

Note

[1] In this summary cause action, the pursuer seeks damages in respect of an injury sustained by him when he cut his arm whilst using a Makita MLT100 table saw on 1 July 2013. He sues the defenders as the importers and distributors of the saw, which bears their branding.

[2] A proof took place on 11, 12 and 14 August 2015. The pursuer gave evidence and also led evidence from his partner, Joanna Turnbull, and from a Consulting Forensic Engineer, James Garry. Evidence was given for the defenders by their Technical Services Manager, Tony Coleman, and by another forensic engineer, Ronald Knak. In addition, a joint minute was lodged, effectively agreeing the medical evidence of Mr Steedman, and agreeing quantum at £1,500.

[3] The circumstances of the accident are not admitted, but I accept from the evidence given by the pursuer and by Joanna Turnbull, both of whom I accepted as credible and reliable, that the pursuer purchased the table saw in August 2011. He was using it on 1 July 2013 to cut timber for flooring which he was laying. As he was locking the so-called "guide" (or rip fence, to give its technical term) into position, the plastic handle which operates a cam attached to the rip fence, and which the pursuer was holding, broke. The consequence of that was that the pursuer's right forearm was cut by the sharp edge of the handle which remained



attached to the saw. The agreed medical evidence confirms that the injury which was sustained is consistent with the accident as described, and there is no doubt that the pursuer sustained his injury in the manner which he described, and that it was caused by a broken fragment of the handle.

[4] It is also common ground between the parties that the handle which broke was not the handle which had first been attached to the saw when it was purchased by the pursuer. That handle had also broken about a year earlier, and the defenders had supplied a replacement handle, which the pursuer had himself screwed on to the cam. The pursuer had not screwed the original handle in. When he took delivery of the table saw, the first handle was already attached to the cam.

[5] Further factual evidence was given by Mr Coleman, whose evidence I also accepted. That was to the effect that 10,000 similar table saws had been sold by the defenders over a period of years. He was unaware of any other complaints of the handle breaking (although he was also unaware of the pursuer's earlier breakage, and so there was clearly at least one breakage which had occurred of which he was unaware).

[6] The handle is designed to be attached to the cam by means of a standard M8 bolt. The bolt is placed into the large diameter side of the handle and screwed into the boss at the end of the handle so that it protrudes through the end of the handle. An epoxy resin is poured into the back of the handle which seals the



bolt in position and prevents it from unscrewing. The effect of that is that when the handle turns, the bolt turns with it. The bolt is then screwed into a blind hole (that is, one which does not go all the way through the cam) drilled into the cam. Thus, the bolt is screwed into position by turning the handle itself clockwise until the bolt is screwed fully into the hole. Once fitted, the handle is used to lock the cam into position by turning it from the horizontal unlocked position, through 90 degrees, to the locked position. The shaft is prevented from travelling beyond the locked position by a split pin.

[7] Having found that the accident occurred as described by the pursuer, the principal issue in the case is the cause of fracture of the handle, and whether the defenders are liable in damages to the pursuer, by virtue of the terms of section 2 of the Consumer Protection Act 1987 ("the CPA"). (A common law case of negligence was also pled, but has not been insisted in.)

[8] Section 2(1) of the CPA states:

"Subject to the following provisions of this Part, where any damage is caused wholly or partly by a defect in a product, every person to whom subsection (2) below applies shall be liable for the damage."

[9] It is accepted by the defenders that they are a person to whom subsection (2) applies. The issue then becomes whether damage was caused to the pursuer wholly or partly by a defect in the table saw. Section 4 of the Act provides that it would be a defence for the defenders to show that the defect did not exist at the "relevant time". It is common ground that in this case the relevant time was the time of supply by the defenders to another person. In



practical terms, the effect of this provision is that the pursuer can succeed only if there was a defect in the table saw at the time he purchased it. I revert below to the question of burden of proof in relation to the defence.

[10] I do not propose to rehearse the submissions for the parties at length. Broadly speaking, the pursuer's position was that I should accept that the pursuer had proved on a balance of probabilities that there was a manufacturing defect in the saw when it was purchased by him; that the defect was a defect in terms of the CPA; that the defect caused the pursuer's injury; and that, quantum having been agreed at £1,500, decree should be awarded in the pursuer's favour in that sum. The defenders' position was that there was no manufacturing defect; that there was in any event no defect in terms of the CPA; and that any defect which there was did not cause the pursuer's injury but rather that he had been the author of his own misfortune by overtightening the second handle *et separatim* by applying excessive force to the cam when locking it into position. Finally, in the event that the defenders were liable by virtue of section 2, they contended that the damages should be reduced by virtue of contributory negligence on the part of the pursuer.

