

SCOTLAND / JUDGMENT

Leebody v Liddle [2000]

ScotCS 89 (31 March 2000)

[2000] ScotCS 89

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[2000] ScotCS 89 [New search] [Help] OUTER HOUSE, COURT OF SESSION O/1479/5/98
OPINION OF LORD MACFADYEN in the cause JOHN LEEBODY Pursuer; against GORDON LIDDLE Defender:

Pursuer: McEachran Q. C., Cherry; Thompsons Defender: Stewart Q. C., Speir; HBM Sayers 31 March 2000

Introduction

- [1] In this action the pursuer, who was born on 25 February 1943, seeks damages in respect of personal injuries which he suffered in a road accident on 20 June 1997. Liability has been admitted by the defender, as has the fact that the pursuer did sustain certain injuries in the accident. The proof which I heard was accordingly concerned only with quantification of damages. The Accident
- [2] Despite the admission of liability, some evidence was led about the circumstances of the accident, and it is necessary to consider that evidence with a view to ascertaining whether it casts any light on the nature and extent of the injuries which the pursuer suffered. There is no dispute that the accident happened when the pursuer, in the course of his duties as a supervisor with the East of Scotland Water Authority ("ESW"), was driving a Vauxhall Astra van belonging to his employers. While his van was stationary in Station Road, Grangemouth, it was struck from behind by a Ford Sierra car driven by the defender. The pursuer was wearing a seatbelt at the time of the collision. According to his account, a furniture van was stopped in Station Road with its nearside wheels on the pavement, but nevertheless blocking part of the road. Because of oncoming traffic, the pursuer had to stop and wait for an opportunity to pass the furniture van. He stopped, on an upward incline, and put on his handbrake. He looked in his mirror and saw no traffic behind him. The collision then took

place. His head bounced off the headrest, and he felt pain in his neck and back. His van was pushed forward some 15 or 20 feet (reduced to 10 feet in cross examination) and, because it had been stopped at an angle ready to pass the furniture van, was pushed into the opposite carriageway. He was unable to comment on the speed of the defender's car. The pain in his neck and back was so severe that he did not want to get out of the van until skilled help arrived in the form of the ambulance crew. The pain was less severe if he put his hands on the steering wheel and pushed back against the seat. He accepted that the defender came and spoke to him, but denied the suggestion that he mentioned angina to the defender.

- [3] The defender, a 33 year old unemployed labourer, disagreed with the pursuer about the reason for the pursuer's van being stationary. There was, by his recollection, no parked furniture van. The road was simply congested because it was lunch time. He had been edging forward a short distance at a time for some minutes. When it collided with the pursuer's van his car was travelling at no more than 5 m.p.h. He attributed the collision to a failure of his brakes. There was no question of the pursuer's van being pushed 15 or 20 feet forward, or pushed into the other carriageway. He went to ask the pursuer if he was all right, and the pursuer said "I've got angina". (The defender initially said that the pursuer's words were "I've got amnesia", but quickly corrected himself). He also indicated by gesture that the pursuer was holding the back of his neck.
- [4] Although there was some reference in the evidence to the damage done to the vehicles, I do not feel able to draw any relevant inferences about the pursuer's injuries from that material.
- [5] In the result I do not find that the evidence about the accident casts very much light on the issues before me. I do not consider that the evidence enables any precise quantification of the severity of the impact to be made. I am inclined to think that in truth it lay between the degrees described by the pursuer and the defender. The pursuer is, as he accepted, by nature an anxious person, and I do not doubt that the sudden and unexpected impact from behind seemed severe to him. On the other hand, the defender, although he had no personal interest in the outcome of the case, seemed to me to be anxious to minimise the incident. The probability, in my view, is that the impact took place at quite a slow speed, and was of only moderate force. I accept that it was sufficient to impart a whiplash movement to the pursuer's neck. The defender, in his demonstration of the pursuer holding his neck, provided some confirmation of that. I find it harder to envisage the mechanism by which any material injury to the pursuer's low back was inflicted, and I shall return to that in the context of the medical evidence. I accept the defender's evidence that the pursuer mentioned that he had angina. Given that the pursuer had for some time before the accident been suffering symptoms of angina, and given his anxious temperament, I find it entirely understandable that, in the immediate aftermath of a traumatic incident, he should have been apprehensive that an angina attack would be precipitated, and should have mentioned that condition. I do not think that he meant to convey that he was having an attack at the time when the defender spoke to him. The Pursuer's Angina

