

SCOTLAND / JUDGMENT

Gordon v EUI Ltd [2011] ScotCS CSOH_36 (17 February 2011)

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[2011] CSOH 36, 2011 GWD 10-231 [New search] [Help] OUTER HOUSE, COURT OF SESSION
[2011] CSOH 36 PD1199/10 OPINION OF LORD MACKAY OF DRUMADOON in the cause
KATHY-ROSE GORDON Pursuer; against EUI LIMITED Defenders: -----
Pursuer: Dawson; Thompsons; Edinburgh Defender: Sheldon; Andersons, Glasgow 17
February

Introduction

- [1] The pursuer was born on 31 October 1980 . On 2 May 2008 , she was driving her motorcar westwards on the A90 dual carriageway near Glencarse. Traffic ahead of her was queuing. She slowed her car to a halt. The car was rammed from behind by a vehicle driven by Mary Rositer. The pursuer was thrown forward and hit her head. She sustained injuries. She now seeks damages for the loss, injury and damage she has sustained by reason of fault on the part of Mary Rositer. The action proceeds against the defenders, who as Road Traffic Act insurers of Mary Rositer, are directly liable. Liability is admitted.
- [2] The action came before me on an opposed motion on behalf of the pursuer for the allowance of issues. The grounds of opposition to that motion included the following:- "The pursuer's case is unsuitable for jury trial. It raises complex issues of fact relating to the nature of the pursuer's injuries and her prognosis for recovery. In particular there is likely to be a major dispute as to the extent to which the pursuer is likely to be able to return to her pre-accident employment and/or level of functioning. The difficulties go beyond merely requiring a jury to discriminate between competing medical experts. Expert evidence in a number of different fields of medical expertise will be required, including, but not confined to, expert comment bearing on the question of prognosis, and the effect of that prognosis on the pursuer's likely earning capacity. Expert comment will also be required on the extent to

which injuries unrelated to the index accident would have affected the pursuer's ability to continue in her pre-accident employment."

- [3] In her written pleadings the pursuer seeks damages under the following heads:-
- (i) solatium, (ii) past loss of earnings, (iii) future loss of earnings, (iv) loss of employability, (v) recoverable sick pay, (vi) AXA insurance payments, (vii) past services, (viii) future services and (ix) miscellaneous expenses.
- [4] Counsel were agreed that when I was considering the motion I should have regard to the parties' written pleadings and to the medical reports which each party has lodged.
- [5] In her written pleadings, the pursuer avers that she sustained injury to her neck, shoulder and back. She has altered senses of smell and taste. She has dizzy spells, which awake her from sleep with a weird sensation. She has developed a hand tremor and a stutter. She has developed bursitis (inflammation) in her hip. Pain continues to interfere with her sleep, her activities of daily living and her leisure pursuits. She is unable to drive a car as she previously did. She will have permanent residual disability. In addition she has developed significant psychological problems including depression and post-concussive syndrome. She suffers significantly from excessive fatigue. She is confused, to the extent of doing stupid and uncharacteristic things. Her personality has changed. Her mood has become labile. She becomes irritable and is prone to losing her temper, contrary to her previous equable temperament. Prior to the accident she was a keen sportsman. She cannot engage in sporting activities as she previously did, to her great frustration and distress.
- [6] The pursuer also avers that she has been unable to return to work. On the date of the accident she was employed teaching children with social, emotional and behavioural needs. This was a skilled, demanding and rewarding post, which involved working with children whose behaviour was challenging. It is unlikely that she will be able to return to such a job by reason of each of her physical and psychological sequelae . Her job is liable to be terminated on capacity grounds. At the time of the accident she was studying for a masters degree. She has been unable to continue her studies. On attaining that degree it is likely she would have been promoted, firstly to a post as guidance teacher; thereafter, and within ten years, to a post as deputy head teacher; and thereafter to a head teacher post. If the pursuer can get back to work at all, it is probable that she will never manage a job requiring more than a modest degree of responsibility or concentration. Light and/or part time work is likely to be the best she will be able to do. The written pleadings include no details as to the nature of such work or the anticipated level of remuneration.

