

SCOTLAND / JUDGMENT

Bremner v. Bartlett [2008] ScotCS CSOH_03 (09 January 2008)

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[2008] CSOH 03 PD2076/06 OPINION OF LORD MALCOLM in the cause DONALD BREMNER Pursuer; against KEVIN BARTLETT Defender: ____ Pursuer: Primrose; Balfour + Manson LLP Defender: Young, QC; Simpson & Marwick 9 January 2008 [1] On 20 November 2003 the pursuer was involved in a road traffic accident on the A9 Scrabster to Thurso road. He was stationary at a junction when the defender's vehicle collided with the rear of his car. Liability for the accident is not an issue. However there is a dispute over quantum . After proof Mr Young for the defender invited me to pronounce a decree in the sum of £29,044. Mr Primrose for the pursuer submitted that the appropriate award is £173,640, which failing £70,826. While the proof ranged over a wide area, in their submissions counsel have identified and focussed the matters in dispute. I am grateful to them for that, and in this opinion I will concentrate on those relatively few issues. [2] The defender accepts that as a result of the accident the pursuer, who was a selfemployed lobster fisherman, suffered whiplash injuries which prevented him from working until March 2006. However, the defender contends that thereafter the pursuer's accidentrelated injuries were superseded by cervical spine damage at C5/6 and C6/7 disc levels which was caused by natural degeneration. March 2006 has been identified as a key date because this was when testing first indicated a neurological problem, namely when the pursuer was examined by Mr Kelly, a consultant orthopaedic surgeon, for the second time. Mr Kelly said that if there had been neurological problems when he first saw the pursuer in September 2005, he would have discovered and identified them at that time. Mr Primrose accepted that this postMarch 2006 spinal damage would prevent the pursuer from working as a fisherman, and was caused by degeneration. However, he submitted that the cause of the

degeneration was the road traffic accident, thus the defender remains responsible for ongoing loss of income beyond March 2006. The larger figure proposed by Mr Primrose represents full liability on this basis, with the smaller figure a fallback position in the event that the pursuer has failed to prove that the degenerative changes were the result of the accident. (Both figures include other claims discussed below). [3] In summary, it is not in dispute that the pursuer's problems up to March 2006 can be attributed to the road traffic accident, and that after that date cervical spine changes at C5/6 and C6/7 levels were in themselves sufficient to prevent the pursuer's preaccident employment. If those changes are not attributable to the accident, liability stops in March 2006, and vice versa . The key issue is whether it has been proven that the degenerative changes were caused by the accident. The cause of the damage to the discs [4] The pursuer led two medical experts on this issue, namely Mr Stanley, a consultant general surgeon at Caithness General Hospital , and Mr Kelly, a consultant orthopaedic surgeon at Raigmore Hospital , Inverness . Mr Young led the evidence of Mr McMaster, a consultant orthopaedic and spine surgeon at Edinburgh Royal Infirmary. All three had different explanations for the progression of the pursuer's symptoms. In his submissions Mr Primrose disclaimed reliance upon Mr Stanley's approach, and rested his case on the evidence of Mr Kelly. Without intending any disrespect to Mr Stanley, I shall not dwell on his evidence. [5] Mr Kelly's overall opinion was that the problems at C5/6 and C6/7 were the result of degenerative changes brought on by the trauma of the accident. Mr McMaster ruled this out on the basis that discs will not be damaged by trauma unless that trauma causes fracture or dislocation of the cervical spine. He says that it is clear that neither occurred in Mr Bremner's case, thus the degeneration can be attributed to natural processes. When Mr Kelly's and Mr McMaster's evidence is considered, it becomes clear that the main issues between them are in narrow compass. Mr Kelly accepts that for trauma to trigger degenerative changes of the kind observed here, there would require to be a fracture of, or at least severe disruption to the neck. His position is that there was such disruption as a result of the accident. On the other hand, Mr McMaster disputed this by reference to the pursuer's presentation as set out in the medical records when treated by his general practitioner and at Caithness General Hospital in the aftermath of the accident. He says that the records speak of a relatively minor soft tissue strain, which one would normally expect to clear up within a short time, and which would not cause damage to the discs. Only a small minority of patients continue to complain of symptoms from such an injury for an extended period. In support of his position, Mr Kelly relied on the pristine condition of the other disc levels in this area of the pursuer's cervical spine, all as revealed on an MRI scan. According to him this points to a traumatic cause of the changes at the C5/6 and C6/7 levels, rather than natural degeneration. Had it been natural degeneration it would have been more widespread. However, Mr McMaster refuted this, saying, in effect, that the pursuer's scan was an extremely common presentation for people with natural degenerative changes. [6] So far as the past and ongoing neck pain is concerned, the evidence indicates that this is independent of the neurological problems, but, apart from an impact on solatium , for the reasons discussed above this is of little practical