- [6] As I have mentioned, the pursuer was, before the accident, suffering from angina. In assessing what the pursuer has proved to have been the consequences for him of the accident, it is necessary to distinguish the consequences of his heart condition. It is therefore convenient at this stage to examine the evidence about the course of the latter condition, both before and after the accident.
- [7] The pursuer, in evidence, identified October 1996 as the date of the onset of his angina. He referred to an occasion when he and his wife had gone away for a weekend and attended a dance, and described the onset of symptoms of breathlessness and pains in the chest. The medical records (No. 7/1/59 of process) disclose, however, that it was in August 1996 that he first attended his doctor complaining of such symptoms. He was seen again in September and November and on each occasion his medication was increased. November 1996 was the first occasion on which Dr Selfridge, the general practitioner who gave evidence, saw the pursuer. He arranged to see him again in January 1997, but he did not attend that appointment. In February ESW referred him to an occupational health physician, Dr Thores, for assessment of his fitness for work underground in sewers and water conduits, which might involve the wearing of breathing apparatus and heavy clothing, and could involve strenuous activity. The pursuer mentioned his angina to Dr Thores, who wrote (No. 7/1/60) to Dr Selfridge seeking further information. Dr Selfridge saw the pursuer on 4 March and recorded (No. 7/1/59) that he was having more pain, especially on exercise. He accordingly referred the pursuer (No. 7/1/58) to the Medical Out-Patients Department at Falkirk and District Royal Infirmary (FRI) for further investigation. At FRI the pursuer was seen on 18 March by Dr Doig, a consultant physician, who reported (No. 7/1/55) that the pursuer described episodic fluttering on the left side of his chest, exertional chest pain since August, and more recently a sharp left sub-mammary chest pain brought on by exertion and associated (like the fluttering) with paraesthesia in the left arm. Dr Doig described the chest pains as "a little atypical", but nevertheless suspected ischaemic heart disease and arranged for further tests including an ECG and an exercise tolerance test. The pursuer said in evidence that at about the same time as he saw Dr Doig, he attended a breathing apparatus training course and managed to undertake what it required of him. The tests ordered by Dr Doig were carried out on 15 April, and Dr McSorley, the consultant physician who supervised them, reported to Dr Doig (No. 7/1/53) that the ECG showed no obvious abnormality, but that the exercise tolerance test, which was carried out under the Bruce Protocol, was terminated after 7 minutes and 14 seconds (the full duration being 10 minutes) because of patient fatigue. Significant ST segment depression (a sign of ischaemic disease) was noted, and the test was therefore reported as positive, and the pursuer was described as having relatively limited exercise capacity (a description with which, in cross examination, he did not agree). Dr Doig reported (No. 7/1/50) to Dr Selfridge that he did not think that the pursuer's condition at that stage warranted angiography. A further entry in the FRI records dated 26 May 1997 (No. 7/2/38-39) does not appear to add anything of note except that a cardiac echo appears to have been ordered or carried out, but the outcome was not reported until after the accident.