[11] Broadly speaking, the case, or at least the issue of causation, turns on which of the experts I prefer. Mr Garry, for the pursuer, spoke to the terms of his report, number 5/10 of process. In general terms, Mr Garry's evidence was that the handle fractured due to a manufacturing defect in the saw. More particularly, the defect which he identified was that the hole in the cam into which

the handle was screwed was not deep enough for the screw to be fully inserted, leaving a gap of some 2mm between the boss end of the handle, and the surface of the cam. Consequently, when the handle was screwed into the cam, it bottomed out into the hole before the body of the handle met the body of the cam. This had the effect that each time force was applied to the handle there was a bending moment applied to the screw directly into the handle body. It was also likely that when the bolt reached the bottom of the hole, rather than the thread continuing to turn into the hole, the handle began to roll down the thread creating torsional forces on the plastic material. Further, where the screw extended out through the handle body, it was continually exposed to bending forces. Thus, force was applied to the handle internally. It was quite likely that a crack was caused in the initial set up, which propagated over time, until final failure, eventually reaching a point where it was not strong enough to withstand the force applied by everyday use, causing it to snap. The final cause was overload, that is, a force being applied to it which the handle, in its weakened state, was unable to withstand. Various factors led him to this conclusion, the first and foremost of which was that when he first attempted to screw a replacement handle into the cam, there was in fact a gap of 2mm between the boss end of the handle and the cam, which he could not close by further tightening of the handle. The gap was illustrated in photographs 4 and 5 annexed to his report. Measurement of the hole at the time of his first inspection gave a depth reading of 9.9mm. Further evidence that the depth of the hole was less than the length of the bolt was the shiny appearance not only of the bottom of the thread of the incident bolt, but of the replacement bolt which Mr Garry had

attempted to screw in, in each case indicative that the bolt had reached the end of the hole and had continued to try to cut into the material. The existence of a small crack in the handle led further support to Mr Garry's explanation. Finally, the surface of the fractured area was predominantly smooth but with rough areas also being visible. Mr Garry explained that, in his opinion, the smooth area showed where there had been fatigue over a period of time; with the rough area being indicative of the final force being applied which had caused the breakage, that being the so-called "overload" failure which had been the immediate cause of the breakage.

[12] Mr Knak, by contrast, spoke to his reports numbers 6/2, 6/3 and 6/4 of process. He was of the opinion that the failure was caused by excessive force having been applied by the pursuer when operating the handle. Mr Knak's position was that the pursuer must have continued to apply pressure to the handle after it had been stopped by the split pin, in a misguided attempt to tighten the rip fence and attach it more securely to the table, the rip fence being attached in a less secure way than on certain other, more expensive, models. Mr Knak, when he first inspected the saw, unlike Mr Garry, did not attempt to attach a replacement handle, nor did he measure the hole. In an attempt to demonstrate that the break had probably occurred due to excessive force he conducted an experiment whereby he applied a force of 45kg to the handle. That force was insufficient to cause it to break. He had not applied any greater force because he was not able to measure beyond 45kg. Accordingly he did not succeed in breaking the handle by applying force to it. He was therefore unable

to say what was the maximum force which the handle could withstand. Thus, while he asserted without qualification in his evidence-in-chief that the pursuer would have been capable of applying sufficient force to break the handle, he was constrained to concede, in response to a later question by me, that he was not in a position to make that assertion with any confidence without knowing what that force was. When subsequently examining the cam, Mr Knak did measure the hole and obtained readings of between 13.1 and 14.1 millimetres. He also obtained broadly similar results when he measured the hole in an exemplar cam. That finding was thus directly contradictory of Mr Garry's earlier measurement. When Mr Knak then tried to screw in an exemplar handle, he was able to do so without leaving any appreciable gap of the dimensions previously noted by Mr Garry. Mr Knak pointed to these findings as supporting his hypothesis that the fracture must have been caused by the application of excessive force. Mr Knak derived further support for his opinion by comparing the number of threads in the hole (which he had counted from a photograph which he had taken but which was not lodged in process) with the number of threads on the bolt. He also considered that the fracture could not have occurred in the manner postulated by Mr Garry because if it had, immediately before the final overload, the crack would have been of such dimensions that the operator of the cam would have noticed that it was significantly less stiff than it had been, and no such report had been made by the pursuer. Mr Knak also backed up his opinion that the fracture was exclusively an overload factor by referring to his having shown photographs of the fractured surface to a colleague who was a materials specialist who had confirmed that the surface was consistent with an overload fracture. Again, the

photographs were not lodged and for that matter the colleague did not give evidence. Mr Knak also based his opinion on the fact that no-one else, other than the pursuer, had reported any failure in a handle to the defenders.

