

SCOTLAND / JUDGMENT

Duthie v MacFish Ltd [2000]

ScotCS 184 (6 July 2000)

[2000] ScotCS 184

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[2000] ScotCS 184 [New search] [Help] OUTER HOUSE, COURT OF SESSION 0/512/5/99
OPINION OF LORD MACFADYEN in the cause BRIAN DUTHIE Pursuer; against MACFISH
LIMITED Defenders:

Pursuer: Dorrian, Q. C.; Thompsons Defenders: Springham; Brechin Tindal & Oatts 6 July 2000

Introduction

- [1] In this action the pursuer concludes for payment by the defenders of damages in respect of personal injuries which he suffered while working in their employment on 24 January 1998. Liability is no longer in issue, and it is agreed that there should be finding of 25% contributory negligence on the part of the pursuer. The proof which I heard was therefore concerned only with the quantification of the pursuer's claim for damages.
- [2] The circumstances of the accident need only be summarised briefly. On the day of the accident the pursuer was working as a night shift cleaner at the defenders' fish processing factory in Fraserburgh. He was carrying out a cleaning operation which involved the use of a chemical spray. The chemical was chlorinated caustic foam (CF 314). That is a strongly alkaline substance which burns human tissue on contact. A pipe carrying the chemical became detached, and the chemical splashed into the pursuer's eyes. As a result he suffered the serious injuries in respect of which he brings this action. The Pursuer's Ophthalmic Injuries

- [3] The evidence about the ophthalmic aspects of the pursuer's injuries was given by Dr Peter Kyle, a consultant ophthalmologist who examined the pursuer with a view to giving evidence. Although he gave evidence about two occasions on which he examined the pursuer (on 11 December 1998 and 28 April 2000), much of his evidence was derived from the records of the treating hospitals and (latterly) information provided by the pursuer. His evidence was, however, uncontradicted and is not materially in dispute.
- [4] The accident took place at about 3.30 a.m. on 24 January 1998. The pursuer, with the assistance of a fellow employee, immediately washed his eyes out with water. He was then taken to Fraserburgh Hospital, where his eyes were again rinsed by Dr Beattie, who happens to be his own general practitioner. He was then transferred to the Ophthalmology Ward at Aberdeen Royal Infirmary. Further treatment of the same kind was again given and arrangements were made for him to be transferred to Queen's Medical Centre, Nottingham, where he came under the care of Professor Dua, who has a particular interest in the type of injury that the pursuer had suffered. He was admitted there at about 4 p.m. on the day of the accident.
- [5] When the pursuer was examined on admission in Nottingham, it was found that he had suffered severe alkali injury of both eyes, the right eye being worse than the left. As Dr Kyle explained in evidence, the eye has much less ability to resist injury by alkalis than injury by acids. Alkalis tend to penetrate the ocular tissues rapidly, inciting a severe inflammatory reaction. There was total loss of the corneal epithelium (the outer tissue of the cornea) of the right eye, with extensive ischaemia of the limbus (the border of the cornea) and oedema. In the left eye there was epithelial loss, and more localised limbal ischaemia involving particularly the lower quadrant. The pursuer's vision on admission was 6/36 with the right eye and 6/60 with the left.
- [6] By 2 February vision with the right eye had deteriorated to 6/60, while that with the left had improved to 6/18 (although the figures are not strictly comparable, those on the later date having been achieved with the aid of a pinhole). At that stage a conformer (an object shaped like a large contact lens) was placed in the fornices (the arcs lying between the eyeball and the eyelids) of the right eye to discourage scar formation. On 11 February an allo-limbal graft (i.e. a graft of limbal tissue, possibly from the other eye, but in the circumstances of this case more probably from a donor, to provide source cells to promote regeneration of the epithelium) was carried out on the right eye. A left tarsorrhaphy (stitching together of the upper and lower eyelids to protect the cornea) was carried out. At about this stage, the pursuer, who had been suffering significant pain, was seen by a representative of the Acute Pain Service, and a change in his oral analgesic therapy was recommended. The left tarsorrhaphy was opened on 20 February, by which stage the corneal epithelium of that eye had regenerated and was intact. In the right eye, however, there was by then evidence of loss of the lower conjunctival fornix, as well as a persisting epithelial defect, indicating that both the placing of the conformer and the allo-limbal graft had been unsuccessful. That was the state of affairs when he was discharged home on 3 March.

