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

PN355/18

JUDGMENT OF SHERIFF PETER J BRAID

In the case

STUART LAMBERT

Pursuer

against

PROSERVE UK LIMITED

Defender

Edinburgh, 30 April 2019
Pursuer: Olson, Advocate; Slater & Gordon Scotland Ltd.
Defender: MacGregor, Advocate; Clyde & Co (Scotland) LLP.

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

1. The pursuer was employed as a de-burring and stamping operative by KRG Industries Ltd ("KRG") from 29 July 2013.

2. On 1 July 2014 his employment was transferred to the defender together with KRG's liability to make reparation for any negligent exposure to vibration.

3. The pursuer went on sick leave with a back injury from 1 November 2015.

4. The pursuer was made redundant on 9 March 2016.

5. He has obtained alternative employment since then.

6. Although the pursuer was generally in employment, he had not been exposed to vibration before 29 July 2013.

7. During his employment with KRG and the defender, the pursuer was exposed to vibration from the use of hand-held vibrating tools.

8. The pursuer used conical cutters, angle guns, angle grinders and buffing tools.

9. His job included removing excess metal by grinding, cutting and polishing metal objects.

10. The pursuer was exposed to an unknown amount of vibration from 29 July 2013 to 1 November 2015.

11. Hand and arm vibration syndrome ("HAVS") is a condition caused by exposure to vibration. Its onset is insidious. It is a progressive condition. The onset and progress of the condition varies as between individuals. There is no safe level of vibration. If the condition is detected in its early stages, the progression may be halted.

12. KRG and the defender knew of the risk that employees who use vibrating tools may develop HAVS before the pursuer started working for KRG.

13. A reasonable and prudent employer would have had in place a system of work designed to prevent or minimise exposure to vibration at work.

14. Such a system would involve an assessment of the levels of exposure to which employees might be subjected.

15. Such a system would require an employer to consider whether exposure to vibration might be avoided or, if it could not be avoided, whether the exposure to vibration could be reduced to the lowest level reasonably practicable.

16. The following regulations applied to KRG and the Defender:-

The Management of Health and Safety at Work Regulations 1999 regulations 3, 4, 5, 6, 7 and 10.

The Provision and Use of Work Equipment Regulations 1998 regulations 4, 5, 6, 7, and 8

The Control of Vibration at Work Regulations 2005 regulations 4, 5, 6, 7, and 8.

17. A reasonable and responsible employer would comply with his duties under the said regulations.

18. The defender was not aware of the levels of vibration to which the pursuer was exposed.

19. The pursuer first developed symptoms of his current condition in late 2014 or early 2015.

20. The pursuer was not subject to any pre-employment screening for HAVS nor was he subject to regular review.

21. In December 2015 the pursuer was seen by an occupational health doctor in connection with a back condition.

22. The pursuer was never warned about the risks of vibrating tools and HAVS.

23. The pursuer was never given any advice about his exposure to vibration or how to manage his exposure or how to recognise HAVS.

24. The pursuer suffers from vasospastic blanching in all fingers in each hand. However, he has not developed HAVS. He suffers from primary Raynaud's phenomenon.

25. The pursuer is unfit to work with vibrating tools.

26. He will have difficulty with small component assembly or working with small objects.

27. The pursuer has suffered no loss of employability.

Finds in fact and law:

The pursuer has not suffered loss, injury and damage through any breach of duty by the defender.

Therefore, assoilzies the defender from the crave of the initial writ; assigns 17 June 2019 at 10:00am within the Sheriff Courthouse, 27 Chambers Street, Edinburgh as a hearing on expenses.

Note

Introduction

[1] The pursuer in this action is suing for damages of £100,000, averring that he has developed HAVS (hand and arm vibration syndrome) due to exposure to, and use of, vibrating power tools in the course of his employment with the defender. The defender denies that the pursuer has HAVS. It also argues that the pursuer has not established what magnitude of vibration he was exposed to, and therefore has not established either that there was a breach of any duty owed to him or that any breach of duty had any causative effect.

[2] There are therefore two principal questions of fact to resolve. First, does the pursuer have HAVS? Second, has he established what level of vibration he was exposed to? Thereafter, there is an issue as to whether the pursuer has established that the defenders were in breach of their duty of reasonable care towards him and, if so, whether he has established causation. Finally, *quantum* is also in dispute.

[3] To set all of what follows in context, it is helpful to begin by referring to the relevant terms of the Control of Vibration at Work Regulations 2005.

The Control of Vibration at Work Regulations 2005

[4] The Control of Vibration at Work Regulations 2005 apply to the defender. The regulations provide for a daily exposure limit value ("ELV") and daily exposure action value ("EAV"). "Daily exposure" is defined in regulation 2 as the quantity of mechanical vibration to which a worker is exposed during a working day, normalised to an 8-hour reference period, which takes account of the magnitude and duration of the vibration. "Exposure action value" means the level of daily exposure set out in regulation 4 for any worker which, if reached or exceeded, requires specified action to be taken to reduce risk. "Exposure limit value" means the level of daily exposure set out in regulation 4 for any worker which must not be exceeded. Regulation 4 provides that for hand-arm vibration, the daily exposure limit value is 5 m/s^2 A(8) and the daily exposure action value is 2.5 m/s^2. In other words, if the pursuer was exposed to at least that amount of vibration on a daily basis, the defender required to take action to reduce the risk. In terms of regulation 6(4), the defender was also under a duty to ensure that employees were not exposed to vibration above the exposure limit value.

[5] Regulation 5 (1) provides that:

> "An employer who carries out work which is liable to expose any of his employees to risk from vibration shall make a suitable and sufficient assessment of the risk created by that work to the health and safety of those employees and the risk assessment shall identify the measures that need to be taken to meet the requirements of these Regulations."

[6] In conducting that risk assessment, the employer is required by regulation 5(2) to assess daily exposure to vibration by observation of specific working practices; refer to relevant information on the probable magnitude of the vibration corresponding to the

equipment used in the particular working conditions; and, if necessary, measure the magnitude of vibration, and thereafter assess whether any employees are likely to be exposed to vibration at or above an exposure action value or above an exposure limit value. Regulation 5(3) sets out various factors which must be considered in a risk assessment, including appropriate information obtained from health surveillance.

[7] Regulation 6(1) provides that an employer shall ensure that the risk from the exposure of his employees to vibration is either eliminated at source or, where this is not reasonably practicable, reduced to as low a level as is reasonably practicable. Regulation 6(2) provides that where it is not reasonably practicable to eliminate risk at source and an exposure action value is likely to be reached or exceeded, the employer shall reduce exposure to as low a level as is reasonably practicable by establishing and implementing a programme of organisational and technical measures which is appropriate to the activity.