- [8] At this stage in the pursuer's medical history the accident occurred. When the pursuer was taken to FRI after the accident, the records (No. 7/2/2) disclose, unsurprisingly, that although his complaint on admission was of neck and lower back pain, his history of angina and details of the medication which he was taking in that connection were elicited. The admission sheet (No. 7/2/2) also contains a note (apparently added to the main entry) recording "Now c/o chest pains ...", and an ECG was ordered. After his release from hospital, the pursuer's first recorded contact with his general practitioner was on 23 June, when the entry in the records (No. 7/1/1a (reverse)) reads: "Phone. Been in RTA. Codydramol gives him angina! Stop and take [paracetamol]". On 24 July Dr Doig reported to Dr Selfridge (No. 7/1/45) that the cardiac echo revealed "mild LV [left ventricular] systolic dysfunction with no LV dilation". The pursuer was seen again by Dr Doig on 29 September, and was referred (No. 7/1/44) to Professor Hillis in the Department of Cardiology at the Western Infirmary, Glasgow (WIG) for consideration of coronary angiography. The factors which prompted Dr Doig to make that reference were (i) "his poorly controlled symptoms", and (ii) "widespread changes [i.e. ST depression] in his exercise test" [i.e. the one carried out on 15 April]. Professor Hillis placed the pursuer on a waiting list for invasive investigation (No. 7/1/41). Left ventricular angiography and coronary arteriograph were carried out, apparently in early December 1997, and Professor Hillis's report of 17 January 1998 (No. 7/1/34) records that the pursuer had single vessel disease and was suitable for angioplasty. He was placed on a waiting list. The pursuer was seen again by Dr Doig on 22 December 1997 (Nos. 7/1/33 and 7/2/40), when his symptoms were found to be reasonably stable. On further review on 16 March 1998 (No. 7/2/41) he was complaining of chest pain once or twice a day. On 1 April 1998 the pursuer underwent angioplasty to his anterior descending coronary artery. That involved inflating a balloon within the artery with a view to restoring its internal diameter. In his report dictated on 13 April (No. 7/1/19) Professor Hillis described the result as "less than ideal". He therefore deployed a stent (a permanent insert into the artery to maintain its diameter). That showed "an excellent result".
- [9] The surgical intervention did not put an end to the pursuer's chest symptoms. In the early hours of the morning on 7 April he was admitted to FRI complaining of tightness in his chest (No. 7/2/43). The relative discharge report (No. 7/1/12), which was not written until July, records the pursuer's complaint more fully as being of chest tightness with a tingling sensation in the left arm, not relieved by GTN [glyceril trinitrate]. The cardiological registrar at WIG, who was consulted, did not consider that referral to WIG was indicated. On 5 May 1998 the pursuer consulted Dr Selfridge, from whose clinical notes (No. 7/1/1) and letter of reference to FRI (No. 7/2/50) it appears that the complaint was of chest pain and shortness of breath on the slightest exertion. The doctor described his condition as "crescendo angina". (Dr Selfridge explained in evidence that his concern was that there might be a blockage of the stent. He accepted that if the stent had been successful, it was difficult to explain the continuing complaint of angina. In cross examination, however, he made the point that some patients have angina, or at least angina-like symptoms, without coronary artery disease.) The pursuer was transferred the next day from FRI to WIG and sent for further

angiography. That confirmed (No. 7/2/29) that there was no significant obstructive disease. The angioplasty result was described as "excellent". On 15 June, he was reviewed at Professor Hillis's clinic at WIG. It was recorded (No. 7/1/13) that he described resting pain since the operation, which the reporting doctor described as sounding atypical but as being relieved with GTN spray. It was suggested that it was reasonable to increase his anti-anginal medication although "this may not improve his symptomatology". On 22 June he was seen again by Dr Doig (No. 7/1/14) and gave an account of chest pain occurring less frequently than before the operation, usually once a day. On 3 July, following three episodes of angina, the pursuer called out the emergency GP service "Faldoc" in the early hours of the morning (No. 7/1/16). Dr Selfridge's clinical notes (No. 7/1/1) record that the pursuer was still having angina on 14 July and 7 and 27 August. The next hospital review was on 26 October, when Dr Doig recorded (No. 7/1/9; see also 7/2/56) that he continued to be fairly limited by exertional breathlessness "which he feels is gradually getting worse", with anginal symptoms on stairs, managing about half a flight before having to stop. The pursuer also at that stage described flashing left sided chest pains, which Dr Doig described as atypical, saying that they did "not sound ischaemic in origin". On 23 December the pursuer again called "Faldoc" in the early hours of the morning complaining of stabbing chest pain, spreading to the left arm, with tingling. He was advised to telephone 999 to obtain admission to hospital, but it is not clear whether he did so (No. 7/8/14). A similar incident took place on 11 January 1999 (No. 7/8/15), and on this occasion the pursuer did attend at FRI (No. 7/8/13). The pursuer in evidence said that on that occasion an angina attack came on because of pain in his back. He said that the stabbing pain was diagnosed as bruising of the lung, but was unable to recall any traumatic incident which might have caused such bruising. When he was seen in Dr Doig's clinic on 1 March 1999 (No. 7/8/12), the pursuer was still complaining of tightness in his arms and chest on a daily basis, although the symptoms went away promptly with use of his GTN spray. On further review at that clinic on 13 September 1999 (No. 7/8/6) it was recorded that the pursuer was having chest pain or discomfort three or four times a week, although its aetiology was described as "unclear". It was noted that he was on "a whole host of antianginal medication", which the doc