- [7] At review on 17 March, vision in the right eye was still 6/60, and in the left 6/18. It was decided that the right upper eyelid should be lowered with botulinus toxin (a neurotoxin used to cause paralysis of the muscles of the eyelid so as to produce drooping - ptosis - of the eyelid over the cornea), that a central tarsorrhaphy be carried out and that consideration be given to a penetrating corneal graft. Botulinus toxin was given on two occasions, but there was no ptosis. The central tarsorrhaphy (which constituted, in effect, an alternative way of procuring that the eyelid covered the cornea) was carried out on 28 March and the pursuer was again discharged. He was re-admitted on 14 April. By that stage vision with the right eye had reduced to the perception of hand movement only. There was extensive peripheral corneal vascularisation (an inappropriate and undesirable form of "healing" of the cornea, which is normally, and ought to be, avascular) and an irregular epithelium. He was referred to the oculo-plastic service for reconstruction of the fornices with buccal mucosa (mucous membrane from the inside of the cheek). That was carried out on 12 May, the procedures being release of symblepheron (an adhesion of the eyelid to the eyeball) and buccal mucosal graft. He was discharged on 14 May.
- [8] The pursuer was reviewed and re-admitted on 3 June. At that stage the findings in relation to the left eye were satisfactory. So far as the right eye was concerned, an amniotic membrane graft was carried out on 6 June. By 15 June it was apparent that he required a corneal graft combined with lens extraction and the placement of an intra-ocular implant. That was carried out on 17 June, and he was discharged home on 22 June. At review on 4 August he was found to have in-folding of both the upper and the lower eyelids of the right eye. Vision was slightly better (at 1/60) in the right eye and still 6/18 in the left. He was re-admitted for eyelid surgery, which was carried out on 11 August, and was again discharged home the next day.
- [9] When Dr Kyle saw the pursuer on 11 December 1998, the right eye was inflamed and red. Vision was restricted to the ability to count fingers. There was extensive right-sided conjunctival hyperaemia (i.e. the eye appeared red), with obliteration of the fornices and extensive vascularisation of the grafted cornea. Thus, the reconstruction of the fornices had not proved successful, and the corneal graft had likewise not succeeded. There was a corneal epithelial defect inferiorly. Epithelial regeneration was thus incomplete. By that stage the pursuer had had about twelve operations on his right eye, but the vision in it remained markedly substandard. It remained to be seen what more might be done, but Dr Kyle expressed the view that vision would remain substandard no matter what was done. Vision in the left eye remained 6/18. In that eye there was superficial corneal scarring involving the lower two thirds of the cornea and vascularisation of the inferior limbus. The corneal epithelium appeared stable, but there was corneal haze, secondary to superficial stromal scarring (i.e. scarring of the superficial layer of the deeper structure of the cornea). Nevertheless, Dr Kyle felt that the pursuer would retain reasonable vision in the left eye. Dr Kyle also remarked on the considerable pain to which the pursuer had been subject since the accident, requiring strong analgesia.

- [10] Thereafter the pursuer underwent two further corneal grafts, the first in Aberdeen at a date not clearly identified in evidence and the second in Nottingham in August 1999. By December 1999 he had to be readmitted to hospital, because the third graft was either infected or being rejected. He required to have a course of intravenous steroids. He was subsequently advised that the graft had failed. In early 2000 he had a further injection of botulinus toxin, this time successfully causing ptosis. He continued to take a variety of anti-rejection agents, and to use antibiotic and anti-inflammatory drops and topical lubricants in the right eye, as well as analgesics.
- [11] When Dr Kyle examined the pursuer for the second time on 28 April 2000, he found the vision in the right eye to be limited to perception of light. There was partial ptosis. Elevation of the eyelid revealed a disorganised anterior segment, with superficial and deep vascularisation of the cornea. There was an inferior corneal epithelial defect. Dr Kyle described the state of the eye at that stage as substantially worse than when he had seen it before. I understood him to be of the view that for all practical purposes nothing more could be done to restore useful sight to the eye. By that stage the prospect of further surgery had been discussed with the pursuer, but he was disinclined to submit to such procedures when the prospect of improvement of vision was poor. Dr Kyle also found new cause for concern about the left eye. The central corneal haze remained, but there was now a peripheral inferior corneal epithelial defect, with associated hyperaemia of the conjunctiva. Dr Kyle was of opinion that the epithelium remained prone to breakdown, and that there was a risk of infection developing and spreading throughout the cornea. His view was that it would be foolhardy to attempt to fit a contact lens in an eye subject to such risks. Because of the nature of the defect in the eye, involving irregular astigmatism, spectacles would be unlikely to afford satisfactory means of improving the vision of the eye. It will be necessary for the pursuer to use a lubricant in the eye, which will slightly blur the vision in it but, given the already reduced visual acuity, that may not be very noticeable.
- [12] Since Dr Kyle's second examination of the pursuer there has been a further development in relation to the right eye. A decision has been taken that it should be enucleated. That operation was due to take place in the week following the proof, i.e. in late June 2000. Dr Kyle regarded that decision as entirely sensible and reasonable, but thought that the proposed procedure would be technically very demanding. Although the pursuer's understanding was that a prosthesis would then be fitted, Dr Kyle's opinion was that it was unlikely, because of the extent of the damage already done, that that could be achieved. To keep a prosthesis in place, there must be fornices, and Dr Kyle was unable to envisage how that would be achieved. Enucleation would alleviate the pain in the eye. The cosmetic appearance of the eye might be improved, if it turned out to be possible to fit a prosthesis, but would be likely to be worse if that were not possible.
- [13] The physical effects of the accident on the pursuer's right eye may therefore be summarised as follows. The sight has for all practical purposes been wholly lost. Once enucleation has been carried out the loss will be complete. In the period of two years and five months that