[8] Regulation 7(1) provides that if the risk assessment indicates that there is a risk to the health of employees who are, or are liable to be, exposed to vibration; or employees are likely to be exposed to vibration at or above an exposure action value, the employer shall ensure that such employees are placed under suitable health surveillance, where that is appropriate under regulation 7(2).

[9] The defenders did not carry out a risk assessment at the material time. They therefore took no steps to comply with the regulations. I discuss the consequences of this more fully below.

What is HAVS

[10] HAVS is caused by exposure to vibration and has two components, namely vascular HAVS and sensorineural (or neurological) HAVS. Vascular HAVS results in the blood vessels which supply blood to the fingers going into spasm, preventing blood from getting through to the fingers for a period of time, which in turn results in blanching (whitening of the fingers). Raynaud's Phenomenon also produces blanching, by the same mechanism. Sensorineural HAVS occurs where exposure to vibration has caused nerve damage, resulting in tingling or numbness in the fingers outwith a blanching episode. A sufferer can experience one or the other or (more commonly) both. There is no dispute in the present case that the pursuer suffers from vasospastic blanching episodes affecting all the fingers of each hand. However, the parties disagree as to whether that is as a result of Raynaud's phenomenon or vascular HAVS, and the defender also disputes that the pursuer suffers from sensorineural HAVS.

The proof

[11] Evidence was led on 8, 9, 10, 11, 15 and 16 January 2019. A hearing on submissions took place on 1 February, written submissions having previously been lodged. Evidence was given by the pursuer, who also adduced evidence from his partner, Kerry Gillespie; Mr Drury, a consultant general vascular surgeon; and Calum Smith, an ergonomist. The defender led evidence from Kevin Mackay, a work colleague of the pursuer; Mr Murie, also a consultant vascular surgeon; and David Smith, an engineer.

The pursuer's evidence

[12] The pursuer gave evidence about his prior employment history. He then spoke about his employment with the defender (and their predecessor, KRG). He said that he was employed as a deburring and stamping operator from 29 July 2013 until 9 March 2016, although latterly was on sick leave from 1 November 2015 with a back injury. He has since gained alternative employment (not working with vibrating tools).

[13] He described his job whilst in the employ of the defender. Stamping is the application of a stamp to a finished product so that it can be identified. Deburring is removing the sharp edges from a job. He would also grind down objects to the correct tolerance. He described using four types of tool, namely:

1. Conical cutters, which he described as being similar to a pen, about the size of one hand, weighing about a kilo. Different fittings could be attached. These were used one-handed.
2. Right angle guns. These had an abrasive disc attached, which could vary in size from 12 to 30 inches and were a more aggressive type of tool, used to take sharp edges off holes which had been bored through large blocks. The pursuer guessed that they would weigh about one kilo and they were also used one-handed.
3. Angle grinders. They were more aggressive still and were used to take edges off, and to give surfaces a nice finish.
4. A buffing and polishing tool which had been made by a colleague of the pursuer, John McGuiness. The pursuer guessed its weight as four or five kilogrammes.

[14] The pursuer described a typical day as working 8.00am till 4.00/4.30pm and then "mostly" working overtime until 6.00pm or 6.30pm. He said that he also often worked on Saturdays (7.00am until 3.00pm or 4.00pm) and Sundays (8.00am until 12.00 noon). Breaks were from 10.00am until 10.15am, and from 1.00pm to 1.30pm, and again (if working overtime) from 4.30pm until 4.45pm. The pursuer described days which involved the constant use of power tools. He accepted that the tools were well maintained. He estimated that he would spend one and a half hours "trigger time" between 8.00am and 10.00am. However, it depended what he was working on. He would take seconds to change a tool or a fitting. Sometimes he had to work above head height. Sometimes he applied more pressure than at other times. One of the surfaces which he had to work on, Inconel, would require a greater degree of force. Depending on which tool he was using he would swap hands after 5, 10 or 20 minutes. He said that all of the tools vibrated. He was allocated the worst jobs.

[15] At this stage, it is useful to interject a brief narration of Kevin Mackay's evidence, since he was the only work colleague of the pursuer also to give evidence, albeit he was called by the defender. He worked alongside the pursuer, doing the same sort of work. He described the same types of tools as had the pursuer in his evidence. He also said that other work was done, not using air tools. He said that an assessment of trigger time had been carried out, where he and other employees had self-reported the amount of time spent using each tool over a period of time. He was referred to 6/16 of process. He had not seen that document before. He said that the sort of times recorded in that document as trigger times accorded with his recollection. Even without reference to the document, he said that in an eight hour shift, he would estimate trigger time as around two hours, but certainly no

more than four. In cross-examination, he specifically denied the suggestion put to him that the pursuer had been allocated the worst jobs.

[16] Pausing there, there are certain difficulties with the pursuer's evidence. First, it is all rather vague and not backed up by documentary evidence such as timesheets or risk assessments. Of course, that might be down the defender's failure to keep proper records or to carry out risk assessments during the period of the pursuer's employment, but nor is much of the pursuer's evidence corroborated by any fellow employees. On the contrary, the only fellow employee who gave evidence, Kevin Mackay, did not only not support the pursuer's description of the amount of trigger time but gave contradictory evidence. Although he was called by the defender, I do not see that he would have any reason not to tell the truth or do anything other than give evidence to the best of his recollection. On the contrary, he gave his evidence in a thoughtful manner and I accepted him as credible and reliable. Certainly, he appeared to have a more reliable recollection of events than the pursuer. While I do accept that the pursuer worked hard, the amount of trigger time seems likely to be exaggerated by him. For example, it is unlikely to have taken merely "seconds" to have changed a fitting, as the pursuer suggested. Second, the allocation of time spent by the pursuer on the different tools is also vague. The pursuer made no real attempt to specify how long, in each day, he would spend using each tool. However, the third and fundamental difficulty is that there was no other evidence about the *particular* tools used by the pursuer. There is therefore no evidence at all of the magnitude of vibration which each tool which he used was likely to transmit to him as the operative. Evidence was given by the various experts about vibration generated by certain tools which featured in productions lodged by the defenders. However, these were not spoken to by any witness, nor was it

agreed by joint minute that these were the tools used by the pursuer. It is not for the court to speculate on matters about which there might have been, but was not, evidence. It would have been easy for the pursuer to have been asked whether the tools in the defender's productions were the tools (or at least, similar to the tools) that he used, in which event, perhaps, inferences could have been drawn. However, as the evidence stands I am simply not in a position to make any findings about the magnitude of vibration to which the pursuer was exposed on a daily basis, even were I minded to accept his description of trigger time, which I am not. Accordingly, all I can ultimately take from the pursuer's evidence is that on a daily basis, he used tools which vibrated.