importance. The key difference between Mr Kelly and Mr McMaster is as to the degree of damage caused by the accident. Mr McMaster says that not much damage occurred, thus the current problems can be attributed to natural degeneration. Mr Kelly contends that the injury was severe, and so is the explanation for the onset of degenerative changes. On this issue Mr Young submitted that it would be unsafe to rely upon the pursuer's recollection that after the accident he suffered shooting pains in his neck, both arms, and the sides of his body. Mr Young relies on the fact that the extensive medical records from (a) the pursuer's general practitioner;

- (b) the hospitals which treated him; and (c) the physiotherapist who saw him on many occasions, do not support the pursuer's recollection. Mr McMaster stated that, in a sense, the pursuer's MRI scan could be described as normal, in that it is identical to that seen in many patients of the pursuer's age, but with no history of trauma. He said that degenerative changes at only the C5/6 and C6/7 levels of the cervical spine are common in cases of natural degeneration. Degeneration is usually the result of a genetic predisposition, though by a certain age almost everyone will have a degraded spine, fortunately usually asymptomatic. So far as the literature referred to by Mr Kelly is concerned, Mr McMaster said that it is of no real assistance one way or the other on the key issue, and in any event was to a large extent superseded by subsequent work. Discussion [7] Mr Young's principal contention was that a study of the hospital and GP records for the period after the collision indicates that the pursuer's cervical spine was not severely disrupted by the accident. Xrays showed no fracture. There was limited restriction on movement and no neurological deficits. I agree with this submission, and it is my main reason for rejecting the pursuer's evidence on the shooting pains, etc, and for not accepting Mr Kelly's approach. If the pursuer's recollection had been correct, it would have been reflected in the records of the numerous examinations of him and treatment given to him during the months after the accident. I have not overlooked the evidence given by the pursuer's brother and sister, but I do not regard them as reliable historians on this matter. [8] I do accept that the pursuer had a significant injury in the more general sense of whiplash strain to the ligaments and muscles in and around the neck, and that for some unexplained reason these problems have persisted through ongoing neck pain and restrictions on movement. However the critical thing now is to decide whether it has been proven that the accident is responsible for the specific changes at C5/6 and C6/7 levels, which by March 2006 had degenerated to such an extent that, on their own, they disabled the pursuer from pursuing his work as a fisherman. The burden of proof lies on the pursuer, and overall I have not been persuaded that he has satisfied me that on a balance of probabilities the degenerative changes were caused by the accident. They might have been, but it has not been proven. The uncertainty is exemplified by the disagreement between even the surgeons led by the pursuer as to the explanation for the long delay between the accident and the neurological symptoms. At the very least the contrary evidence of Mr McMaster is of sufficient power and potency to prevent me from favouring Mr Kelly's evidence. [9] If I had to choose between the two experts, I would have preferred Mr McMaster for the following reasons. (i) His lengthy and extensive experience of and

