

SCOTLAND / JUDGMENT

ANDY HEER AGAINST ASDA STORES Ltd [2016] ScotSC 43 (22 June 2016)

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[2016] ScotSC 43 [New search] [Help] SHERIFFDOM OF TAYSIDE, CENTRAL AND FIFE AT KIRKCALDY

[2016] SC KIR 43 PD85/15 JUDGMENT OF SHERIFF ALASTAIR G D THORNTON In the cause ANDY HEER Pursuer ; Against ASDA STORES LIMITED Defenders : Act: Ms Douglas Alt: Ms McEwan Kirkcaldy, 13 June 2016 The sheriff having resumed consideration of the cause. FINDS IN FACT

- [1] The pursuer is aged 63 – he was 61 at the time of the accident to which these proceedings relate. He is a local authority councillor.
- [2] The pursuer suffered an ankle injury when he fell in the defenders’ store in Glenrothes on 12 February 2015. Liability for the accident has been admitted by the defenders.
- [3] The injury was to the soft tissue of Mr Heer’s right ankle. When he tried to stand up, the ankle could not bear any weight. He described his ankle being at an unusual angle and then clicking back into place. The ankle was so swollen that it appeared to the paramedics who attended the supermarket and took him to the accident and emergency unit at Victoria Hospital, Kirkcaldy that it was fractured. The doctor who first examined the pursuer at accident and emergency also thought that the ankle was fractured. However, upon being X-rayed it became clear that the ankle was not broken and that rather it was a soft tissue injury. The pursuer was given pain killers and a walking stick and was discharged.
- [4] About two and a half weeks later when the pursuer saw his general practitioner, he was still limping as a consequence of pain in his ankle. He coped with the pain by taking ibuprofen tablets and gel.

- [5] Because of the associated swelling in his foot he could not wear shoes for about 12 days after the accident. As well as being swollen, the right ankle would not bear weight. Accordingly the pursuer was effectively housebound for that 12 day period. It was difficult for him to put weight on the ankle for about one month after the accident. He used the walking stick for most of that month.
- [6] For that period of about one month the pursuer's activities were substantially restricted. It was difficulty for him to go up and down stairs in the home he shares with his partner. Both walking and standing were inhibited. He could not walk the Border collie dog he and his partner have, so she required to do all of that for him for a period. The dog is a larger dog and needs a lot of exercise. The pursuer is generally better suited to walking the dog than his much more petite partner, Ms Neithercut. The dog requires to have two walks during the day of about 30 minutes duration each and a shorter walk in the evening. Although Ms Neithercut did a small proportion of the dog walking before the accident she had to do it all for about three weeks immediately following the accident. When Mr Heer was able to start walking the dog again, he had to avoid hills and rough ground because his ankle could not cope with such conditions.
- [7] There were other household chores which Ms Neithercut had to carry out on her own because the pursuer was incapacitated for a period. These included washing-up, shopping, cleaning the house, gardening, and putting the bins out. Again the pursuer is better suited to doing some of these tasks than his partner because of her smaller size. She required to undertake all these tasks for about three of four weeks after the accident, whereas the pursuer did some or all of them before the injury and after he recovered.
- [8] The injury also meant that the pursuer found it impossible to go downstairs from the bedroom to the toilet during the night. He had to resort to using a bucket which his partner had to take down and empty for him. This lasted for about two weeks after the accident.
- [9] The pursuer was unable to drive as a consequence of the injury. His partner had to pick him up from hospital and subsequently she required to collect his car from the defenders' carpark where it had been left when he was taken to hospital by ambulance.
- [10] In addition the pursuer was unable to attend to his duties as a councillor for a period of about two weeks. He missed five meetings during this period but lost no remuneration. THEREFORE Grants decree against the defenders for payment to the pursuer of the sums of (i) £3,000 with interest thereon at the rate of 4 per centum per annum from 12 February 2015 until today's date and thereafter at the rate of 8 per centum per annum until payment, and (ii) £18 with interest thereon at the rate of 8 per centum per annum from 12 February 2015 until payment; certifies Mr Edward Dunstan, consultant orthopaedic surgeon, Victoria Hospital, Kirkcaldy as a skilled witness who provided a report; finds the defenders liable to the pursuer in the expenses of process as taxed on the summary cause scale. Note

