and 5 of the Management of Health and Safety at Work Regulations 1999 as providing the basis for a common law duty to undertake a risk assessment in this case. Regulations 3 and 5 provide *inter alia* as follows:

> "3.— Risk assessment
>
> (1) Every employer shall make a suitable and sufficient assessment of—
>
> > (a) the risks to the health and safety of his employees to which they are exposed whilst they are at work; and

> (b) the risks to the health and safety of persons not in his employment arising out of or in connection with the conduct by him of his undertaking,
>
> for the purpose of identifying the measures he needs to take to comply with the requirements and prohibitions imposed upon him by or under the relevant statutory provisions.
>
> 5.— Health and safety arrangements
>
> (1) Every employer shall make and give effect to such arrangements as are appropriate, having regard to the nature of his activities and the size of his undertaking, for the effective planning, organisation, control, monitoring and review of the preventive and protective measures.
>
> (2) Where the employer employs five or more employees, he shall record the arrangements referred"

[73] Whilst the court in *Chell* held that there would have been no need to include the assessment of a risk of injury from horseplay in a risk assessment, even if the injury in that case had been foreseeable, because the only relevant risk that could have been included was a general one of risk of injury specific from horseplay, I consider that the facts of the present case do not justify a similar conclusion. Here, at least by June 2018, when Mr Smith issued his warning, there was a well-established culture of horseplay on the nightshift at the Comely Bank store. This included, in the main, the throwing of objects and, I have already found established, this was conduct which could foreseeably lead to a risk of injury. Thus, if the management had properly considered the matter in an adequate risk assessment, they would have identified that risk and could have taken steps to issue instructions that objects were not to be thrown around the store, even if such acts were intended as light-hearted fun.

[74] Accordingly, I find that there has been a breach of the duties pled by the pursuer in respect that the defender failed to act on and address the complaints and concerns raised by employees, including the pursuer, in respect of the actions of James Moran and the other younger employees in relation to the throwing of balls and horseplay. I also find that the

defender failed to adequately supervise its employees by allowing such acts to continue, even after the complaint by Paul Thomson to the effect that such conduct was liable to result in injury to someone. As the defender had clearly delegated responsibility for such matters to their management, the case of vicarious liability is also made out in respect of the failures of Mr Smith to deal with the complaints adequately and to ensure that the pursuer was adequately supervised. The defender is also vicariously liable for the acts of Mr Moran in throwing the ball at the pursuer. It was obviously foreseeable that to surprise another employee by throwing a ball at them from behind with some force when they were working such as to cause them to lose balance and fall forward, carried a risk of injury. The force of the blow was enough to cause the pursuer to feel "thumping pain". In the circumstances where, as I have found, the defender knew of Mr Moran's propensity to behave in this manner, the defender is liable for his actions, whether they are characterised as an act of negligence or as an assault, as the pursuer pleads in the alternative.

[75] Had I found it to be established that after the warning had been issued in June 2018 by Mr Smith that management had been unaware of the continuing practice of the throwing of objects and general horseplay in the Comely Bank Store, in other words if they had thought that Mr Smith's warning had been effective and had no further cause to suspect the practice was ongoing, then I would have found that Mr Moran's act of throwing the ball on the evening of 13 October 2018 was not sufficiently connected with acts that he was employed to do that it would have been fair to consider that this was an act done by him in the ordinary course of his employment. There are several reasons for this:

(i) Although there was no direct evidence of his duties, it appeared that Mr Moran was employed as a general shelf replenisher like the pursuer. Certainly there was no evidence that he had any responsibility for or role to play in the setting

out or re- stocking of the balls that were being thrown around the store. Indeed, on some occasions he would throw improvised balls which he had made from packaging around. There was no evidence that it was part of his work to be dealing with the balls in any way.

(ii) It was accepted by the witnesses on the merits that the throwing of balls was nothing to do with their duties and that the staff members who were doing so would have known that they ought not to be. This was illustrated by the evidence that ball throwing usually happened when managers were not on the shop floor.

(iii) The risk created by Mr Moran was not one which was inherent in the business. The employer's store and stock provided the background and context for the risk and created the ground for it but that of itself is insufficient to create a close connection with the risk.