- [10] The pursuer was examined for the purposes of the present proceedings by Dr John Kennedy, a consultant cardiologist, on 15 March 1999. Dr Kennedy's report and covering letter dated 7 April 1999 form No. 6/4 of process. As part of his examination he carried out a modified Bruce Protocol exercise tolerance test. It required to be stopped after six minutes because the pursuer was complaining of back pain. There was no complaint of chest pain, and no electrocardiographic evidence of cardiac ischaemia. Dr Kennedy confirmed that the pursuer had had an excellent outcome from the angioplasty with coronary stenting. He stated that there was nothing clinically to suggest that the pursuer's intermittent chest pain was cardiac in origin, and regarded the treadmill test as supporting that view. He gave the opinion that the cardiac prognosis was excellent, and recommended gradual reduction of the pursuer's cardiac medication. He expressed the view that the pursuer's day to day activities and "overall life style" are not limited by any cardio-respiratory symptomatology; his previous

cardiac pathology has (and would by July 1998 have had) no bearing on his ability to work. In evidence, Dr Kennedy explained that angina is the symptom, not the disease. It is usually a symptom of narrowing of the coronary arteries. Angina is classic only in some 50% of cases, and atypical in the other 50%. Dr Kennedy was unable to explain the aetiology of the chest pains of which the pursuer continued to complain. The Pursuer's Neck and Back Injuries

- [11] In order to examine the evidence about the pursuer's injuries in the proper context, it is convenient at this stage to note the terms of the parties' respective averments. The pursuer avers that he suffered soft tissue injuries to his cervical spine and his lumbar spine. He avers that he has suffered pain in his neck and back since the accident, and still does so; that his sleep is disturbed by pain; that he requires to wear a lumbar support and cervical collar; that he requires to take analgesics on a daily basis; that he requires to use a stick, and a wheelchair when he has to cover a substantial distance; and that he is unable to have sexual intercourse because of neck and back pain. There are averments, which I need not set out in full, about the ways in which his activities are restricted by the injuries to his neck and back. The defender avers that the injuries which the pursuer suffered in the accident were a soft tissue strain of his neck, and a soft tissue injury to his lower back albeit to a much lesser extent. He avers that there was no bony injury, and nothing to suggest nerve root irritation or compression. His position is that the injuries would have caused pain, and rendered the pursuer unfit for work, for only two or three months; that thereafter there would only have been mild pain eased by activity; and that pain suffered after that period, and absence from work after that period, are not attributable to the accident. The averments continue: "The symptoms exhibited by the pursuer are inappropriate for the injuries of which he complains. On examination on 3 November 1999 the pursuer was able to walk without a stick, dress and undress without difficulty, pull clothes over his head, remove and put on his socks and stand on one leg without support. He held his head and neck normally and had a normal range of movement. There were no neurological abnormalities nor evidence of muscle wasting, weakness or sensory disturbance. On disguised testing, the pursuer demonstrated a normal range of movement in his back and legs. The pursuer's lower limbs exhibited no neurological abnormalities and nor (sic) evidence of muscle wasting or weakness." There follow averments about the pursuer's angina. There was dispute, in the course of counsel's submissions, over whether the averments which I have quoted from the defences went far enough to entitle the defender to contend that the pursuer was malingering. I shall return to that issue in due course. I note, however, that the pursuer makes no attempt to aver, either as his primary position or in the alternative, that the symptoms of which he complains, if not caused by organic damage suffered in the accident, have been caused by his involuntary psychological reaction to physical injuries suffered in the accident.