specialisation in this part of the body and these types of injuries. Without intending any disrespect to Mr Kelly, he cannot, at least at this stage of his career, match the authority and qualification of Mr McMaster to advise the court on the critical issues. Indeed Mr Kelly's practice now tends towards the treatment of hips and knees. (ii) The contemporary records do not indicate the kind of severe disruption to the cervical spine which both experts regarded as necessary to trigger these changes. (iii) The long delay between the accident and the neurological symptoms points away from the suggested connection. (iv) Doing the best I can, I do not find anything clearly supportive of Mr Kelly's position on the key issue in the literature which he relied upon. Nor did Mr McMaster, who dismissed it as superseded by subsequent work. [10] Another issue discussed in the evidence was whether the pursuer's approach could be ruled out because, whatever else, trauma would cause damage to only one disc level. As Mr Stanley put it, a string under strain will break at only one place. In the result, I do not need to resolve this, but in general I doubt if one could rule out the possibility of damage at two levels as a result of a single event. I should also record that Mr. Primrose did at one stage present a third scenario whereby recovery of loss of income could continue beyond March 2006, even if the degeneration was independent of the accident, but he withdrew this in the course of the hearing on the evidence. Psychological injury [11] The parties were also in dispute as to whether the pursuer suffered from a psychological injury in the form of an adjustment disorder as a result of the accident. Evidence was led from Dr Chiswick for the pursuer and from Dr Stewart for the defender. In the result I prefer the evidence of an adjustment disorder given by Dr Chiswick, primarily because he had the benefit of an interview with one of the pursuer's sisters, who provided additional and useful information. Dr Stewart based his opinion on an interview with the pursuer alone. I agree with the submission that the pursuer might well have failed to communicate the full details of his problems to Dr Stewart. However, this finding in favour of the pursuer is not of major importance. The disorder relates to the pursuer's inability to work, so it is not independent of the physical problems. It was not and is not a separate disabling condition. Though not adding to financial loss, my finding on the adjustment disorder does have some effect on solatium . Financial losses and solatium [12] The result is that on the question of ongoing financial loss I reject Mr Primrose's main submission. The fallback was his scenario 2 as per his schedule of damages, with wage loss stopping at March 2006. There was little between him and Mr Young on the relevant figures in that schedule. However, Mr Young invited me to reduce the sums sought by 25% to reflect uncertainties flowing from the pursuer's stop/start and diverse work pattern in the past. It is true that over the years Mr Bremner has pursued a variety of forms of employment. At one time he completed a course in nuclear waste treatment at Thurso College . From time to time he was unemployed, occasionally for lengthy periods, though the two most recent examples were explained by reference to external causes. There is uncertainty in the evidence as to the full extent of the pursuer's fishing activities in the 1990s and the early 2000s. I agree with Mr Young's submission that the picture is of a man with an intermittent work record over recent years. Further, the figures on wage loss in the joint minute are based on only seven months trading, being the seven months immediately before the accident. I accept the evidence that at that time the

pursuer was working only on his fishing enterprise, and that he was in the course of building up the business and improving its prospects. He had bought more creels, and had plans to create a pond to keep a substantial number of lobsters for sale in the more lucrative markets at Christmas and Easter. In broad terms I accept the evidence of the accountant led for the pursuer, Mr Graham, that the records are sufficient to allow a reasonable estimate to be made of future income, and I agree with him that by ignoring the possibility of improved trading in future years, he adopted a conservative or cautious approach in his calculations. I consider that to base future wage loss on the actual trading picture in those seven months is a reasonable compromise between (a) the uncertainties which Mr Young spoke of, and (b) the real possibilities for higher income in the future. The result is that I am not prepared to reduce the joint minute figures by the suggested 25%. This means that I accept Mr Primrose's submission on wage loss to March 2006. [13] As to solatium for the various physical and mental consequences of the accident, and on the hypothesis that I did not accept his primary submission, Mr Primrose suggested that it should be assessed at £15,000, with Mr Young proposing £10,000. I consider that one is slightly too high, and the other slightly too low. I assess solatium at £12,500, with interest on one half of that at 4% per annum, giving a figure of £13,500. Both counsel suggested a modest award for services, for which I award £500. [14] This leaves a miscellany of different claims which I deal with as follows. The pursuer spoke of about three prescriptions per month for the first year at £6 each. With interest from the end of the first year the total would be about £270. With regard to the cost of travelling for medical treatment, no direct evidence was led on this head of claim, but I consider it reasonable to top up the immediately preceding figure to £500 inclusive of interest, to cover both prescription charges and travelling costs. [15] The pursuer also has a claim in relation to creels which were lost in the period immediately following the accident. The explanation for this claim is that because of his injuries the pursuer was unable to take to sea to look after his creels. As a result, shortly after the accident they were lost when high tide conditions swept them out to sea. Had there been no accident the pursuer would have taken the normal steps necessary to protect his property. He did request assistance, but without success. His brother indicated that he was not familiar with the sea and tidal conditions in the area, and that it would have been unsafe for him to agree to help. A couple of days after the accident, this brother, despite the use of binoculars, was unable to see the creels. Tide tables confirmed that this coincided with high tides. [16] Mr Young submitted that an issue of remoteness of damage arises. He quoted the grand rule in *Allan v Barclay*