has elapsed since the accident, the pursuer has, however, undergone a large number of operations on his right eye, many of them under general anaesthetic. Three of those operations involved corneal grafting. None of the operations achieved long-term success. He has suffered considerable pain, which has required to be controlled by the extensive use of analgesic drugs. He has also had to take a variety of other drugs, for purposes such as prevention of rejection of grafts, the control of inflammation and the promotion of healing of the tissues of the eye. The original injury, and the successive surgical interventions, have had an adverse impact on the appearance of the eye and the area surrounding it. Enucleation will relieve the pain. It is, however, improbable that a satisfactory prosthesis will be fitted. The cosmetic result is therefore unlikely to be improved, and may well be worsened, by the enucleation.

- [14] The physical effects of the accident on the pursuer's left eye, although much less severe than those on the right eye, are nevertheless also significant. They may be summarised as follows. The eye has not required surgical intervention (apart from the protective tarsorrhaphy at an early stage). The sight of the eye has been reduced to between 6/18 and 6/12, possibly fluctuating within that narrow range. Neither a contact lens nor spectacles can be used to achieve improvement of the sight. The epithelium of the cornea of the eye remains prone to breakdown, and when that occurs, the eye is vulnerable to infection which, if it spread, might further prejudice the vision in the eye. The probability is, however, that useful vision will be retained.
- [15] The effect of the accident has been to deprive the pursuer of the sight of one eye and damage the sight of the other. The pursuer's field of vision is thus restricted - he has a "blind side". He has been deprived of stereoscopic vision, and as a result is unable to judge distance, or the speed of moving objects, in the usual way. There are techniques which can be used to overcome that disability to some extent, but not completely. The pursuer is not prevented from getting about, since the remaining vision in his left eye is sufficient for that purpose. He requires to take special care, however, in crossing busy streets, and in any other context in which people and objects are moving around him. His vision is not good enough to allow him to drive (although he did not before the accident hold a driving licence). As any one-eyed person requires to do, he must take extra care to protect his remaining eye. That is, however, particularly so in his case because of the vulnerability of the epithelium of the left cornea to breakdown and the consequent increased risk of infection that might further harm the vision of the remaining eye.
- [16] Apart from its effect on his working capacity (to which I shall return when assessing future loss of earnings) and on what he can do in the household context (to which I shall return when assessing the claim for remuneration for necessary services), the damage to the pursuer's sight has had a material effect on his enjoyment of life. His principal leisure activity was golf. Because of the shift he worked, he was able to play most days. Although for a time in 1999 the pursuer did return to playing golf, and was able to see well enough with his left eye to hit the ball, he found that he could not follow the flight of the ball, and was

therefore constantly dependent on others to spot where his ball landed. He felt that he was imposing on those who partnered him, and spoiling their enjoyment. He therefore gave up membership of his golf club, and has ceased playing. The Psychological Effects of the Injuries

- [17] It is not disputed that the accident and its consequences have had a significant psychological effect on the pursuer. Evidence on that aspect of the case was given, from the lay point of view by the pursuer and his wife, and from the psychiatric point of view by Dr Shanks on the pursuer's behalf and by Dr Stewart on the defenders' behalf. Although the two psychiatrists applied different diagnostic labels to the pursuer's condition, that did not seem to me to be of much moment, since for the purpose of the assessment of the pursuer's claim for damages it is the practical effect on him, rather than the appropriate diagnostic label, that matters.
- [18] Dr Shanks first saw the pursuer in December 1998. He elicited from the pursuer a narrative of having cried easily in the period following the accident, of suffering from disturbance of sleep, of developing a clinging dependency towards the important people in his life (in practical terms, his wife), of fear initially that he might never see again, and of nightmares of being blind. The pursuer described himself to Dr Shanks as feeling a sense of changed personality - "I'm locked in a shell, I've buried myself, I'm just in bits". Dr Shanks' view was that the pursuer had suffered a loss of self-esteem and self-confidence, and had developed a tendency to social avoidance. By the time of the first examination, the nightmares had receded, but the problems with sleep continued. The pursuer was particularly affected by the cosmetic effect of the injury; he has repeatedly been reported as saying "I feel like a beast now". Dr Shanks identified feelings on the pursuer's part of being transformed for the worse in ways beyond his control. At that stage, his diagnosis was that the initial threat of permanent blindness, the uncertainties of repeated surgery, and the effects of impaired vision and facial disfigurement on his personal life and self image had inflicted on the pursuer severe psychological trauma. Following the accident the pursuer had suffered a severe adjustment disorder with prominent symptoms of depression and fearfulness. By the time of the examination, he saw evidence of more enduring personality change, with social withdrawal, loss of confidence and a phobic reaction to the facial disfigurement. He recommended urgent referral to a clinical psychologist for therapeutic work on the enduring symptoms.
- [19] A referral for psychological assessment was made in January 1999, but for various reasons that assessment was not carried out until May 1999. On 5 May 1999 the pursuer was seen by Mrs Julie Wyness, a consultant clinical psychologist. The problems with which he presented on that occasion (some identified by the pursuer himself and some by his wife) included severe loss of confidence, a belief that he was now ugly and looked like a "beast", feelings of anger about what had happened and a tendency constantly to ask himself "Why me?", unpredictable mood swings with loss of temper and aggressive outbursts, a hostile attitude to his son, and the taking of alcohol while on anti-depressants. Mrs Wyness did not offer the