- [12] In his evidence the pursuer described his head bouncing off the head rest on impact. He suffered pain in his neck, which was worse if he did not press back against the head rest. There was also pain in his lower back, which was likewise more severe if he did not press back against the seat. He therefore held on to the steering wheel and pushed back against the seat. Because of the pain, he was not willing to attempt to get out of the van without skilled assistance. Members of his squad sent for an ambulance, and he waited in the van until it arrived. The ambulance crew took the sensible precaution of fitting a neck support, and he was transferred by stretcher to the ambulance and conveyed to FRI. The ambulance service records (No. 7/2/3) show that he was complaining of pain in his neck and lower back, but of no other injury. They also record his past medical history of angina. The admission records from FRI (No. 7/2/2) (which unfortunately are only partially legible) appear to record complaints of pain in the neck and shoulders, and the lower back. There is also a note of a complaint of chest pains in terms which suggest that anginal symptoms may have come on while the pursuer was being examined. That led to an ECG being carried out. He was given an injection of Voltarol (a non-steroidal anti-inflammatory drug) and was prescribed analgesics and given a soft collar. The pursuer said that he was advised that he should take hot baths and that the pain would go away. He telephoned Dr Selfridge on 23 June, reporting that he had been in a road accident. He was recorded (No. 7/1/1a) as having been complaining that the analgesic prescribed at FRI gave him angina. Dr Selfridge expressed some scepticism about that by putting an exclamation mark after the note, but took the pragmatic step of substituting paracetamol for codydramol. Although there is no note on that date of a complaint of neck or back pain, I do not consider it to be a reasonable inference that the pursuer was not then suffering such pain. According to the pursuer the pain got worse, and on 26 June he saw Dr Selfridge, who certified him as unfit for work and referred him for physiotherapy (No. 7/1/1a). The course of physiotherapy continued until November. At the end of December 1997 the Physiotherapy Department reported (No. 7/1/36) that he had had 20 sessions, that he was still experiencing pain "at times", that he felt that his medication was "now helping ++" and that physiotherapy was not by then required. Somewhat earlier, however, on 11 September, Dr Selfridge had recorded (No. 7/1/1a): "Neck pain settling. Still has pain [in] lumbar area. ... To try for light duties?" In cross examination the pursuer accepted that at that stage the neck pain was "easing off", but did not accept that it had settled. He explained, however, that the level of pain fluctuated, being eased temporarily by the physiotherapy.
- [13] The question of the pursuer's possible return to light work was further discussed in late 1997, but does not appear to have been handled very positively. The next reference to the matter in the records is in a letter (No. 7/1/39) from Dr Thores, who saw the pursuer on behalf of ESW on 5 November 1997, to Dr Selfridge asking for information to help him assess the degree of the pursuer's disability and the prognosis for his return to work. In his reply (No. 7/1/38) Dr Selfridge reported that x-rays of the cervical and lumbosacral spine immediately after the accident had confirmed that there were no fractures, that the diagnosis had been of a "whiplash type of injury", that the pursuer was still having difficulty