[13] Reverting to Mr Garry's evidence, by the time the proof commenced he had been made aware of the measurements taken by Mr Knak. He had himself again measured the hole, on the morning of the proof, and this time obtained measurements similar to those of Mr Knak (although the first measurement he took was in line with his previous measurements). He concluded that when he had first inspected the saw, there had been material within the hole, left by the manufacturing process, which he described as a burr, which had since become dislodged. The effect of that was that the effective depth of the hole had been less than the design depth. This theory was given support by the appearance of a shiny area at the bottom of the hole. He remained of the view that all the factors which he observed supported his opinion that the cause of the fracture was a manufacturing defect.

[14] Each expert gave their evidence in a cogent manner, and I am satisfied that both are experts, that is, that they each have the necessary qualifications and experience to qualify them to give opinion evidence to the court. I also found both to be credible and reliable, and both were doing their best to assist the court. Nonetheless, their opinions were diametrically opposed and I thereafter have to decide whose evidence is to be preferred.



[15] In many ways the starting point is the original measurement of the depth of the hole taken by Mr Garry, because his evidence is largely based on the premise that that measurement was correct; and Mr Knak's evidence is largely based on the premise that it cannot be correct. I have already said I found Mr Garry to be credible and reliable. I also gained the impression that he was methodical and careful. Having regard to those matters, and to his experience, I accept his evidence as to the depth of the hole when he first measured it, which had the effect of preventing the screw from being inserted to the full extent, thus resulting in the gap which I accept Mr Garry observed when he tried to screw in the exemplar handle, and which can be seen in the photographs attached to Mr Garry's report. The cause of the difference in measurements over a period of months is perhaps a matter of conjecture, to which I return, but as a matter of fact, rather than a matter of opinion, I find that when Mr Garry measured the hole, it was shallower than the length of the bolt attached to the handle. I also find as a fact that that is likely to have been the depth of the hole at the time of the incident and at the time of supply, there being no evidence to support any suggestion that the pursuer or his partner had in some way or for some reason inserted some extraneous matter into the hole. Further, since two handles failed, there is an inference that the same features were present at the time of, and contributed causally to, both failures. It is also significant that the first handle was fitted not by the pursuer, but had been fitted by the time of supply, and there was no suggestion that the pursuer had unscrewed the first handle before it broke, nor would he have had any reason so to do.



[16] Having made these findings of fact, that undermines the basis of much of Mr Knak's opinion evidence because he proceeded on the basis that the hole at the time of the incident was of the same depth as when he subsequently measured it very shortly before this proof.

[17] Mr Knak's evidence that excessive force was the likely cause of the accident is further undermined by the fact he was unable to say what degree of force was required to cause the handle to fracture; and was consequently unable to state that the pursuer was capable of exerting that degree of force. His readiness to accept in his evidence-in-chief that the pursuer was so capable perhaps was redolent of an over-anxiety to support the defenders' case; and in any event is based on a hypothesis that the pursuer had applied excessive force for reasons which were never put to the pursuer in cross-examination and for which there is not a shred of evidence. On the contrary, the pursuer's evidence, which I accepted, was that "*I was engaging the mechanism when the handle snapped, just as I locked it*", which suggests that the pursuer was aware that the handle had locked, and could and should go no further, and that the snapping was contemporaneous with the locking and that there had been no appreciable application of force after the mechanism had locked into place, as Mr Knak suggested. Indeed, the pursuer was asked in terms how much force he had applied, and stated that it was a "fair" degree of force, as he was operating a cam against a lock, going on to say that there was a split pin to prevent one from going too far. He stated that he had never tried pushing it past the split pin, and that once the cam was fully engaged it gave quite a good grip on the table. None

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of that was challenged in cross-examination, beyond a suggestion being put to the pursuer that on the day of the accident he had been frustrated and pushed too hard, which he denied. Mr Knak sat in on that evidence, the whole purpose of which was to inform his subsequent opinion evidence. It seems to me that he has required to assume that that evidence must be wrong, so as to fit his theory as to the cause of the fracture; rather than asking the question, "assuming that evidence is true, what then was the likely cause?" For my part, I do accept the pursuer's evidence on these matters, and I therefore I do accept that no excessive force was used by the pursuer, which means that I cannot attach great weight to much of Mr Knak's evidence.