pursuer further appointments, taking the view that further psychological support "would not necessarily be therapeutic". Dr Shanks expressed the view that that was an unfortunate decision, and Dr Stewart also thought it strange.

- [20] In addition to the referral to Mrs Wyness, the pursuer was also referred to the Royal Cornhill Hospital, Aberdeen for psychiatric treatment in light of the fact that his symptoms had been becoming more severe and he had been entertaining suicidal feelings. Between 11 March and 30 July 1999 he was seen on a number of occasions by Dr Turnbull, Senior House Officer to Dr Ross Hamilton, a consultant psychiatrist. Dr Turnbull prescribed anti-depressants. Some symptomatic relief was reported, although it is also possible to trace a correlation between the severity of the pursuer's symptoms from time to time and whether the news about the state of his sight was good or bad. After Dr Turnbull left her post as Dr Hamilton's SHO, the pursuer continued to see Dr Hamilton, and continued to take anti-depressants which on the whole he perceived as relieving his symptoms. Latterly occupational therapy had been arranged, with a view to identifying activities to give structure and content to the pursuer's life. Dr Shanks regarded that treatment as entirely appropriate.
- [21] When the pursuer saw Dr Shanks for the second time on 3 May 2000, the level of his distress had again increased. Dr Shanks related that to the combined effects of the news that the right eye was to be enucleated, and the concern about infection in the left eye. These developments had, in Dr Shanks view, "at least temporarily reversed some of the hard won adjustments to the consequences of his injury". Nightmares had recurred, weepiness and agitation had increased, and there was increased social avoidance. Dr Shanks concluded that anti-depressant drug therapy and supportive counselling could alleviate some of the pursuer's symptoms, including insomnia, anxiety, irritability and social avoidance. The enduring emotional and psychological effects of the accident were likely, however, permanently to impair his capacity for employment, partly as a result of fluctuating episodes of emotional distress and partly because of the pursuer's perception that others see him as disfigured. Dr Shanks foresaw a possibility of serious self harm if the vision of the left eye were threatened. He considered that the pursuer requires ongoing specialist assessment and treatment. Without such treatment, his mental state would deteriorate. Even with such treatment, Dr Shanks view was that psychological problems would continue over a long period, and possibly permanently, although a better outcome was possible.
- [22] Dr Stewart saw the pursuer on 5 June 2000. He found him to be severely depressed and severely agitated, with suicidal ideas but no actual plans to take his own life. His diagnosis was that the pursuer was suffering from severe depressive reaction with suicidal ideas, with co-morbid post-traumatic stress disorder (DSM IV criteria fulfilled). The depression was accentuated by the impending enucleation of the right eye and the poor vision in the left. His opinion was that the severe depressive reaction and the post-traumatic stress disorder were both directly related to the accident. He expressed the view that the prognosis was guarded, given that the pursuer was facing a life drastically removed from that which he would have expected before the accident, and significantly altered for the worse. The

pursuer was devalued in his own opinion in his marital and family relationships, vocationally, socially and in his inability to maintain his principal leisure interest, golf. He identified the pursuer's tendency to repress his feelings and regarded it as important for him to work on discussing matters more openly with his wife or a male confidant. He considered it worthwhile, given the severity of the symptoms, to increase the dose of anti-depressant that the pursuer was taking. He felt he would also benefit from psychological counselling. He clearly contemplated that there required to be a multi-disciplinary team approach to dealing with the pursuer's psychological problems. He felt that a return to suitable employment would be beneficial.