turning his head to the right and extending his neck backwards, and that he still complained of a pain down his right thigh and at the small of his back. He was able to flex to his toes, but extension of the back was painful. At that stage the pursuer had not seen an orthopaedic surgeon. Dr Thores replied on 23 December 1997 (No. 7/1/35) stating inter alia : "I understand that Mr Leeboddy's employers have indicated to him that they would be willing to re-employ him on lighter duties once he is off sick leave. The decision on when his sick leave terminates rests on your practice". Dr Selfridge's evidence was that he did not sign the pursuer off as fit for light work at that stage because he understood that light duties were not available. He said that he had been so informed by the pursuer in September or October. He would have signed him off if light duties had been available, because he was fit for such duties by September. Dr Thores saw the pursuer again (No. 7/6, letter dated 18 December 1997) and reported to ESW in the following terms: "I understand Mr Leeboddy is having further investigations [this being, as I understand it, a reference to the investigation of the pursuer's heart condition, which Dr Selfridge had mentioned in No 7/1/38] and his GP continues to sign him off on sick pay. In these circumstances I am not in a position to reach a decision about his return to work, but as soon as it is clear that his GP has agreed to his return to lighter duties I would be prepared to discuss with you what might be appropriate in that respect." At about this time a Dr Pugh succeeded Dr Thores as ESW's occupational health adviser. It is not clear from the records when Dr Pugh saw the pursuer - his letter to Dr Selfridge of 23 March (No. 7/1/29) was clearly written some time after his examination - but the pursuer in evidence said that it happened in January 1998. Dr Pugh expressed the opinion that the pursuer could return to work, provided the amount of walking and climbing was kept to an absolute minimum, and stated that ESW had assured him that such restrictions could be accommodated, and that the pursuer felt able to return to work on that basis. The pursuer's evidence was that he had been in pain when examined by Dr Pugh, and that he had told him he had difficulty in sitting and driving. He did say, however, that he then wanted to return to light duties, but that the decision lay with Dr Selfridge. By that stage, of course, the pursuer was on the verge of undergoing his angioplasty, and the question of his return to work was therefore superseded.

- [14] On 20 February 1998 the pursuer was for the first time examined by an orthopaedic surgeon in connection with the injuries suffered in the accident. He was seen by Mr R. C. Marks FRCS, who did not give evidence, but whose report (No. 7/1/11) was at one time specifically referred to in the pursuer's pleadings (although that reference was later deleted by amendment) and forms part of the General Practitioner's records which are agreed as relating to the pursuer. Mr Marks recorded the pursuer as complaining of pain every day in both neck and back. The neck pain spread into the right shoulder, and was felt by the pursuer to be slowly improving with time. The low back pain affected both sacroiliac region (sic) and sometimes spread into the back of the right thigh as far as the knee. Mr Marks also recorded a history of sleep disturbance every night. At that time the pursuer was using a lumbar support at all times, but weaning himself off the use of a cervical collar. On examination, Mr Marks thought that there was a minor degree of scoliosis of the lumbar

spine (a view which Mr McMaster, the orthopaedic surgeon led by the defenders, who had had the advantage over Mr Marks of seeing x-rays, firmly, and to my mind convincingly, rejected). Mr Marks found tenderness around the lumbo-sacral junction, and a good range of movement, but with discomfort on rising from the flexed position. In the cervical spine, there was tenderness of the cervico-thoracic junction, and restriction to about 75% of normal movement in right rotation and in lateral reflection on both sides.

- [15] Chronologically, the next record of the pursuer's condition is that taken when he attended for examination by the orthopaedic surgeon engaged by the defenders, Mr M. J. McMaster FRCS. Mr McMaster first saw the pursuer on 18 January 1999, and his report upon that examination is No. 7/13 of process. The pursuer's complaints on that occasion, as recorded by Mr McMaster, were of (i) a continuous burning sensation in the lower lumbar region, with on occasions a stabbing pain radiating into the back of the right thigh, and (ii) a burning sensation at the back of his neck, not radiating into the arms. There was no complaint of motor or sensory disturbance. By specific questioning Mr McMaster further elicited that the pursuer took pain medication daily, that he wore a lumbosacral support daily and a cervical collar occasionally, that he could not bend or lift anything more than a carton of milk, that he could sit for only ten minutes and stand for only 20, that he could walk for only 20 metres before developing chest pain (angina), that he used a stick and that his sleep was disturbed by backache. In describing his examination of the pursuer, Mr McMaster noted that he presented himself as significantly disabled, walked slowly, holding himself stiffly, limping on the right side and using a stick. He noted a tendency "to sigh and groan". On examination of the neck, Mr McMaster found that the head and neck were held normally. During the interview the pursuer moved his head through a normal range without obvious pain or discomfort. On formal examination, however, he actively restricted movement to 50% of the normal range in all directions. On palpation he complained of tenderness over a widespread area at the base of the neck. There was no evidence of muscle wasting or other abnormality in the arms. The lumbar spine was held stiffly, and he complained of tenderness on palpation over a widespread area of the lower thoracic and lumbar regions. Lumbar movements were apparently severely restricted in all directions, with forward flexion through 2 cm (normal 6 cm). However, on disguised testing he had a much freer range of movement. He was able to sit up on the couch and lean forward with his hands well beyond his knees. Simulated movement and axial compression of the spine produced complaints of pain, when they should normally be pain-free. Straight leg raising was 70° on both sides. There was no muscle wasting or other abnormality. At that stage Mr McMaster's view was that the pursuer had suffered a soft tissue injury of his neck and, to a much lesser extent, his lower back. He considered that he would normally have expected the symptoms to have improved significantly over a period of two to three months, leaving the pursuer fit for light work, with any residual discomfort resolving with activity and no long term disability. Mr McMaster went on to describe the neck and back symptoms of which the pursuer complained at the time of the examination as "non-specific and out of proportion to the injury". He referred to his findings on disguised testing and the