[17] The pursuer also gave evidence about the symptoms from which he had suffered. It was not always easy to grasp the detail of what he was attempting to convey. As counsel for the defender submitted, the only symptom about which he maintained any real degree of consistency in his evidence was his fingers turning white in the cold, particularly under reference to his attendance at football matches either as a spectator or coach. Beyond that it was unclear to me, from the pursuer's evidence, whether or not he experienced sensations of tingling and numbness in his fingers at times away from blanching and if so, when he first noticed symptoms of that type. The pursuer did maintain some consistency in relation to the onset of his symptoms, stating several times in his evidence that he first noticed them about a year and a half into his employment. When asked if that would therefore be about the beginning of 2015, he replied that it would be. He therefore placed the onset of symptoms at the beginning of 2015 *because* he remembered that the symptoms were one and a half years into his employment. However, it seems to me that that is a slightly odd way of putting it. It would be more natural to remember the month or season when symptoms first

appeared for example by reference to Christmas or winter, or snow being on the ground, or being at a particular football match, or some such, and then use that as a frame of reference to work out how long into the employment the symptoms began, rather than the other way round which appears to be the pursuer's thought process. He did say that he noticed the symptoms first at football coaching in a cold environment and then started to feel tingling and then numbness in the tips of his fingers and the whiteness appearing thereafter. He also described other problems such as clumsiness, difficulty in gripping, and dropping things, which was confirmed by his partner, Ms Gillespie. He also gave evidence about having seen occupational health, shortly after the defender took over as his employers, which would have been about a year into his employment and there was also some indication that he had first noticed symptoms around that time. The date of onset is not a completely academic point, since the period of time between the commencement of using vibrating tools and the onset of symptoms is relevant in diagnosing whether or not the pursuer suffers from HAVs or Raynaud's Phenomenon as will be seen below.

[18] The pursuer also gave evidence in relation to the occupational health records. They form number 6/3 of process. At pages 43-51 of that production there is a record of an assessment by Dr Burton (to whom the pursuer had initially been referred in respect of back pain) on 10 December 2015. He reported whitening of all fingers when the weather was cold and numbness in the pursuer's left little finger only. The pursuer denied that he would have complained about numbness in only his left little finger, maintaining that he suffered numbness in all his fingers, but he was unable to explain why Dr Burton would have got that wrong. In a letter of 14 January 2015 (6/3/23 and 24 of process) Dr Susan McHardy reported that the pursuer was complaining of tingling and numbness and a difficulty

handling and manipulating objects. (In that letter, Dr McHardy also referred to the symptoms first having appeared in 2014.) She said that it was "possible, though unusual, to experience symptoms due to vibration after a relatively short period". On 12 February 2016 Dr Alex Mijares assessed the pursuer as having vascular and sensorineural HAVS (6/3/1 of process). However, he recorded no tingling or numbness without blanching.

[19] Prior to giving evidence, the pursuer had, of course, also described his symptoms to Mr Drury and Mr Murie for the purposes of their compiling their respective reports. At paragraphs 2.3 and 2.4 of his report (no. 5/2 of process), Mr Drury recorded that the first symptoms were of tingling in the fingers when using tools and for 30 minutes thereafter. He said that gradually the pursuer became aware of his fingers being numb with associated clumsiness which could also occur in warm atmospheres. In paragraph 2.4 he said that gradually a cold exacerbation of the symptoms was noted and that the pursuer described tingling, numbness and blanching of the fingers. However, when asked about this in his evidence, the pursuer did not recollect having mentioned that the numbness could occur in warm atmospheres and he also disputed that Mr Drury had correctly recorded that he had said that the tingling came first. Turning to Mr Murie's report (6/4 of process), he recorded the pursuer as having complained of reduced dexterity and poor grip as being the first symptoms. The pursuer denied that he would have described his symptoms in that way and, (putting to one side the actual language used by Mr Murie, since I accept that the pursuer would not have used the term "manual dexterity") in particular, said that he would not have begun by complaining of poor grip as the first symptom.

[20] Accordingly, the pursuer not only disputed the accuracy of the occupational health records but also claimed that both experts who had examined him for the purpose of

litigation had incorrectly noted his symptoms as described by him. However, it is unlikely that one experienced doctor, let alone three, misunderstood what the pursuer told them; and the pursuer's insistence that all three were wrong can have only an adverse effect on, at the very least, his reliability, and inevitably lessens the weight which I am able to attach to his evidence. He was particularly unconvincing when trying to describe when he first noticed whiteness in his fingers and how long that was after he first noticed tingling. At one point in cross-examination, he said that from the first time he noticed tingling till his first noticing whiteness was a matter of weeks but immediately thereafter he said it would be a couple of days. I should say that I did not form the view that the pursuer was lying in court to bolster his claim: simply, that he does not have a very good recollection of detail. So, while I am not suggesting that the pursuer was fabricating his symptoms – it is generally accepted that he does suffer from whitening of his fingers – I have formed the view that he does not have an accurate recollection of what symptoms he first noticed and when, and that he is not now a reliable historian of what symptoms he suffered and when. A further example of the pursuer's poor memory, if one is needed, was in relation to his recollection in evidence of his examination by Dr Burton. It was readily apparent from the medical records that after being examined in the early part of December, Dr Burton saw him again on 31 December 2015. However, the pursuer was initially adamant that he had not seen Dr Burton on that date before eventually being constrained to accept that he must have done. Clearly that is an appointment which he has simply forgotten, and yet the pursuer spent several minutes in evidence repeatedly denying that there had been such an appointment.

[21] While I have not so far been critical of the pursuer's credibility, I cannot ignore the fact that there were examples in the productions of his having previously been less than

candid in relation to his medical history. He accepted, under reference to pages 50 and 51 of the GP records (6/1 of process), that he had had to leave the Army in 2000 due to back problems. However, he did not disclose his back problem in his pre-employment medical questionnaire (5/3/41 of process). The pursuer was unable to explain why he had scored out every medical condition on that page, including musculoeskeletal, his only suggestion being that he "might have been ignorant". Similarly, in his application for industrial injuries disablement benefit (6/2/24 and 25 of process) the pursuer stated that he had only ever had the occasional pulled muscle in his back before. Again, he was unable to explain that apparent untruth. Accordingly, there is precedent for the pursuer being, at the very least, economical with the truth in relation to his medical ailments in order to pursue his own ends.