- [23] There is one aspect of Dr Stewart's evidence that I do not accept. On the basis of certain entries in the records of the Royal Cornhill Hospital, Aberdeen, he came to the conclusion that there was possibly an element of alcohol dependence in the pursuer's condition. What the records show is that in late 1997 the pursuer was referred to the community psychiatric nurse for alcohol counselling. That was done at the instance of Mrs Duthie, who was concerned that the pursuer was getting drunk when he went out for a drink with friends. The pursuer was seen once by the community psychiatric nurse. The referral was not formally terminated until early 1999, when it came to light when the pursuer was referred for psychiatric treatment for the consequences of the accident. Dr Stewart inferred that there had been continuing treatment for alcohol dependence from 1997 to 1999, but that is quite clearly a mistake. Moreover, Dr Stewart misinterpreted figures of alcohol consumption given to him by the pursuer as referring to daily consumption, whereas it seems clear from other evidence that the figures probably related to his consumption on the two days a week on which he now goes to the pub with a friend. There are entries in the records which indicate that on occasion the pursuer has drunk more than was wise in conjunction with his antidepressants. It seems clear to me, however, and Miss Springham for the defenders did not argue otherwise, that there is no proper basis in the evidence for concluding that the pursuer's psychological condition is complicated by alcohol dependence.
- [24] One other aspect of the psychological impact of the accident requires to be noted, namely that on the pursuer's relationship with other members of his immediate family. In the period since the accident, first the pursuer's son, then his elder daughter (and very recently his younger daughter also) have been taken into the care of the local authority. Dr Stewart initially, on an incomplete understanding of the circumstances, related the taking of the two older children into care directly to the anger and irritability experienced by the pursuer as part of the post traumatic stress disorder. In my view it is clear, when the whole circumstances are taken into account, that the causal relationship is not as simple as that. The pursuer's son was diagnosed as hyperactive, and that clearly played an important part in the problems that were encountered with him, although the pursuer's own view was that in his depression and irritability he behaved towards his son in a way that he would not otherwise have done. More recently, however, that relationship has to some extent been repaired. The hostility of the pursuer's elder daughter towards him appears at least in part to stem from her view of his treatment of her mother. Before the accident, the pursuer had an

affair, but by the time of the accident he and his wife had become reconciled. Indeed, since the accident the relationship between the pursuer and his wife has grown in strength, and he is greatly dependent on her. It appears, however, that his elder daughter is unable to accept or forgive the pursuer's previous behaviour. Once aware of the more complicated circumstances, Dr Stewart modified his view that the taking of the children into care was attributable to the effects of the accident. I take the view that the proper conclusion on the evidence is that the pursuer's depression, anger and aggression attributable to the accident probably made it more difficult for him to cope appropriately with the problems in his children's behaviour, and that if he had not been suffering from those psychological consequences of the accident the breakdown in the relationships with his children might have been less severe. Solatium

- [25] Miss Dorrian for the pursuer submitted that the appropriate award of solatium would be £80,000 or more. In support of that submission she referred me to the Judicial Studies Board Guidelines for the Assessment of General Damages in Personal Injury Cases (Fourth Edition). Paragraph 4A(c) of the Guidelines is in the following terms: "Loss of Sight in One Eye with Reduced Vision in the Remaining Eye
- (i) Where there is serious risk of further deterioration in the remaining eye, going beyond the normal risk of sympathetic ophthalmia £42,500 to £75,000 (ii) Where there is reduced vision in the remaining eye and/or additional problems such as double vision £28,000 to £48,500". Miss Dorrian submitted that the case fell within the scope of paragraph 4A(c)(i), but that the figures in the Guidelines required to be increased, marginally to take account of inflation since 1998 and also more significantly to take account of the decision in *Heil v Rankin*
- [2000] 2 WLR 1173 . In that case the Court of Appeal held that awards of damages for pain, suffering and loss of amenities in personal injury cases needed to be increased if they were to provide fair, reasonable and just compensation (1200C, para. 82). For awards currently above £10,000, the Court held that there should be a tapered increase up to a maximum increase of one-third for the most catastrophic cases (1200D, para. 83). Miss Dorrian pointed to three of the eight cases which were before the Court in *Heil* , namely *Kent v Griffiths* (1209H-1212D) in which an award of £80,000 was increased to £95,000, *Rees v Mabco (102) Limited* (1212F-1213F) in which an award of £45,000 was increased to £50,000 and *Schofield v Saunders & Taylor Limited* (1213G-1214B) in which an award of £40,000 was increased to £44,000. From those examples she inferred that the range of figures in paragraph 4A(c)(i) of the JSB Guidelines , if modified in light of *Heil* , would be £46,750 to £90,000. Miss Dorrian also referred to *Re Moore (Kemp and Kemp, Quantum of Damages* , paragraph D2-020/1), a CICB case in which the claimant suffered virtually total loss of the sight of one eye, with scarring and psychiatric injury, and was (in 1998) awarded general damages of £55,000. The psychiatric injury in that case was social phobia, mild post-traumatic stress disorder, and an enduring personality change marked by a hostile attitude towards the world, social withdrawal, feelings of emptiness, fear of attack and estrangement. Minimal improvement was expected. There was no unusual risk

in relation to the remaining eye.