[18] Further, Mr Knak's opinion on at least two matters – the number of threads in the hole, and the smooth surface of the fracture being consistent with an overloading rather than a fatigue fracture – was supported either by reference to photographs which were not lodged as productions and which the court did not have the opportunity to view, and upon which Mr Garry did not have the opportunity to comment, or upon the second- hand evidence of a colleague who was not the subject of cross-examination, or both, all of which further lessens the weight to be attached to those parts of Mr Knak's evidence. Further, one of the reasons which Mr Knak put forward in support of his contention that a fatigue fracture was unlikely was that it would have been obvious to the operator of the saw, before the break, that a fracture was likely to occur, because the cam would become less stiff; but the quick answer to that is that even if correct, that was



never put to the pursuer. Accordingly, the possibility cannot be ruled out that the cam was noticeably weaker immediately before the accident.

[19] Next, Mr Knak relies upon the absence of other complaints about the handle as being evidentially significant, and points to the fact that the pursuer has broken not one but two handles as indicating some factor common to him. However, various comments can be made in response to that. First, even if excessive force was used, given the number of units sold – 10,000 according to Mr Colman – one would not expect the pursuer to be the only “hashy” user to have broken handles in that way, which seems statistically improbable. Second, it seems to me that as a matter of pure logic, the fact that the pursuer broke two handles is equally consistent with a defect in the cam as with a fault on the part of the pursuer. Third, as pointed out by Mr Garry, not all breakages will be reported to Mikita in any event. Finally, even assuming in the defenders’ favour that these are the only two handles ever to have broken, I do not see that that assists the defenders when the issue is whether this particular product had a defect, not whether other similar products had a defect.

[20] Finally, it is a minor point but Mr Knak’s reliance upon the instruction manual at page three, which cautions against forcing the tool, is based upon a mis-reading of that paragraph which is clearly, as Mr Garry suggested, directed at use of the saw rather than the cam lever.

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[21] So for all these reasons I prefer Mr Garry's evidence to that of Mr Knak. It is worth noting that Mr Knak accepted that if there was a gap, then Mr Garry's explanation was "possible"; but if there was no gap then a fatigue failure was extremely unlikely. As I pointed out, that was a different way of saying that both were possible, but he declined or was unable to put any degree of probability or likelihood on Mr Garry's explanation being correct if there was a gap.

[22] Having rejected Mr Knak's evidence, and accepted the pursuer's evidence of fact that he did not abuse the handle by applying excessive force to it, and accepted Mr Garry's evidence as to the likely cause – namely, the depth of the hole in the cam being too shallow for the bolt, resulting in a gap between handle and cam, resulting in forces being applied to the handle, resulting in a crack, resulting in failure of the handle – I have little difficulty in finding on a balance of probabilities that that was the cause of the handle breaking. Mr Garry gave cogent and plausible reasons for his reasoning, which I accept.

[23] Having been able to make that finding, I do not need to say very much about the authorities in relation to the court's approach to causation in cases of this kind. In particular, I do not require to rely on the so called the Sherlock Holmes approach, where the court having excluded all possible causes bar one as being impossible, then concludes that the remaining cause must be the one which caused the accident, no matter how improbable that cause might be. My reading of the case of *Ide v ATB Sales Ltd* [2007] EWHC 1667 (QB) (QBD) is that where there are two possible causes in a case of this type, neither of which is

improbable, one of which is defect and the other is not, and the other is excluded, then the court is entitled to hold that the defect was the cause. However, the cases of *Love v Halfords* [2014] EWHC 1057 (QB) and *McGlinchey v General Motors UK Ltd* [2012] CSIH 91 should also be considered in this context and at the very least, care should be taken in finding that injury has been caused by a defect simply because all alternative theories have been discounted. The authorities make clear that the onus of proof is always on a pursuer to prove, on a balance of probabilities, that his injury was caused by a defect and as I have made clear in the foregoing paragraphs, I am satisfied, on the evidence, particularly that of Mr Garry, that the pursuer has discharged that onus without having to resort to "Holmesian" logic.