The medical evidence

Introduction

[22] The next chapter of evidence to consider is the medical evidence, which was given by Mr Drury for the pursuer, and Mr Murie for the defender, both vascular surgeons with many years' experience. I have already made reference to their reports. I accept that both are qualified to give expert opinion evidence to the court and, indeed, each was suitably deferential towards the other, being careful not to criticise the other's qualifications, experience or reports (except where the latter was unavoidable). To a large extent, as one would expect, the evidence which they gave was in similar terms. However, they did disagree on the central question of whether or not the pursuer suffers from HAVS. That is perhaps not very surprising when one bears in mind that unlike most conditions, the diagnosis of HAVS is very much a subjective exercise, depending largely on the history

given by the subject at the particular time of examination. Mr Drury was of the opinion that the pursuer did suffer from HAVS (vascular and sensorineural); Mr Murie, that he did not. Before examining their conclusions in more detail, it is important to note that they saw the pursuer at different times, almost two years apart. Mr Drury, at the very end of his evidence, said that if he had recorded the same findings as had Mr Murie then he would probably have written the same report, which was a telling remark. Mr Murie was also keen to emphasise the different times at which he and Mr Drury had seen the pursuer and he did not dispute Mr Drury's findings, albeit, as discussed below, he found them difficult to explain in the light of his own examination of the pursuer, but that is not a criticism of Mr Drury.

Mr Drury's report

[23] After describing the history of onset of symptoms (referred to above) Mr Drury then described the pursuer's account of the symptoms to him. At paragraph 2.6 of his report he states:

> "[The pursuer] described whiteness of the fingers which, at its worst, could affect all the fingers but not the thumbs down to the proximal interphalangeal joint. The whiteness is circumferential with a good interface between the discolouration and normal skin colour. The attacks would vary in length but were never more than two hours duration. He did describe a sensation on rewarming and that this could be uncomfortable. The toes and other extremities are not affected. [The pursuer] has never visited his general practitioner specifically about his fingers."

He went on to record that the pursuer estimated that the blanching attacks would be worse in cold conditions and often occurred more than three times a week. There was no regular waking at night but he could waken with tingling of the fingers. In his everyday life he described dropping objects because of clumsiness and excessive coldness. He had been aware of reduced grip strength and gripping at the gym.

[24] Mr Drury carried out an examination of the pursuer's hands and fingers. At 4.3 and 4.4 of his report, he recorded:

> "4.3 The hands and fingers were warm and well perfused and [the pursuer] was of a muscular build. There was a deformity of the right ring finger and small finger metacarpal bones due to a previous fracture. There was a good range of movement of the finger joints and no small joint tenderness or swelling. There was no muscle wasting. A modified Allen's test was positive. Adson's manoeuvre was normal and that the elevated stress was normal. Grip strength tested using a Jamar Dynamometer scored 21 KGF. On the right hand 27 KGF on the left (normally equalling 34 KGF).
>
> 4.4 Sensation and moving two-point discrimination were normal in both thumbs. There was virtually no apparent sensation in the fingers and moving two-point discrimination could not be tested due to failure to feel the implement. A Purdue Pegboard Test scored four on each hand and the pursuer noted difficulty in feeling the metal rods".

[25] Mr Drury explained what these tests were in his parole evidence. In particular, the Purdue Pegboard test involved inserting metal rods into a device in as quick a time as possible. He described the tests as all being subjective. The Purdue pegboard test scores were low and indicative of poor sensation. The two-point discrimination test measures the ability to feel two pressure points on one's hand or fingers simultaneously. That could not be carried out due to a complete absence of sensation, which Mr Drury described in his parole evidence as a severe disability.

[26] Mr Drury was also asked about the occupational health records. He acknowledged that these appeared to be inconsistent, in that they did not disclose consistent test results, and he was concerned about the apparently rapid deterioration in the pursuer's condition.

[27] Mr Drury expressed his opinion at section 7 of his report. The essence of this is at paragraph 7.3 where he states:

> "After a short lead-in time of around 18 months, [the pursuer] has developed vascular and sensorineural symptoms in the fingers".

At 7.4 he recorded that there has been a reasonable description of the vasospastic blanching in all the fingers and although this could last up to two hours it would also frequently fall within the parameters of blanching associated with HAVS (the use of the word "also" appears to indicate that two hours is outwith those parameters). Mr Drury said that the worst symptoms of being unable to feel gripped objects and blanching causing clumsiness had been confirmed on examination and that the pursuer did have a reduced grip strength for his age which "can be" associated with vibration exposure. As regards the sensorineural symptoms, he said these were more difficult to understand. He was able to state (at paragraph 7.14 of his report) only that:

> "the question of sensorineural HAVS is more difficult. If the current history is correct along with the examination of findings today, then there *could be* significant sensorineural impairment in the fingers" (emphasis added).

[28] He went on to say at 7.15:

> "However there does appear to be some doubt regarding the examination findings today when compared with those of 12/2/16 and 14/12/15".

That in turn was a reference to no neurological symptoms having been reported on 14 December 2015 other than numbness in the pursuer's little finger; and to level 1 sensorineural HAVS having been diagnosed on 12 February 2016, a matter of months before Mr Drury examined the pursuer. Accordingly, even Mr Drury was of the opinion only that there *could* be sensorineural HAVS.

[29] Mr Drury was also asked to comment on Mr Murie's report. He accepted that the pursuer had described his symptoms differently to Mr Murie than to himself. He accepted, too, that the findings on physical examination were significantly different, and that it would be unusual, if not unprecedented, for someone to recover to the degree that the pursuer

apparently had. He accepted that Mr Murie had drawn the correct conclusions from what he recorded. He did not agree, however, that the pursuer had displayed no signs of neurological element outside of a blanching episode; nor did he agree that the age of onset of symptoms in the mid-30s was a factor pointing towards Raynaud's phenomenon rather than HAVS. He also took issue with Mr Murie's statement that there was a high prevalence of primary Raynaud's in the general population. He himself would estimate 3% to 8% of the general population as having Raynaud's subject to the qualification that there was little scientific research on the topic. Mr Drury said that the reasons for his own opinion that the pursuer had HAVS and not Raynaud's were: that the pursuer had in fact been exposed to vibration, which provided an explanation for the blanching; that only his fingers were affected; that his age was at the upper end of the range for the first symptoms of blanching to appear; and that he did not have any other signs of disease. Mr Drury completed his evidence by stating that if he had seen Mr Murie's report without ever having himself seen the pursuer, he would have agreed completely with its conclusions.