- [26] Miss Springham for the defenders submitted that the appropriate award of solatium would be £45,000. She relied in particular on three cases: *Wilson v Price* 1989 SLT 484, in which a 15 year old boy suffered severe cranio-facial injuries leading to loss of the vision of one eye, permanent impairment of the vision in the other, loss of the sense of smell and impairment of the sense of taste, impairment of memory and concentration, irritability and reluctance to care for himself. Solatium was assessed at £25,000. Miss Springham suggested that the present day equivalent after allowing for inflation would be £37,000; *Re Khassal (Kemp and Kemp, paragraph D2-023)*, in which a 12 year old boy was shot in the right eye with an air pistol and lost the sight of the eye. There was no cosmetic disability. Vision in the left eye was naturally poor, and there was a 10% risk of retinal detachment which, if it happened, involved an 80% risk of loss of fine vision in the remaining eye. The claimant's learning difficulties were aggravated by the loss of the eye. General damages (including an element for disadvantage on the labour market) were assessed at £25,000 (now £37,000); and *Re Campbell (Kemp and Kemp, paragraph D2-024)*, in which a 25 year old female suffered severe alkaline burns in both eyes. Despite extensive treatment she lost the sight of her right eye. She was left cosmetically deformed. She underwent significant changes of temperament, involving panic attacks, loss of confidence, sleeplessness and depression. General damages were assessed at £30,000 (now £36,300). In addition Miss Springham mentioned a number of less serious cases (*Hempsey v Inverclyde District Council* 1985 SLT 348; *McDermid v Crown House Engineering Limited* 1993 SLT 543; and *McLean v Ross Harper & Murphy* 1992 SLT 1007), as well as one which she submitted was more serious. The latter case was *McKinlay v British Steel Corporation* 1987 SLT 522, in which a 24 year old man lost an eye and, as a result, developed a manic depressive illness. Solatium was assessed at £32,000 (now £52,480). I note, however, that the eye was removed only three months after the accident, and that there was no injury to the remaining eye. In relation to the JSB Guidelines , Miss Springham submitted that the present case should properly be regarded as falling within the scope of paragraph 4A(c)(ii). She further submitted that it was not appropriate for me, at first instance, to have regard to the increased level of awards adopted by the Court of Appeal in *Heil* .
- [27] In my opinion the award of solatium which I must make in the pursuer's favour requires to take account of five principal elements of the effect of the accident upon him. First, there is the simple fact of the total loss of the sight of his right eye. Secondly, there is the fact that the pursuer has undergone repeated attempts to treat the right eye surgically, suffered considerable pain, and had to take a variety of medication in great quantities. Thirdly, there is the cosmetic effect of the injury and the surgical attempts to deal with it, viewed both objectively and from the pursuer's own subjective viewpoint. Fourthly, there is the fact that the sight of the remaining eye has also been damaged, and that eye remains vulnerable to deterioration. Fifthly, there is the serious psychological effect of the injury on the pursuer, which is likely to continue for at least a material time and may possibly be permanent. Miss Dorian was in my view right in identifying the case as coming within the scope of paragraph

4A(c)(i) of the JSB Guidelines . There is no doubt that there has been loss of the sight of one eye with reduced vision in the remaining one. It is also, in my view, the case that there is what can be regarded as a "serious risk of further deterioration in the remaining eye". It is true that Dr Kyle's view was that it was probable that useful sight would be retained in the left eye, but the risk of further deterioration is one that needs to be actively guarded against, and if such deterioration were to eventuate the consequences for the pursuer would be catastrophic. I regard that as a situation properly described as a "serious risk" of further deterioration. Within the range suggested in paragraph 4A(c)(i), it seems to me that the elements of prolonged and ultimately unsuccessful surgical treatment, cosmetic disability and psychological injury tend to place the case towards the upper end of the range.