- [7] The written pleadings on behalf of the pursuer also deal with the help the pursuer has required since the accident. She has received help with domestic and household tasks from her husband and family. Initially her need for such help was great. The pursuer continues to require practical support and constant supervision, when cooking or ironing, in case she forgets what she is doing and creates a hazard for herself. Her relatives still require to supervise her closely and to cook and shop for her. Submissions on behalf of the defenders
- [8] In opposing the motion, counsel for the defenders submitted that it was clear that the written pleadings in the case, including those on behalf of the defenders, raise a number of complex medical issues. The terms of the medical reports confirmed that the action involves complex questions of fact relating to the nature of the pursuer's injuries, the cause of her continuing symptoms and the prognosis for her recovery. For example, an issue arose as to whether some of the psychological problems the pursuer suffers from have been caused by her sustaining brain injury in the accident, or arise as a consequence of her developing a somatoform disorder since the date of the accident. (A somatoform disorder is a psychological disorder characterised by physical symptoms that mimic physical injury for which there is no identifiable physical cause .) There was accordingly more to that particular issue than determining whether the symptoms complained of have been caused by the accident. Determining the medical cause of those symptoms was necessary before consequential questions as to the appropriate treatment for such symptoms; the likely prognosis following any treatment; and the pursuer's likely employment capabilities could be addressed. Linked to all of that was a dispute as to whether certain of the pursuer's physical symptoms are functional and liable to clear up on the conclusion of the present litigation. A further complication was that the pursuer had suffered a previous accident in 1997. It was arguable that previous accident was partially responsible for certain of the symptoms about which the pursuer now complains. For these reasons, expert evidence relating to different areas of medical expertise would be required in relation to a number of complex medical issues.
- [9] Counsel for the defenders also sought to found on the fact that expert evidence relevant to the quantification of the claims for loss of earnings and services would be required. In the whole circumstances, special cause existed for refusing the allowance of issues. Submissions on behalf of the pursuer
- [10] Counsel for the pursuer submitted that no special cause existed for withholding the allowance of issues. Medical complexities were commonly encountered in cases which are tried before juries. Juries were able to address such issues perfectly well. The issues in the present case were of the nature you would expect to arise in many actions that proceed to jury trial.

- [11] The pursuer's right to jury trial was an important statutory right which she should not be deprived of in the absence of special cause. Special cause involved there being some real ground of substance, making the case unsuitable for jury trial. (See *Graham v John Paterson & Son Ltd* SLT 174, page 178, per LJC Aitchison, *Gardiner v A. B. Fleming & Co Ltd* 1969 SLT (N) 93 and *Stewart v Nicoll* SLT 843).
- [12] Counsel for the pursuer responded to the suggestion that the claims for services gave rise to special cause by pointing out that such claims are by no means unusual. They involve simple questions of fact upon which a jury will be guided by the evidence led, the speeches of counsel and the trial judge's charge. As pled the claims for services were in standard terms. Moreover, alleged difficulties in the quantification of claims for services are notoriously difficult to found on as constituting special cause (see *Stark v Ford* (No. 2) SLT 1329, page 1329 L-1330A, per Lord Marnoch, and page 1330L-1331B, per Lord Clyde). It was not unusual for juries to require to address competing assertions relating to physical and psychological injuries and about future loss of earnings. In the whole circumstances, the defenders had failed to demonstrate a special cause. Counsel for the pursuer indicated that if the pursuer's motion for issues was to be refused, an 8 day diet of proof before answer would be required.
- Discussion
- [13] I have reached the conclusion that special cause does exist for refusing the allowance of issues. That conclusion is based on the number and the nature of the medical issues, which arise and will require to be addressed, before solatium, past loss of earnings, future loss of earnings and loss of employability can be quantified. The submissions advanced on behalf of the defenders in relation to other heads of loss, in particular the claims for past and future services, have not played any part in my reaching the conclusion I have.
- [14] As counsel were agreed I should, I have considered the terms of the written pleadings and the contents of the medical reports which parties have lodged. These medical reports are by (a) Niall Craig, Consultant Orthopaedic Surgeon, dated 10 November 2009 (no 6/5 of process); (b) Niall Craig, Consultant Orthopaedic Surgeon, dated 27 January 2010 (no 6/4 of process); (c) Dr Emma Hepburn, Clinical Psychologist, undated (no 6/6 of process); (d) Colin J Mumford, Consultant Neurologist, dated 27 October 2009 (no 6/7 of process); (e) report by Dr Alan J Carson, dated 28 June 2010 (no 7/1 of process); and (f) report by Dr Alan J Carson, Consultant in Neuropsychiatry and Psychological Medicine, undated (no 7/2 of process). Those reports review in considerable detail the medical history of the pursuer since 2 May 2008. It is clear from the written pleadings and the medical reports that a number of medical issues arise. The principal ones would appear to be:
1. The nature and extent of the physical injuries the pursuer sustained as a consequence of the accident on 2 May 2008 and the likely duration of any continuing physical disabilities.
 2. Whether the neck and shoulder pain which the pursuer experiences is attributable to the occurrence of that accident?