Mr Murie's report

[30] Mr Murie's overall approach was not dissimilar to that of Mr Drury. He, too, asked the pursuer about his symptoms. At page 4 of his report, he recorded that he enquired about digital tingling and numbness, stating:

> "The pursuer said that he had tingling just before the onset of blanching and also at its conclusion. At the end of a white finger episode the affected fingers turn bright red and tingle. This is typical of the reactive hyperaemia that tends to occur after a period of digital vasospasm (found in both Raynaud's disease and vascular HAVS). Away from a blanching episode the pursuer does not experience digital tingling or numbness; he may experience loss of dexterity and/or grip strength."

[31] Mr Murie also carried out a physical examination. He also found that both hands were warm, pink, moist and apparently adequately perfused with no tenderness or swelling of any of the interphalangeal joints or any of the knuckle joints. He found that grip strength on grip testing appeared excellent bilaterally. There was no diminution in appreciation of pinprick or light touch at any fingertip. Two-point discrimination was 5mm at all fingertips (normal for age). With respect to manual dexterity, he said that the pursuer handled papers during the interview with ease.

[32] Mr Murie concluded that the pursuer did not have HAVS. His reasoning in this regard is encapsulated at page 14 of his report as follows:

> "With respect to neurological HAVS [the pursuer] does not appear to have the symptoms of this condition namely digital tingling and numbness outside of a blanching episode. Neurological examination does not reveal any significant sensory loss. He does feel that he has some loss of dexterity and grip strength but again examination hardly backs this up, and his ability to tackle weights at the gym argues strongly against any loss of grip function. For these reasons it is my opinion (on the balance of probabilities) that the pursuer has not developed neurological HAVS"

[33] On the question of whether the pursuer has vascular HAVS, Mr Murie's opinion is found at page 15 of his report, paragraph 6 there. Having previously (in paragraph 4) expressed the view that the pursuer must either have HAVS or Raynaud's disease, Mr Murie then stated:

> "The following features favour primary Raynaud's disease as a diagnosis: (a) probable insufficient exposure to vibration, (b) no neurological element outside of a blanching episode, (c) age of onset (37 years) of symptoms, and (d) the high prevalence of primary Raynaud's disease in the general population. For these reasons, it is my opinion on the balance of probability) that the pursuer has primary Raynaud's disease and has *not* developed vascular HAVS."

[34] In support of points (c) and (d) Mr Murie referred to an NHS document, appended to his report, which described Raynaud's phenomenon as a common condition affecting up

to 20% of the adult population worldwide, and stating that the condition usually begins in the third or fourth decade of life.

[35] In his parole evidence, Mr Murie said that he had never experienced a case of HAVS which had occurred after exposure of only 12 months. He did not use the Pergue Board test, or similar, because he found they were not useful in clinical situations, given that they depended on the person trying their hardest. When referred to Mr Drury's report and the findings there, regarding lack of sensation, he said he found it remarkable that what Mr Drury was describing were totally insensate fingers, being all the more remarkable for having developed within 8 months (since the pursuer had previously been examined). He was unable to explain those findings in terms of HAVS. Moreover, had the pursuer's fingers been as described by Mr Drury he would have expected to see signs of damage when he examined the pursuer two years later, but he did not. Further, if the pursuer had had truly insensate fingers, he would have expected him to have consulted his GP, but the GP records made no mention of the problem.

The technical evidence

Introduction

[36] The final chapter of evidence was in relation to the technical issue of how much vibration the pursuer had been exposed to, and whether the defender had taken all steps which it ought to have taken.

[37] Some time was taken up at proof on this issue. In addition to the evidence given by the pursuer himself, evidence was given by the parties' competing experts, Calum Smith and David Smith. In the course of their evidence, much reference was made to various

manufacturers' manuals lodged in process, which related to tools of various descriptions, which in fairness appeared to be the sort of tools which the pursuer described having used. However, as pointed out above in the context of the pursuer's evidence, it was never established in evidence either that these *were* the tools that the pursuer used, nor even that he used tools similar in specification to those tools. Accordingly, to a very large extent the evidence about magnitude of vibration to which Calum Smith and David Smith spoke were merely hypothetical. They also commented on documents lodged by the defender nos. 6/15 and 6/16 of process, which purported, respectively, to be a hand vibration risk assessment, and a hand vibration assessment assessment (*sic*). Again, however, those documents were neither spoken to in evidence nor were they agreed in a joint minute (save to the limited extent mentioned below) and so they are of limited value. Subject, then, to the limitation that the expert witnesses were, in the main, speaking to documents which were never proved, I would comment on their evidence as follows.

Calum Smith

[38] Calum Smith is an ergonomist. He spoke to his report no. 5/8 of process. His qualifications and experience are set out in the brief CV at page 15 of his report. He also supplemented these details in his parole evidence. I accept that he has sufficient expertise to qualify him to give opinion evidence to the court. He carried out the exercise of considering the pursuer's account of his daily use of power tools, and, by reference to the manufacturers' data in the manuals lodged in process, estimating the time which it would have taken the pursuer to reach the EAV and the ELV of the tools referred to in those manuals. In summary, his evidence was that, taking that approach, the time taken to reach the EAV ranged from 1 hour 45 minutes to 8 hours, depending on the tool used. The time to reach

the ELV ranged from 6 hours 50 minutes to more than 12 hours. He concluded that, if the pursuer's account of vibration exposure were accepted (which, of course, it has not been), the pursuer was likely to have exceeded the EAV but not the ELV (although that remained possible). In that event, the defender ought to have introduced a programme to reduce risks and to provide health surveillance. He also gave evidence that the manufacturers' data as to vibration amounts should generally be at least doubled, in line with HSE advice. If the court accepted the defender's account of exposure times, the pursuer was still likely to have exceeded the EAV if the manufacturers' figures as to vibration amounts were doubled. If the court took the defender's account of exposure times, and the manufacturers' data, then the EAV was not likely to have been exceeded.