- [28] It is, in my view, appropriate for me to take note of the decision of the Court of Appeal in Heil . In doing so, I am not undertaking the task undertaken by the Court of Appeal of reviewing the general level of awards (1200C, para. 82). I am simply having regard to what is now the current level of awards in England. It has been clear since *Allan v Scott* 1972 SC 59 that it is appropriate to do that. I am not bound by Heil , but I would in my view be going against the spirit of *Allan v Scott* , by which I am bound, if I were to ignore it.
- [29] In all the circumstances of the case I am of opinion that the appropriate award of solatium for me to make in the pursuer's favour is £75,000.
- [30] Counsel were agreed that I should apportion one half of the award of solatium to the past, and that interest should run on past solatium at the rate of 4% a year from the date of the accident. On that basis, interest to date amounts to £3650. Loss of Earnings to Date
- [31] It is a matter of agreement between the parties that the loss of earnings suffered by the pursuer to date, inclusive of interest to date, amounts to £14,415. Future Loss of Earnings
- [32] The pursuer's prospects of future employment are affected not only by his physical disability, but also by his continuing psychological problems. Before the accident the pursuer had worked for many years in the fish processing industry, latterly with the defenders. Before that, he had trained and worked as a chef. His limited sight means, according to the evidence of Dr Kyle (which I accept), that he now cannot safely work with machinery or in any environment that involves rapidly moving objects, and could not cope with a repetitive task that required to be carried out at speed. Moreover, Dr Kyle said (and again I accept his view) that it would be foolhardy for the pursuer to work in dirty or dusty conditions. Dr Kyle also expressed the view that it would not be safe for the pursuer to work with raw fish, because of the risk of accidental infection of his remaining eye. Miss Springham suggested that that was going too far, pointing to the evidence that she led from the defenders' personnel manager about the levels of hygiene maintained in the defenders' factory. It seems to me, however, that the hygiene precautions taken by the defenders are aimed at protection of the product rather than the employee, and that they would not necessarily eliminate the risk of infection which Dr Kyle perceived. I bear in mind too the catastrophic impact that further damage to his sight would have on the pursuer. I proceed

on the basis that Dr Kyle's advice that the pursuer should not work with raw fish is well founded and prudent. Subject to those limitations, the pursuer will be physically fit for a variety of forms of employment. The impending enucleation operation will, of course, require a period of recuperation, and Dr Kyle's estimate was that the pursuer would not be physically fit for suitable employment for between six months and a year.

- [33] It is harder to assess the effect of the pursuer's psychological condition on his long term capacity for work. Dr Shanks said that at present the pursuer would not cope with working at all. He would have problems with concentration, with feeling overwhelmed by inner tension, and with his belief that others perceive him as disfigured. He expressed a very guarded prognosis in relation to the pursuer's future return to work. He said that it would be cruel to expect the pursuer to return to work at the defenders' fish processing factory where the accident had happened. As I have already mentioned, Dr Stewart expressed the view that it would be beneficial for the pursuer to return to work. He said that the pursuer's own attitude would be important, and it is true that the pursuer expressed himself as keen to return to work, if a job which his medical advisers regarded as suitable could be found. Dr Stewart seemed to regard return to work at the defender's factory as acceptable, although he recognised that it would be difficult psychologically for the pursuer to do so, and that he would require help to confront his fear of doing so. He suggested that it might be good for the pursuer to confront that fear. He saw the fact that the pursuer's step-father, with whom he has a good relationship, works for the defenders as a helpful factor which would be supportive if he returned to work there. He did accept, however, that it would not be unreasonable on the part of the pursuer to refuse to return to the factory where the accident happened. Dr Stewart laid great emphasis on the need for a multi-disciplinary team approach to the pursuer's psychological problems, and accepted that he would continue to require psychiatric treatment for the foreseeable future. He suggested that after the pursuer's recuperation from the enucleation, a return to work over a period of six to nine months might be achievable. It seemed to me, however, that Dr Stewart was concentrating more on what would be therapeutically desirable than on what would be practically achievable.
- [34] Miss Springham led evidence from the defenders' personnel manager, Carol West, to the effect that the defenders had not terminated the pursuer's employment and would be well disposed to his return to work for them in a suitable job. Mrs West had identified two particular jobs that were thought to be suitable. One involved laying raw fish onto a conveyor for processing. The other involved attaching labels to packages. The former would not in my view be suitable for the reason already identified, namely that Dr Kyle advises against work with raw fish. The second required very precise placing of the labels in specified positions on the packages, and it seemed to me that with his monocular vision the pursuer would be likely to have difficulty in doing that. Moreover, although Mrs West was not very clear on the point, it appeared likely that pallet trucks would be operating in the vicinity, which would not be very safe for the pursuer. On the whole, I was not satisfied that the defenders had succeeded in identifying jobs that were truly within the pursuer's

capacity. Some evidence was led as to the measure of the reduction in earnings (between £653 and £1158 a year, depending on whether shift work was undertaken) which the pursuer would suffer if he were to return to one or other of the jobs suggested by the defenders, but in light of the view I have taken about those jobs, those figures are not in my view relevant.