(iv) Following the guidance from the Supreme Court in *Wm Morrison Supermarkets Limited*, and having regard to cases with similar facts, the throwing of the ball in the circumstances outlined above (where management were under the impression that the problem had been adequately dealt with months before, and did not know that the practice was ongoing) would fall to be regarded as an isolated incident of horseplay, for which the defender ought not to be held liable, see *Smith* v *Crossley Bros Limited* (1971) S.J. 655, *Chell* v *Tarmac Cement & Lime Ltd, supra.*

Causation

[76] The next matter that I require to decide is whether the pursuer has proved that the incident involving the ball caused his loss, injury and damage. In other words has his right sided sensorineural hearing loss resulted from being struck by the ball thrown by Mr Moran.

On this matter I do not find for the pursuer. This is because I did not accept his evidence about when his hearing loss first came on, in particular because this was so clearly contradicted by the evidence of Dr Sarah Oliver, the GP trainee who saw him on 15 October 2018, and because I preferred the evidence of the defender's ENT expert, Mr Marshall over that of Mr Newton, the pursuer's expert. I deal with each of these matters in turn below.

[77] The pursuer's evidence regarding the onset of his hearing loss was that it had come on immediately after the blow, and that by midnight on the night of the accident he could hear nothing at all. The GP entry for 15 October 2018 makes no mention of any injury or trauma, and indeed suggests that the hearing began on Thursday 11 October. Dr Oliver spoke to the terms of the note and gave evidence in a careful, considered manner. I found her to be an impressive witness and both wholly credible and wholly reliable. She appeared to me to be a diligent and thorough practitioner, who was unlikely to misrecord or fail to mention something as important as a recent history of trauma in the context of patient presenting with sudden onset hearing loss. Her evidence was that it was important to have an accurate record of what was discussed with the patient, both for the purposes of knowing what the patients symptoms had been that day, and also to ensure that if the patient was seen by a different doctor at a later date, there would be an accurate record for that colleague to refer to. Dr Oliver appeared to me as someone who would take an accurate and thorough record of a patient's history with these objectives in mind. The note that she took on 15 October was comprehensive and detailed and could only have been the result of such a thorough examination. Whilst, as was understandable, Dr Oliver could not remember the consultation with the pursuer, she gave evidence as to what her normal practice would be when consulted by a patient with sudden onset hearing loss and one of the questions she would ask would be what might have led to the deafness, for example where the patient had

recently been unwell or if there had been trauma to the ear. Her evidence was that a history of trauma was "quite important" and that she would not have omitted to record this in the note if it had been mentioned by a patient in the context of a case involving sudden hearing loss. I also consider the lack of the availability of a tuning fork, as mentioned by Dr Oliver both in her note of 15 October and her later referral letter to be highly significant in deciding which account of the pursuer's report of his symptoms to prefer. Dr Oliver's evidence was that a particular type of tuning fork can be used to differentiate between conductive hearing loss (which could be caused by trauma) and sensorineural hearing loss (which would be a problem with the structures of the inner ear). The fact that Dr Oliver recorded (twice) that she did not have a tuning fork indicates that she was not able to ascertain whether this was a traumatic or a sensorineural loss. On the basis of her evidence, it seems to me to be highly unlikely that she would have recorded that she had been unable to use a tuning fork if she had already been told by the pursuer that he had sustained a traumatic injury leading to deafness. Similarly, when one looks at the history in the referral letter, I simply cannot see how Dr Oliver would have come to record that the pursuer had woken on Saturday morning with no hearing in his right ear and tinnitus on the left side if this had not been what the pursuer had said. This is rendered all the more unlikely by the fact that in that letter Dr Oliver did go to the trouble of mentioning the previous traumatic incident in 1999 when the pursuer was rendered deaf after being struck by a bottle. It would be extremely odd if Dr Oliver had gone to the trouble of mentioning that incident, but at the same time had failed to mention the very traumatic incident which had led to that consultation and that urgent ENT referral in October 2018. The pursuer's evidence as to this discrepancy was weak and unsatisfactory. When challenged on the fact that neither the note of the consultation on 15 October or the referral letter mentioned him being struck by a ball he