David Smith

[39] David Smith spoke to his report, no 6/25 of process. His experience and qualifications are set out at pages 2 and 3 of his report. He provided further details in his parole evidence and I also accept that he is suitably qualified to give opinion evidence. He, too, based his opinion partly on the manuals lodged in process and the manufacturers' data therein. He also based his opinion on the so-called assessments carried out by the defenders of employees doing similar work to the pursuer. He differed from Calum Smith by saying that manufacturers' data for the tools which he was considering in his view over-estimated, rather than under-estimated the amount of vibration transmitted. This evidence was informed by data which his firm held based upon actual measurements of real tools.

[40] He thus concluded that it was unlikely that the pursuer had exceeded the EAV. Given the two assumptions on which this conclusion was reached – that the exposure time was based on the defender's figures, and that the manufacturers' figures were not doubled –

his opinion was not in fact vastly different from that of Calum Smith. The main difference between them lay in the underlying assumptions which they made.

[41] Perhaps the most significant piece of evidence given by Mr Smith was that to produce finger blanching in 10% of exposed persons after a 1 year exposure period requires the average daily A8 exposure to be 26.0m/s^2. If the exposure period were 18 months, that reduced to 20 m/s^2 and for a 12 hour day the figure reduced further to 16.3 0m/s^2 . Both figures were "way in excess" of the magnitude to which the pursuer was likely exposed.

Discussion

Has the pursuer proved the amount of vibration to which he was exposed?

[42] A central factual issue in the case is whether the pursuer has proved the amount of vibration to which he was exposed. That is not only a question of proving the time for which he used vibrating tools, but of proving the amount of vibration likely to have been transmitted by each tool. The pursuer's counsel submitted that the pursuer had proved the level of vibration by having described the tools he used and because his descriptions were not challenged. It is true that the pursuer described the tools that he used, but he did not do so by reference to any document lodged in process and in particular did not do so by reference to the manuals lodged, and which were later referred to by Calum Smith and David Smith. Those manuals were not proved to relate to the tools used by the pursuer. The fact that Mr Mackay said he used similar tools to those described by the pursuer is neither here nor there. He was not referred to the manuals either. Counsel further submitted that the pursuer could rely upon the Risk Assessment 6/15 of process which had been agreed by joint minute to be what it bore to be – but it bears to be a list of tools issued

January 2016 which were the subject of a later Hand Vibration Risk Assessment, after the pursuer's employment had come to an end. If the tools used by the pursuer was a non-controversial issue, it could and should have been agreed by joint minute, but it was not. Alternatively it would have been a simple matter for the pursuer to have been asked about the documents, or to have been referred to the manuals, but again he was not. For completeness, since there is no evidence linking any tool used by the pursuer to any of the manuals or lists in process, I am not prepared to infer, as invited to do by counsel that the tool which had been adapted by his colleague was the Bosch GWS 7-115. Accordingly, I do proceed upon the basis that there is simply no reliable evidence about the amount of vibration. Counsel for the pursuer further came to submit, under reference to *Keefe* v *The Isle of Man Steam Packet Company [2010]* EWCA Civ 683, that, since the defender had been under a duty to measure the vibration, and had not done so, an adverse inference should be drawn against it that the vibration was excessive. Two comments fall to be made about that. First, even if I were prepared to draw an adverse inference to that effect, that would not be a finding of a specific level of vibration and would not assist the pursuer in proving that his condition is HAVS, for reasons explained more fully below. Second, I do not consider that this is a situation where it would be appropriate to draw such an inference. *Keefe* was a hearing loss case where it was clearly impossible for the claimant to replicate noise conditions which had been prevalent years earlier. Here, however, the pursuer did have other means of establishing the vibration produced by the tools in question. The onus of proof was on him to do so, not on the defender.

The expert evidence

[43] This feeds into a discussion of the evidence given by Calum Smith and David Smith. While counsel for the pursuer sought to criticise Mr David Smith's evidence because he had made certain mistakes in his report and calculations, to a large extent that misses the point. In truth, because the tools used by the pursuer have not been proved, no reliance can be placed on any of the calculations done by either expert, and so it does not assist the pursuer to pick holes in David Smith's calculations. Further, the magnitude of vibration is only one of two key factors in determining the vibration to which the pursuer was exposed, the other being the trigger time. On that matter, for reasons already stated, I consider that the pursuer's evidence is exaggerated; and that Mr Mackay's evidence is more likely to give an accurate reflection. As regards magnitude, the main difference between Calum Smith and David Smith, on a matter of principle as opposed to calculation, is whether the manufacturers' data requires to be doubled or trebled to give a true reflection of the vibration, as Calum Smith said; or whether, in the case of the tools which feature in the defender's productions, the figures given by the manufacturers as to magnitude are over-stated. On this matter, I prefer the evidence of David Smith, based as it was on his actual experience and his firm's database, as opposed to Calum Smith's view which was based on the HSE advice and was given from a risk-reduction perspective.

[44] Accordingly, even if it had been proved that the tools to which the data considered by the two experts relate were the same tools as those used by the pursuer, I would have preferred David Smith's approach to that of Calum Smith, and found that it was unlikely that the EAV had been reached.

Has the pursuer proved that he has HAVS

[45] Even if I am wrong on that, the pursuer must nonetheless prove that he has HAVS, since if he does not have HAVS then his claim must inevitably fail. While it is agreed that HAVS is caused by exposure to vibration, and there is no doubt that the pursuer has been exposed to vibration, it does not follow that the pursuer's symptoms are indicative of HAVS (and here I think Mr Drury may, with respect, have fallen into slight error by listing the exposure to vibration as one of the factors which led to his conclusion that the pursuer had HAVS). There is no doubt that the pursuer has been exposed to vibration, and equally no doubt that he has symptoms. The question is whether the vibration has caused HAVS (and if so, whether the pursuer has both components, vascular and sensorineural, or merely one) or Primary Raynaud's Phenomenon. The main difficulty here is, as I have already pointed out, that Dr Drury and Dr Murie agree that the diagnosis of HAVS is almost entirely a subjective exercise, depending largely, as it does, on the history given by the subject, in this case the pursuer. They were, therefore, hugely dependent on his description of his employment history, including the types of tools used and the length of time for which they were used. That inevitably gives rise to a large element of subjectivity and room for error. The difficulty in diagnosis is exacerbated when one bears in mind that the court must make a finding in fact based not on what the pursuer told each expert, but on what he told the court (and neither expert heard the evidence which he gave). Thereafter, the diagnosis depends on the pursuer's account of his symptoms (which, again, may well differ from the account given in court) including: when they first appeared; what the symptoms were; and how long they lasted. Finally, the diagnosis depends on a physical examination, including, in Mr Drury's case, but not Mr Murie's, certain physical tests. However, such tests as can be

used are again subjective. In this case, they depend on the pursuer being honest and trying his hardest. When one adds into the mix that a person being examined for the purposes of a litigation, as the pursuer was, may have the motivation either to exaggerate his symptoms or (even subconsciously) not to try his hardest (in contrast to a person in a clinical trial), the difficulties inherent in diagnosing HAVS are readily apparent.