- [35] My conclusion is that it is clear that the pursuer will not be fit for any form of work until he has recovered from the enucleation. Thereafter, his working capacity will be limited (a) permanently by his impaired vision, and (b) for an uncertain and possibly prolonged period by his continuing psychological symptoms. Although the evidence was that the Fraserburgh area has a relatively low rate of unemployment (3%), much of the local industry is fish processing. It seems to me that realistically the pursuer's prospects of obtaining suitable employment are not good, but that it would be wrong to conclude that he will never work again.
- [36] Some elements of the calculation of future loss of earnings are clear. It is a matter of agreement that in his pre-accident employment the pursuer would by now have been earning £9916 net a year. Miss Dorrian submitted that, if the pursuer had been wholly and permanently incapacitated from any form of employment, the appropriate multiplier (derived from Table 13 of the Ogden Tables, with appropriate adjustments) to be applied to that multiplicand would be 17.35. I did not understand Miss Springham to dispute that that would be the appropriate multiplier on that hypothesis, although her submission was that a different approach should be adopted. Miss Dorrian did not maintain that the multiplier of 17.35 should actually be applied. She recognised that some reduction should be made to reflect the pursuer's prospects of obtaining some form of suitable work at some time in the future. She submitted that the multiplier should not be reduced on that account below 13. She therefore contended for an assessment of £128,908 in respect of future loss of earnings.
- [37] Miss Springham was critical of the pursuer's failure to lead any evidence from those currently involved in his treatment as to his prospects of employment, or from any witness qualified in vocational rehabilitation. The evidence was, she submitted, inadequate to found a multiplier/multiplicand calculation based on the Ogden Tables. Her submission was that I should follow the approach adopted in *Hardie v Keller Colcrete Ltd* (Lord Johnston, 20 October 1999, unreported) of awarding a lump sum for future loss of earnings, rather than apply a multiplier to a multiplicand. She suggested a lump sum of £50,000, which is broadly the equivalent of a multiplier of 5.
- [38] I do not consider that it is appropriate wholly to reject the approach based on the Ogden Tables. *Hardie* was a very special case in which, because of delay in the case coming to proof, past wage loss covering a period of ten years had been awarded, and it is clear that that consideration had a substantial influence on Lord Johnston's approach to the assessment of future loss. On the other hand, it is inappropriate, as Miss Dorrian accepted, to apply the multiplier of 17.35 derived from Table 13 in full. That multiplier serves as an indication of the maximum from which a discount must be made to reflect the pursuer's prospects of obtaining suitable employment. The better the pursuer's prospects of

employment, the heavier the discount ought to be. It is not, however, a matter capable of precise calculation. I have come to the conclusion that the pursuer's prospects of obtaining suitable employment are poorer than would be properly reflected by reducing the multiplier from 17.35 to 5, which would be the effect of accepting Miss Springham's submissions. I consider, however, that I am justified in being a little more optimistic about the pursuer's prospects than Miss Dorrian suggested I should be. I consider that it is appropriate to apply a multiplier of 12. I therefore assess future loss of earnings at £118,992, which I round up, in the interests of avoiding spurious precision, to £120,000. Necessary Services

- [39] The claim advanced by Miss Dorrian under this head was for remuneration for necessary services provided by Mrs Duthie to the pursuer. There was evidence of certain specific things that she has done for him. She helps him wash his hair, because he is afraid that if he does it himself he will get shampoo in his eyes. She helps him put various sorts of drops in his eyes. She generally does more for him than she did before the accident, now cooking all his meals, whereas in the past because of his training he did much of the family cooking. Miss Dorrian suggested that the appropriate awards would be £5000 (inclusive of interest) for the past, and £15,000 for the future. Miss Springham, under reference to *Pascual v AOC International Limited* (Lord Eassie, 5 February 1999, unreported - a section 9 rather than a section 8 case), and *Kennedy v Lees of Scotland Limited* 1997 SLT 510, submitted that a single lump sum of £5000 for past and future would be appropriate.
- [40] I have no doubt that Mrs Duthie has been a very considerable support to the pursuer over the two and a half years since the accident. The evidence of actual necessary services rendered by her was, however, somewhat limited. I consider that an award of £2500, inclusive of interest, would be appropriate in respect of the period to date. For the future, the degree of assistance required should become less, but some measure of services will in my view continue for a considerable time. I assess the appropriate remuneration for the future at £5000. Result
- [41] I therefore assess the pursuer's claim for damages as follows: 1.0 Solatium £75,000 1.1 Interest on solatium to date 3,650 £78,650 2.0 Loss of earnings to date, including interest 14,415 3.0 Future loss of earnings 120,000 4.0 Necessary services to date, including interest 2,500 4.1 Future necessary services 5,000 7,500 TOTAL £220,565
- [42] I am, accordingly, minded to sustain the pursuer's first plea-in-law, sustain the defenders' fifth plea-in-law to the agreed extent of making a finding of contributory negligence of 25%, and grant decree in favour of the pursuer in the sum of £165,423.75.
- [43] Miss Springham submitted that for the purpose of section 15 of the Social Security (Recovery of Benefits) Act 1997, I should specify the amount of the compensation payment which is attributable to compensation for earnings lost during the relevant period as £10,811 (being 75% of £14,415). Miss Dorrian did not dispute the submission, but it's not clear to me that it properly reflects the decision in *Mitchell v Laing* 1998 SLT 203. I shall accordingly, before pronouncing decree, put the case out By Order for further submissions in the point.

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