maintained he had told the doctor about this in response to a question from her about why he had tinnitus and asserted that GPs could make mistakes. He had no explanation as to why the entries in his medical records said what they did and he thought that the doctor may have misunderstood him or not heard what he had said. His evidence was that his anxiety condition made him speak quickly and that this might have caused the doctor to mishear him. I did not accept this evidence and I find it proved that the pursuer did not mention being struck by a ball when he saw Dr Oliver on 15 October 2018, but rather that he reported, as was recorded in the referral letter, that he had woken to Saturday morning to find that he had no hearing in his right ear and left sided tinnitus. In my view there is no real possibility that Dr Oliver had misunderstood or misheard what the pursuer had said to her and the pursuer's explanation that this is what occurred is implausible. The two histories are totally different and it is difficult to envisage a situation in which the pursuer told the doctor that he had been struck on the ear on Saturday night by a ball thrown at work, and that nonetheless the doctor then recorded that he had woken up on Saturday morning with no hearing and tinnitus.

[78] The only challenge to Dr Oliver's evidence in cross-examination was in respect of the different timings as to the onset of hearing loss which appeared in the clinical note of 15 October 2018, which dated the onset of symptoms as occurring 4 days previously, which would be 11 October, and the ENT referral letter, which had the deafness commencing on Saturday morning, which would be 13 October 2018. Dr Oliver agreed that there was an inconsistency in the timings. In re-examination she said that if the letter had been dictated and typed on 16 October then the 72 hours would be taken back from there (which would mean symptom onset on Saturday) morning, but she could not say when the letter was typed or dictated. In my view any inconsistency in timing that is thrown up by a

comparison of the clinical note and the referral letter is unimportant. Regardless of timing, the crucial factor is whether the pursuer reported a history of trauma or, instead, the spontaneous onset of symptoms upon wakening. On either of the timings, Saturday 13 October or Thursday 11 October, the deafness came on before the pursuer was hit by the ball during his nightshift on Saturday. Thus, I do not regard any error that may have arisen in the recording of the onset of symptoms between the notes and the letter to be of significance. I find that the pursuer's hearing loss was not caused by being struck by the ball at work, but that instead that it commenced spontaneously. On balance it appears to me that it is most likely that the pursuer's hearing loss started on the morning of Saturday 13 October, as if it had started on the previous Thursday, then the pursuer was likely to have gone to the doctor either on Thursday 11 October or Friday 12 October as he would have been sufficiently concerned about the sudden onset of such a condition to have done something about that as soon as he could (as he in fact did by going to the doctor on the Monday after the Saturday). I find on the balance of probabilities that the pursuer first became aware of his hearing loss upon wakening on the morning of Saturday 13 October 2018.

[79] Having held that the pursuer's deafness did not start when he was hit by the ball at work, but prior to that and spontaneously, the significance of the evidence of the pursuer's expert falls away, as Mr Newton accepted under cross-examination that if the court were to find that the pursuer's hearing loss came on earlier on 15 October, before the incident in Waitrose had happened, then he would have to change his opinion, and that what would be left in Mr Nelson's case would be a sudden onset of unilateral hearing loss of unexplained origin, which is a recognised phenomenon. The reason that Mr Newton had favoured a traumatic cause of hearing loss was chiefly because of the history provided to him by the

pursuer, because of the results of the audiograms and because of the timing of events as it appeared in the records. Dealing with each of these matters in turn, as I have already found, the pursuer's history of events was unreliable and I did not accept his evidence about when the hearing loss first occurred. Whilst Mr Newton was content to accept the pursuer's version of events, both in his report and in his evidence in chief before me, he did so whilst totally ignoring the terms of the ENT referral letter written by Dr Oliver on 16 October 2018. It was not until he was cross-examined by Mr Hennessy that this letter was even discussed at all. That was a matter of concern to me as the letter was of fundamental importance in the overall consideration of how and when the pursuer's hearing loss was likely to have occurred. When asked whether he had seen the letter in evidence, Mr Newton said that it was "possible that he might have". The letter gave a different time for the onset of the hearing loss to that described by the pursuer and although different from the timing mentioned in the GP notes, was nonetheless still clearly before the evening of Saturday 13 October. The letter also, crucially, stated that the pursuer had woken up with hearing loss, rather than sustained it as a result of any trauma. I considered that the omission of a consideration of this crucial piece of evidence, for whatever reason, seriously undermined the weight which I could attach to Mr Newton's opinion. Even leaving to one side this vital adminicle of evidence, which did not fit at all with the theory of a traumatic cause for the hearing loss, my view was that Mr Newton's opinion that the pursuer's hearing loss had a traumatic case was weak, and that it was not supported by the evidence in several respects. Mr Newton's evidence was that the factors which led him to think that trauma had caused the pursuer's hearing loss were that had been struck on the head, that he had been "knocked to the ground" by the blow, that the incident was noteworthy enough for him to report it to his manager or supervisor and finally the fact that the GP had thought it necessary to refer