[46] One immediate difficulty that the pursuer faces, arising out of what I have already said about his evidence, is that I am not persuaded that the accounts that he gave to the two experts are necessarily to be relied upon. I refer to what I have said above about the pursuer's poor memory, and overall reliability and, to a lesser extent, credibility. I also proceed on the basis that both Mr Drury and Mr Murie, who between them have very many years' experience and have compiled very many expert reports, accurately recorded what the pursuer told them. I do not accept the pursuer's evidence that they both, in different ways, misunderstood, misinterpreted or misrepresented what he said. Accordingly, any diagnosis of HAVS which relies on his self-reporting of symptoms and work history must immediately be viewed with a degree of caution.

[47] Second, in deciding whether or not the pursuer has proved that he has HAVS, I do not consider that my task is as simple as choosing between Mr Drury on the one hand, and Mr Murie on the other. Because their reports were compiled on the basis of examinations carried out two years apart, it is more a case of viewing their reports as complementing each other, rather than necessarily being contradictory in all respects. Mr Drury did, after all, say that had he been presented with the same clinical findings as Mr Murie, he would have written the same report. Having heard from Mr Murie (an advantage Mr Drury did not enjoy), I have no reason to doubt either his findings on his examination of the pursuer, or his

recounting of the pursuer's symptoms. Accordingly, at the time of Mr Murie's examination of the pursuer, in the summer of 2018, the pursuer did not have insensate fingers of the type described by Mr Drury. Both Mr Drury and Mr Murie agreed that recovery from sensorineural HAVS to the degree apparently recorded by Mr Drury was unlikely, to say the least. Further, I accept Mr Murie's evidence that it would be remarkable for the pursuer's fingers to have deteriorated so much as they allegedly had in the eight months leading up to Mr Drury's examination of the pursuer. Still further, Mr Drury himself was unable to reconcile the occupational health findings with his own. However, the clinching evidence was Mr Murie's who said that the variation in symptoms was simply impossible to explain. Had the pursuer's symptoms been as severe as reported by Mr Drury, then he would have expected that to have been apparent on physical examination in July 2018. He would have expected damage to the hands, but there was none. Mr Murie's opinion was also partially based on the pursuer's description of his abilities as at 2018, such as being able to use dumbbells in the gym. The pursuer's counsel complained that Mr Murie had misunderstood or exaggerated the pursuer's ability at the gym but the pursuer did accept in his evidence that he is still able to do weights, simply less than before; and the point which Mr Murie is essentially making in his report is that the pursuer has an ability to do weights at all, which he has. Of particular significance, however, are Mr Murie's findings on his examination (referred to at pages 5 and 6 of his report) and in particular his finding that there was no diminution in appreciation of pinprick or of light touch at any fingertip and that two point discrimination was 5mm at all fingertips (normal for age). Drawing all of this together, and accepting, as I do, Mr Murie's findings in July 2018 as accurate, the only logical inference to draw is that the pursuer did not in fact have fingers which were insensate to the degree apparently noted by Mr Drury. That is not a criticism of Mr Drury in

any way, simply a product of the fact that the diagnosis of HAVS is subjective, and reliant on the account given by the subject.

[48] Taken together, and bearing in mind that even at the time of his examination, Mr Drury was able to say only that the pursuer possibly had sensorineural HAVS, these factors all point emphatically to the fact that the pursuer does not suffer from sensorineural HAVS.

[49] A more difficult question is whether or not he suffers from vascular HAVS. There is agreement that he suffers from vasospastic blanching, the two possible causes of which are HAVS or Raynaud's phenomenon. While I accept that there is no safe level of exposure to vibration and that HAVS can be caused by exposure at a level below the EAV, and it can also be caused by exposure for as little as a year, the evidence of Mr Murie and of Mr David Smith, taken together, is that it would be unusual for someone to develop HAVS after as little as a year, or even 18 months. Indeed David Smith's evidence, which I accept, was that to produce finger blanching in 10% of exposed persons after a 1 year exposure period requires an average daily A8 exposure to be 26.0m/s^2. If the exposure period were 18 months, that reduced to 20 m/s^2 and for a 12 hour day the figure reduced further to 16.30m/s^2 . Both figures were "way in excess" of the magnitude to which the pursuer was likely exposed.

[50] Given that the pursuer developed symptoms after an unusually short period, in my view it is crucial to the establishment of a diagnosis of HAVS that he prove to the court what his actual exposure to vibration was, and that it was of the above order. That is something which was capable of being measured objectively. For the reasons given above, I have concluded that the pursuer has failed to prove his actual exposure. He did not prove that the tools to which Calum Smith and David Smith spoke were the tools which he used.

Wherever the burden of proof may lie in the context of establishing breach of duty, the onus is clearly on the pursuer to prove that he is suffering from HAVS. Since a key (and the only objectively measurable) component in the diagnosis is the degree of exposure, I do consider it incumbent upon him to show what that exposure was, and he has not done so. I have already drawn attention to the logical fallacy of assuming that because HAVS is caused by vibration and because the pursuer has been exposed to vibration, he must necessarily have HAVS simply because he has symptoms of HAVS. That might be so if there were no other explanation for those symptoms but there is: Primary Raynaud's phenomenon. On the one hand, we have Mr Murie's opinon to the effect that the pursuer is within the age range where it is normal for someone to first experience Raynaud's; and on the other, we have Mr Drury's opinion that the pursuer is pushing the upper end of the range (but still within it). That being so, where the period of exposure was so short, it is in my view of even more importance that the pursuer should prove what his actual exposure was likely to have been, so as to make HAVS more probable than Raynaud's. However, he has not done so. So even if I discount factor (d) relied upon by Mr Murie in his report (referred to above at paragraph [33]) which may marginally overstate the statistics, nonetheless I accept that the other factors mentioned by him point, on a balance of probability, to the pursuer not having vascular HAVS either.

[51] Before leaving this topic, there was mention of Raynaud's being hereditary, and also to the pursuer's father having complained of white finger. Since there is no evidence as to what caused his white finger, I have left that out of account.

[52] For all these reasons, I have concluded that the pursuer does not suffer from either component of HAVS. Accordingly, his claim must fail.