[24] A related question is the degree of specificity which there must be of the defect. As *Hufford v Samsung Electronics (UK) Ltd* [2014] EWHC 2956 (TCC) makes clear, at paragraph 25, it is sufficient for the pursuer to prove that there was a defect, without specifying what the defect was. In the present case, the pursuer has in fact proved, as I have found, what the defect was, but he need not have done so. It is for this reason that I do not consider it matters what was the reason for the hole being too shallow for the bolt. Mr Garry provided one explanation; Mr Knak puzzled over the shiny areas for some time; but it does not matter. The fact is, the hole, for whatever reason would not take the full depth of the bolt, for the reasons given by Mr Garry, and that is as far as the pursuer need go.



[25] Having found what the cause of the fracture was, the next question is whether that was a defect in terms of the Act. Section 3 of the CPA defines “defect” as follows:

“(1) Subject to the following provisions of this section, there is a defect in a product for the purposes of this Part if the safety of the product is not such as persons generally are entitled to expect; and for those purposes “safety”, in relation to a product, shall include safety with respect to products comprised in that product and safety in the context of risks of damage to property, as well as in the context of risks of death or personal injury.”

(2) In determining for the purposes of subsection (1) above what persons generally are entitled to expect in relation to a product all the circumstances shall be taken into account, including-

- a. the manner in which, and purposes for which, the product has been marketed, its get-up, the use of any mark in relation to the product and any instructions for, or warnings with respect to, doing or refraining from doing anything with or in relation to the product;
- b. what might reasonably be expected to be done with or in relation to the product;
- c. ...”

[26] In my view, the defect in this case was a defect in terms of that definition. A person purchasing a table saw is entitled to expect that the handle will not break in normal use, leaving a sharp edge liable to cause a cut, as happened here. There were no instructions cautioning against using the handle in any particular way. The users of the saw were also entitled to expect that the handle operating the cam would be able to be fixed to the cam in such a way that the handle would not fracture.

[27] The pursuer having established that there was a defect, the question of whether the defenders have established their defence of showing that the defect



did not exist at the time of supply then arises. During the hearing of submissions I raised the question of whether there was a persuasive burden on the defenders or merely an evidential one. In other words, did they require to prove on a balance of probabilities that there was no defect at the time of supply; or did they merely need to raise the issue, leaving it for the pursuer to disprove the defence by proving that the defect did exist at the time of supply. I rather had the impression that the parties' respective solicitors had not fully considered the point, or appreciated the distinction, although both seemed to proceed, at least initially, on the basis that it was a persuasive burden. Nonetheless, the cases of *Love* and *Hufford* (at paragraph 25) suggest that the burden is merely an evidential one, albeit without a great deal of discussion. I do not wish to venture an opinion on the matter, as there may well be other authorities on this point. The distinction is academic in the present case, because I am satisfied that the pursuer has in fact proved on a balance of probabilities that the defect – being that the hole was too shallow for the bolt – did exist at the time of supply, and that for the reasons set out above in paragraph 14.

[28] Next, I must deal with the defenders' submissions that the pursuer caused or contributed to the fracture either by overtightening the handle or by not tightening it sufficiently thus leaving a gap (which of course are mutually exclusive propositions). I do not accept that any fault attaches to him in that regard. Mr Garry said that it was very probable that he had caused the crack when screwing the handle in, but only because the hole was too shallow, taking us back to the defect in the saw. In any event, the handle did not come with

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instructions, and the first handle also fractured, which tends to confirm that the fault lay with the depth of the hole rather than the person fitting the handle into the hole. The pursuer can hardly be blamed for leaving a gap of 2mm between the handle and the cam when there were no instructions given to him to ensure that there was no gap. Further, Mr Garry's evidence was that he was unable to close the gap by continuing to tighten the handle. For the reasons already given, I find that it is more likely that when the bolt bottomed out, the handle began to work its way down the thread of the bolt, and it simply was not possible to close the gap of 2mm. The pursuer was not to know that the consequence of the gap would be that the handle would be weakened leading to eventual failure and cannot be blamed for continuing to use the handle rather than returning the saw for repair. Accordingly, the defenders have not succeeded in establishing any degree of contributory negligence.

[29] In summary, I am satisfied that the pursuer has proved that there was a defect in the saw when he purchased it; and that that defect caused his injury; all in terms of the CPA. I therefore grant decree in his favour for the agreed sum of £1,500. That sum included interest to the date of the proof, which was 11 August 2015, and so I have found the pursuer entitled to interest at 8% per annum from that date.

[30] Parties were agreed that expenses should follow success. Accordingly, I find the pursuer entitled to expenses as assessed on the summary cause scale. I

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also certify his skilled witnesses, Mr Steedman and Mr Garry, which was not opposed. Dates for the diets of assessment and approval have been fixed.

A handwritten signature in black ink, appearing to read 'Robson'.