Mr Nelson to an ENT specialist immediately. These factors all indicated that a traumatic cause was likely. Later in evidence, Mr Newton said that he did not consider that a great force was needed to cause deafness by traumatic means and that hearing loss could occur in instances where patients had a minor injury and in other cases a blow could be so severe that the patient's skull was fractured but, despite that, no damage to hearing was caused. However, he also suggested that in Mr Nelson's case, as well as damage to hearing, there was likely to have been a soft tissue injury to the skin and scalp, which may have been in the hairline, so he clearly anticipated that even if the blow was not sufficient to cause anything akin to a fracture there would still have been some injury to the soft tissue. The difficulty with this is that there was no evidence whatsoever, either from Mr Nelson or his GP that there was any injury at all to his scalp or soft tissue, so it appeared that the blow, such as it was, was not of sufficient magnitude to cause even the small amount of damage that Mr Newton would have expected to see if it had caused hearing loss. It is also of note that Dr Oliver did not record the pursuer as having been in pain to any degree, either in her clinical note or in the referral letter. One might have expected this if the pursuer had sustained a blow that was sufficient to cause injury to his scalp or soft tissue. In respect that Mr Newton regarded the fact that the pursuer had been knocked to the ground as indicating a blow sufficient to cause hearing loss, it appeared to me that Mr Newton thought that the pursuer had sustained a blow sufficient to knock him to the ground from a standing position. He did not seem to be aware that at the time of the accident the pursuer was on his knees and leaning over with two bottles in his hand and the blow had knocked him off balance, which caused him to fall to the left and onto the lower shelves where he was working. Mr Nelson himself said that knocking him off balance had not been difficult, given his stance. The evidence indicated a blow of lesser magnitude than Mr Newton seemed to

have understood, as he continually referred to the pursuer being "knocked to the ground", which is not what occurred. It appeared that the blow, such as it was, was not sufficient magnitude to cause even the small amount of damage that Mr Newton would have expected to see if it had caused hearing loss. In so far as Mr Newton regarded the pursuer's reporting of the blow his manager or supervisor as important, I struggled to see how this could be regarded as significant in respect of causation. There could have been multiple reasons why the pursuer reported such an incident, even if the blow was not particularly hard and had not caused injury. One reason might be because, regardless of the magnitude of the blow, the pursuer had become sick and tired of the ongoing horseplay and throwing of objects and wished to report it again to see if he could finally get management to bring it to an end. In any event, the pursuer did not report the incident the next day or call a manager on the telephone when he found there was not a manager on shift the following day and, in fact, waited until he was next at work to hand in a sick line in respect of his unconnected absence 2 weeks later before he reported the incident. Thus, I cannot regard the reporting of the accident as of causal significance. In respect of the fact that the pursuer's GP urgently referred him onto ENT, again I do not see why this factor can be said to support trauma as a causal mechanism for the deafness. The pursuer's GP referred him on because he had suddenly developed unilateral deafness and tinnitus. Presumably this was because she wanted him seen by an expert as soon as he could be, irrespective of the cause of the hearing loss and, in any event, as I have found, as a matter of fact she did this because she had been told the pursuer awoke on the Saturday morning with sudden onset deafness, not because of any trauma, of which she was unaware. Again, I do not see how the urgent referral to ENT, which I regard as neutral, could be seen as support of there being a traumatic cause for the deafness as opposed to a spontaneous cause. A similar comment appears to be

applicable in respect of the audiogram findings, which Mr Newton also relied on as supporting a traumatic case. I do not see how an audiogram showing deafness following a visit to the ENT clinic can be said to support one type of cause or another. The audiograms broadly confirmed the onset of deafness at or about the time the pursuer reported it to have commenced. They do not confirm what caused that deafness.