- (1964) 2M 873 per Lord Kinloch at 874: "The grand rule on the subject of damages is none can be claimed except such as naturally and directly arise out of a wrong done, and such, therefore, as may reasonably be supposed to have been in the view of the wrongdoer." The submission was that the creels were not lost or damaged in the accident itself, nor is this an outlay linked to the pursuer's ongoing physical injuries. They were lost because the pursuer was unable to collect them; he could not persuade anyone else to assist; and the tides were at their highest shortly after the accident. Mr Young submitted that this kind of

loss could not be in the reasonable view of the wrongdoer as being a loss which would flow directly from the road traffic accident. For the pursuer, Mr Primrose submitted that this was a cost flowing naturally and directly from the accident. It caused the pursuer to be unable to take the necessary action, and he could find no one else to help. As a result the creels were swept away by the tides within 23 days of the accident. [17] It is often said that matters such as this have to be addressed on a commonsense basis. In this regard I see little distinction between this claim and other recoverable claims, such as loss of income, prescription charges and the like. If one injures a lobster fisherman, it is foreseeable that this may cause him property damage or loss of the kind suffered here. Factual causation in a "but for" sense is made out. The rule that one takes one's victim as one finds him is not limited to physical or psychological vulnerability. It covers injuring a self-employed fisherman who needs to tend property at sea. In my view there is a sufficient connection between the accident and the loss of the creels to bring them within the natural and direct test set out in the grand rule. As to the appropriate recoverable sum, both parties submitted that this should be calculated by reference to the market value at the time. In the result there was little between the parties on the appropriate figure, and taking into account lost lobsters from the keeper creels, I value this head of claim at £8,500 inclusive of interest. [18] I take a different view of the claim for the cost of repairing the pursuer's fishing boat and returning it to proper working order. Being unable to work, the pursuer removed his boat from the water a few months after the accident. Since then it has not been maintained, and has been allowed to deteriorate. The engine, gearbox and electrics have seized up. The deck and the wheelhouse have rusted away. The engine is sea cooled and could not be run for any extended period out of water. It is submitted that the pursuer could not afford the necessary work. His brothers were unable to help. The necessary work is estimated at costing over £21,000, including VAT. Alternatively Mr Primrose submitted that the boat is now virtually worthless, and a claim for diminution in value would be roughly the equivalent of the repair costs. [19] For the defender Mr Young criticised the quality of the evidence as to the quantification of the repair costs. He noted that some of the deterioration of the boat would have occurred post March 2006. In any event the pursuer would have become unable to work and operate his boat after that date, even if there had been no accident. On the known facts, if the boat had been laid up in March 2006, or thereabouts, by now it would be well on the way to its current state. Further the pursuer cannot simply ignore regular maintenance of the boat and then claim either substantial repair costs or effectively total loss of value. The loss claimed arose from the lack of maintenance, not from the accident. [20] Had I reached that stage, I would have been prepared to accept the evidence as to the cost of necessary repairs. However I uphold the other submissions on this claim made by Mr Young. I do not regard this as a recoverable head of claim. There is no good reason to suppose that the pursuer would not have laid up the boat and failed to maintain it after March 2006, when the natural degenerative changes in his spine would have prevented him from working in any event. In any event, as a matter of simple causation, the loss in value can be attributed to the failure to care for the vessel, rather than the accident itself. It would be unreasonable to

hold the defender responsible for the effective total loss of the value of the pursuer's boat.

[21] The parties are agreed that two years storage of the boat should be allowed at a cost which can be rounded to £2,000. Mr Primrose also sought compensation for the pursuer's inability to maintain his car at a sum of £350, but there was no record for this, nor did the pursuer give any evidence to support the claimed figure. I therefore reject this claim.

Summary [22] The overall result is as follows. 1. Solatium

- £13,500 inclusive of interest. 2. Wage loss to March 2006, inclusive of interest £20,500. 3. No loss of income recoverable thereafter. 4. Value of lost creels and lobsters £8,500 inclusive of interest. 5. Services £500. 6. Other patrimonial loss £2,500. I shall pronounce decree in the sum of £45,500. BAILII: Copyright Policy | Disclaimers | Privacy Policy | Feedback | Donate to BAILII URL: https://www.bailii.org/scot/cases/ScotCS/2008/CSOH_03.html
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