- [1] This is an action of damages in which the defenders admit liability to compensate the pursuer in respect of the injuries which he suffered when he fell in their Glenrothes store on 12 February 2015. The proof which took place before me on 13 June 2016 was restricted to the matter of the quantum of damages. I heard evidence from the pursuer and his partner Ms Neithercut both of whom I found to be entirely credible and reliable witnesses. Their evidence was not challenged by the defenders, nor were any defence witnesses led. I considered the pursuer and his partner to be excellent witnesses, and I have set out above my findings in fact based upon their evidence. I delivered my judgment on quantum on an *ex tempore* basis after evidence had been led and submissions made, but both agents requested me to provide a written decision for future reference.
- [2] The issues in this case relate to the quantification of damages for solatium, services and out-of-pocket expenses which the pursuer suffered as a consequence of the accident.
- [3] In assessing solatium I have had regard to the various case authorities cited on behalf of both parties. It does appear that there are few Scottish cases which relate to soft tissue ankle injuries alone.
- [4] I respectfully agree with the view of Sheriff Crowe in *McCord v Thomson*, 2008 GWD 34-511 and that of Sheriff Tait in *Upadhyaya v Hodgekiss*, Perth Sheriff Court, 9 May 2014 (unreported) to the effect that my task is to assess what would be regarded as reasonable compensation for the loss, injury and damage the pursuer has suffered as a result of the accident.
- [5] From the English Judicial College Guidelines, I take the likely top end of solatium for a modest injury where recovery is complete within a year to be £4,175. In this case the medical report from Mr Dunstan makes it clear that the pursuer's symptoms which specifically related to the accident would have resolved within three months. It is not appropriate in my view simply to divide the figure of £4,175 for recovery within one year by four in order to arrive at a valuation when recovery is complete within three months. Although the defenders' agent indicated that such an approach might be one way of assessing an appropriate figure, to be fair to her I do not think she was advocating that I undertake such a mechanistic exercise. The effects of injury are always most serious at the outset and I consider that an arithmetical approach of dividing the top end figure to reflect the proportion the recovery period bears to one year is inappropriate and unreasonable. It would however be reasonable for an injury such as the pursuers to be assessed at a figure quite significantly less than the Judicial College's top end because the duration of the symptoms was much shorter than the period envisaged there.
- [6] I do not consider that a great deal of assistance is to be derived from the cases to which I was referred of *Baxter v Direct Line Insurance plc*, Greenock Sheriff Court, January 2009 (unreported) or *Mathewson v Winters*, Kirkcaldy Sheriff Court, 12 February 2016 (unreported), since these cases relate to neck injuries. [7] *Upadhyaya* is a soft tissue ankle injury case. The sheriff there stated her view that the pursuer had a tendency to exaggerate

the extent of her injury and its impact on her life. Nevertheless while having regard to that factor, I think the solatium assessed by the learned sheriff in that case (£2,400) is not all that far away from what would be reasonable here. It does appear that the immediate acute pain and symptoms suffered by Mr Heer in the present case were more pronounced and lasted longer than those experienced by the pursuer in Upadhyaya , albeit that the overall duration of Mr Heer's pain was shorter.

- [8] It seems to me that a number of other cases to which I was referred, namely *Nimmo v British Railways Board*, 1990 SLT 680 , *Connell v BP Chemicals Ltd*, 1993 SLT 787 and *Ogilvie v Heron*,
- [1996] CLY 2345, are now somewhat elderly cases which are of less assistance than more recent authorities.
- [9] The specific consequences of the injury in the English case of *F (A child) v Birmingham City Council* [2010] CLY 2521 do not appear to me to be markedly different to those in the present case, although perhaps the award of general damages in that case (£3000) might be thought to be slightly generous against the backdrop of the awards in the recent Scottish cases referred to. [10] *McCord* was a case where there were multiple injuries (not just to the pursuer's ankle).
- [11] In all the circumstances, and having regard to the various authorities to which I was referred, I consider a reasonable level of compensation for Mr Heer's injury to be £2,500. Solatium is all in the past, and so interest should be awarded at the rate of 4% per annum from the date of the accident until the date of decree, and 8% per annum thereafter until payment.
- [12] Turning to services, in my view it is not appropriate to assess the services provided by Ms Neithercut by reference to an estimate of the number of hours over which she was engaged multiplied by the minimum wage. This was an approach which the defenders asked me to consider. I consider that to be inappropriate because Ms Neithercut is also in employment – she had to rearrange a number of aspects of her life over a period in order to assist her partner. The impact upon her was greater in my view than the impact on the pursuer's husband in *Upadhyaya* , for which the learned sheriff in that case awarded £350. I agree with the pursuer's evaluation of £500 as being reasonable compensation in relation to these services. Again interest will be at the rate of 4% from the date of the accident until decree, and 8% per annum thereafter until payment.
- [13] The parties agreed out-of-pocket expenses at £18, and I shall award that figure together with interest at the rate of 8% per annum from the date of the accident until payment.
- [14] The total of these principal sums comes to £3018, and interest will be due thereon as I have provided.

[15] After I had delivered my decision ex tempore as above, the parties addressed me in relation to expenses. I agreed with the pursuer's agent that expenses should follow success, and this was not contested by the defenders' agent who confirmed that the pursuer had beaten the tender lodged previously by the defenders. I was moved to certify the expert witness, Mr Edward Dunstan, which I did and thereafter both parties asked me to find the defenders liable to the pursuer in the expenses of process as taxed, but limited to the summary cause scale. I agreed that this was appropriate. BAILII: Copyright Policy | Disclaimers | Privacy Policy | Feedback | Donate to BAILII URL: [https://www.bailii.org/scot/cases/ScotSC/2016/\[2016\]SCKIR43.html](https://www.bailii.org/scot/cases/ScotSC/2016/[2016]SCKIR43.html)

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