3. Whether the back pain which the pursuer experiences is attributable to a previous accident in which the pursuer was involved during 1997?
 4. Whether degenerative changes in the pursuer's spine are attributable to the accident on 2 May 2008 ?
 5. Whether the ankle injuries for which the pursuer received treatment between 2004 and 2006 give rise to any continuing physical disabilities relevant to the pursuer's ability to return to her pre-accident employment?
 6. The nature and extent of the neuro-psychological deficits which the pursuer has experienced since the accident on 2 May 2008 and the likely duration of any continuing deficits.
 7. Whether the difficulties with cognitive functioning and behavioural, social and psychological functioning, which the pursuer experiences, are attributable to her having sustained brain injury in the accident on 2 May 2008; or to her having developed a somatoform disorder since the date of that accident?
 8. Whether the pursuer suffered from psychological problems prior to the accident on 2 May 2008 ?
 9. Whether the pursuer is suffering from post-traumatic syndrome and depression?
 10. The extent to which the pursuer would benefit from further treatment for the various physical disabilities, neuro-psychological deficits and psychological problems of which she complains; the nature and duration of any such treatment; and the likely prognosis were the pursuer to undergo such treatment.
- [15] In my opinion all of these medical issues will require to be addressed during the course of determining the damages the pursuer should receive. Certain of them, and in particular 6, 7 and 10, are complex. They are obviously relevant to the quantification of solatium. However, they are also relevant to determining loss of earnings. Whether the pursuer's claimed inability to return to her pre-accident employment is due to her physical disabilities, or to neuro-psychological deficits, or psychological problems, or to a combination of those factors, is central to the calculation of future loss of earnings and the assessment of loss of employability. That is because her employability in the future is liable to depend on the availability of appropriate treatment for whatever condition(s) have prevented her from returning to work thus far, and the likely prognosis following such treatment. On reading through the written pleadings and the medical reports, it is possible to identify a number of possible answers to each of the questions as to (a) whether the pursuer will be able to return to work; (b) if so, in what capacity, and (c) if so, when. The assessment of future loss of earnings is further complicated by the averments on behalf of the pursuer about studying for a master degree and the likely pattern of her future employment had the accident on 2 May 2008 not occurred.

[16] The assessment of whether special cause exists in a particular case for refusing the allowance of issues involves considering whether or not the action gives rise to difficult and complex questions of fact and causation. In my opinion this action does. However, it is also important to have regard to the difficulties which a trial judge might face in giving the jury appropriate and effective directions on questions of mixed fact and law. In my opinion in this action those difficulties would be considerable. The impression I have gained from reading through the medical reports is that several days of expert evidence will be required to cover the medical issues that arise. That impression is consistent with counsel for the pursuer's assessment that a 8 day diet of proof before answer would be required. Such a volume of expert evidence would be also be liable to complicate the task of charging a jury. In these circumstances, and on the basis of the submissions I heard, I have reached the conclusion that in the present action special cause does exist for refusing the allowance of issues. I will accordingly refuse the pursuer's motion and allow a proof before answer.

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