[53] That is strictly necessary to dispose of the case in the defender's favour. It is entitled to decree of absolvitor. However, it is necessary to consider other issues which were raised in the case, lest I am wrong in holding that the pursuer has not proved that he has HAVS.

Did the defender breach its duty of care to the pursuer?

[54] On this matter, I prefer the submissions of counsel for the pursuer to those of counsel for the defender. In particular, it is not the case that an employer necessarily complies with his duties under the regulations if he exposes his employees to vibration which is less than the EAV. As was clear from the evidence, there is no such thing as a safe level. Regulation 5 imposes a clear duty on an employer who carries out work which is liable to expose any of his employees to risk from vibration, to carry out a risk assessment, which must identify the measures that need to be taken to meet the requirements of the regulations. This the defender did not do. Insofar as the requirements of the regulations are concerned, regulation 6 imposes a requirement either to eliminate vibration at source or to reduce it to as low a level as is reasonably practicable. Regulation 7 requires employees to be placed under health surveillance if *either* the risk assessment indicates a risk to the health of the employees *or* employees are likely to be exposed to vibration at or above an EAV. Similarly, regulation 8 imposes a duty to provide employees with suitable information, instruction and training if either of those conditions are met. Accordingly, it is as clear as it can be that an employer's duties to his employees do not arise only if the EAV is likely to be exceeded but also if the risk assessment indicates a risk to health and safety. So, while the pursuer has failed to prove, for the reasons already stated, that the EAV was likely to be exceeded, that does not mean that he has not shown that the defender is in breach of the regulations by

virtue of its failure to carry out a risk assessment which may in turn have required it to carry out the various other requirements referred to. The pursuer's submission in this regard is supported by *Billington* v *British Rail Engineering Ltd* [2002] EWHC 105 (QB) where the Court of Appeal rejected an appeal by the employers, first, on the ground that the judge at first instance had not erred in holding that the employers' duty of care had been breached by not taking steps to reduce vibration exposure even though their exposure levels were below the then action level (para. 22); and second, on the ground that if the employers could not escape liability simply because the vibration levels were below the action levels. Rather, if they wished to rely on the then HSE guidance which applied, they required to show they had acted in accordance with it, by taking measurements, and, if necessary thereafter, preventive measures, and they had not done so (para. 23).

[55] No evidence was led of any steps taken by the defender to comply with its duties under the regulations. Accordingly, the defender was in breach of its duty of care, inasmuch as the prudent employer would have complied with the Control of Vibration at Work Regulations 2005 and the defender did not.

Did the defender's breach of duty cause the pursuer loss (*esto* he has HAVS)?

[56] This is where I think the pursuer's argument runs into more difficulty. It is not enough for him, in my view, simply to show that the defender failed to carry out a risk assessment. Since he has failed to show that the EAV was reached, he must therefore show that the risk assessment would have triggered the other regulations which required the defender to take action, depending on the outcome of the risk assessment. It is not enough for him simply to show that one or more employees was exposed to risk from vibration. It is that exposure which triggers the obligation to conduct the risk assessment. In my view, the

pursuer would have required to prove what the outcome of the risk assessment would probably have been. One way of doing that would have been to prove what magnitude of vibration it would have uncovered. Of course, had that been in excess of the EAV, that would have triggered the requirements of regulations 7 and 8 in any event. Another would have been to show that other employees had developed HAVS. That may then have enabled findings in fact to have been made as to what steps the defenders should then have taken: *cf Allen* v *BREL* referred to in *Billington, supra*, at para. 15. Absent any findings about the vibration levels (*cf Brown* v *Corus (UK) Ltd* [2004] EWCA 374, where the vibration levels were found to be "dangerously high"), in my view the evidence in this case comes nowhere near to establishing that had the defender not breached the regulations, the outcome for the pursuer would have been any different. We simply do not know whether the risk assessment would have required the defender to take any preventive measures, and if so, what those would have been. The evidence rings no particular alarm bells. The evidence from Mr Mackay, which I accept, was that tools were not used for an excessive period. The tools themselves were well maintained. No other employee was known to have suffered from HAVS. Accordingly, on the evidence, I would not have found there to be any causal link between the defender's breach of duty, and the pursuer's condition.

[57] Counsel for the pursuer submitted that causation did not have to be proved, but that it was sufficient to establish an increased risk of HAVS, amounting to material contribution. In support of this, he founded upon *Brown* v *Corus.* However, in that case, as I have pointed out, there had already been established to be a dangerously high level of vibration. In other words, the claimants there had shown an increased risk to them, in a way that the pursuer here has not. It is a step too far to say that simply because the defender failed to carry out a

risk assessment, the risk to the pursuer increased; or that because there was *a* risk (namely the risk which necessitated the risk assessment in the first place) therefore causation must be held to be established wherever an employee develops HAVS. That is not our law, where it is fundamental that a pursuer must prove his or her case on a balance of probabilities.

Quantum

[58] Finally, I must express a view as to the damages which I would have awarded had I found for the pursuer. For the reasons given above, I would not in any event have found that he suffered from sensorineural HAVS. Both parties referred to the JSC Guidelines. Counsel for the pursuer placed the pursuer's condition within the moderate category, described as including claimants in their middle years where employment has been maintained or varied only to remove excess vibration, with attacks occurring mostly in cold weather. The range of that bracket is £6,890 to £13,360. Counsel submitted that an award of £10,000 would be appropriate, with interest at 4%. He further submitted that an award of £10,000 for loss of employability should be made. Counsel for the defender submitted that the pursuer's condition fell within the minor bracket, described as occasional symptoms in only a few fingers with a modest effect on work or leisure, with a range of £2,390 to £6, 890. He proposed a figure of £3,000 with interest on half that sum from January 2015, amounting to another £179. He further submitted that the nature of the pursuer's back injury subsumed any loss of employability that the pursuer might suffer due to the vascular component of HAVS. He pointed out that the pursuer had a prior history of work without recourse to vibrating tools and had been able to source work since leaving the defender.

[59] I consider that the pursuer's symptoms more readily fit into the moderate bracket but at the lower end. Had I found for the pursuer, I would have awarded solatium of £8,000

with interest at 4% from 1 January 2015, being the best estimate of when his symptoms first appeared. I would not have made any separate award for loss of employability, on the basis of the evidence which was led, when only a very small part of his working life has been spent working with vibrating tools and where other employment appears readily available to him.

Expenses

[60] I have assigned a hearing on expenses.