[80] In his supplementary report number 5/4/5 of process, Mr Newton stated that although a traumatic cause for the pursuer's hearing loss was unlikely, it could have occurred. On this basis Mr Hennessy suggested in submission that the pursuer's causation evidence did not meet the requisite standard of the balance of probabilities. However, Mr Newton did say in his evidence in chief that, on the balance of probabilities and in the absence of other causative factors, he considered that the blow to the head that the pursuer received had caused his deafness. Despite this for the reasons I have explained above, I do not consider that the pursuer has established that this is the case.

[81] Having regard to the shortcomings in Mr Newton's evidence, I preferred the evidence of Mr Marshall. In my opinion he gave evidence in a much more straightforward manner and had considered the medical records and documentation more carefully, including the terms of the referral letter written by Dr Oliver on 16 October 2018. His evidence was that the content of the GP records and the ENT referral did not support the theory of a traumatic cause for the pursuer's hearing loss. I preferred his evidence that the pursuer had suffered a sudden onset of right-sided hearing loss of unknown aetiology. As Mr Marshall said, the onset of such symptoms is a fairly common presentation in ENT departments, and around a third of such cases occur during sleep. Against the factual background which I have found established of a relatively minor blow, it appeared to me that on the balance of probabilities, the pursuer's hearing loss was of this nature. I accepted

Mr Marshall's evidence that for trauma to cause hearing loss, he would expect an event involving significant force to be involved and that if a force of the type described by the pursuer could give rise to deafness one would expect this would be a well-recognised problem. This appeared to me to be a sensible and well-reasoned view of why the incident described by the pursuer was insufficient to cause the deafness of which he complained. Whilst Mr Marshall was careful to concede that he would never say that it was impossible that a blow of the type the pursuer experienced could cause deafness, he considered it very unlikely. I accepted this evidence.

Quantum of damages

[82] Had I decided in the pursuer's favour on causation I would have awarded damages as follows:

(i) Solatium

The pursuer's counsel invited me to make an award for solatium of £57,000 with interest thereon at 8%. This was on the basis that the pursuer had sustained a minor head injury with permanent deafness and tinnitus which would be improved with treatment and which had affected his life in the manner outlined in evidence. In his written submission, counsel made reference to the 16th Edition of the Judicial College Guidelines, and in particular JC - 21(B)(d) and JC-63. For the defender, Mr Hennessy submitted that the pursuer had sustained hearing loss which was associated with trauma but which had improved somewhat before deteriorating again. He too referred me to the Judicial College Guidelines at JC - 21(B) (d) and (e) and submitted that the claim had a value of £5,000. On the basis that the pursuer's deafness did on the evidence appear to improve somewhat between the two initial audiograms, but

then to deteriorate over the long terms for reasons which according to Mr Marshall's evidence, which I accepted, were unlikely to be related to the accident, I am of the opinion that an award which is much more in line with the figure quoted by the Solicitor Advocate for the defender would be appropriate, although that figure is too low, and I would have awarded solatium of £12,500 with interest on all of that sum to the past at 8%.

(ii) Services

Some evidence was led from the pursuer about the services which he had been rendered by his daughter and in respect of the care tasks he was now unable to render to his son. However, there was no evidence of the duration of time over which such services were rendered, nor how often, nor as to how long it took to perform the services which Mr Nelson's daughter rendered to him. Similarly, the evidence from the pursuer about the things he could no longer do for his son, and in particular how often he had performed such services and how long that had taken him in the past when he was able to do so was so imprecise as to make any meaningful quantification impossible. I would have awarded the nominal sum of £2,500 including interest for past services, and nothing for the future, as there was no real evidence about whether and to what extent the services might continue.

(iii) Needs and other expenses

I would not have awarded anything under this head as it appeared that the pursuer's ongoing and worsening right sided deafness was unrelated to the events of October 2018.

(iv) Inconvenience

The sum of £150 sought by the pursuer did not seem unreasonable and I would have awarded this sum, had I found for the pursuer.

Disposal

[83] For the above reasons, I find that the pursuer's case fails. I shall grant decree of absolvitor. The case will be put out on a date which is mutually convenient for the parties for a hearing on expenses.