inappropriate findings which, he said, "suggest psychological distress manifesting itself as abnormal illness behaviour", and suggested that that was contributing to the majority of the pursuer's disability. Leaving aside the pursuer's cardiac condition, he regarded him as fit, if sufficiently motivated, to return to light work.

- [16] The pursuer was examined for a second time by Mr McMaster on 3 November 1999 (Report, No. 7/14). Mr McMaster recorded that on that date the pursuer said that his spinal symptoms were slightly more severe - there was a constant burning sensation radiating from the back of his head to the base of his spine, felt more severely at neck and waist levels. The pain also radiated into both shoulders and the back of the right thigh. Among the complaints elicited by specific questioning was that if he carried anything heavier than a paper and a pint of milk he felt as if his "right arm is being pulled off". Sitting and standing were said to be restricted to 10 minutes before he had to change position, walking was limited to only 20 metres with the aid of a stick, and he could climb only 12 stairs before stopping. He required assistance to get out of bed or a bath, and required assistance to put on his socks. Mr McMaster recorded the pursuer's presentation in terms similar to those of his first report. He noted, however, that he was able to observe the pursuer dress and undress without apparent difficulty. He described one occasion on which the pursuer flexed his head and neck forward to grasp his vest in his teeth to hold it out of the way while he put on his lumbosacral support. When giving evidence, Mr McMaster demonstrated that particular manoeuvre, which appears to have struck him as particularly significant. He also recorded that the pursuer took his socks off and put them on without assistance. In cross examination Mr McMaster accepted that his nurse made to help the pursuer to put his socks on, but that he (Mr McMaster) stopped her, because he wanted to see how the pursuer managed on his own. The pursuer was able to stand on one leg while putting on his trousers. Mr McMaster again observed the pursuer moving his neck through a normal range without obvious pain, and on one occasion while standing on weighing scales exhibiting a full range of flexion by lowering his chin onto his chest to look down to see the read-out on the scales. On formal testing, however, the range of movement was again restricted, this time to only a few degrees. In relation to the lumbar spine, the pursuer's presentation and the results of disguised testing were much the same as on the previous occasion. Straight leg raising was restricted to 50° on both sides, but disguised testing elicited a normal range of 90° bilaterally. Mr McMaster's opinion remained that the pursuer's complaints were inspecific and out of proportion to the injury. He added: "In my opinion his present level of disability is either due to a considerable degree of psychological distress manifesting itself in abnormal illness behaviour or there may be an element of deliberate fabrication. It is not possible for me to be more specific on this without further occult surveillance".
- [17] In light of the last sentence of the passage which I have just quoted, arrangements were made on the defender's behalf for a video recording to be made of the pursuer's movements without his knowledge. The video recording was made on 17 and 18 November 1999. The tape is No. 7/11 of process and an accompanying surveillance log is No. 7/10. The tape was played in the course of the pursuer's evidence, and it was accepted by him that it showed

some of his movements on the date in question. He maintained, correctly, that it showed him "hirpling", and suggested that it was wrong to judge the extent of his disability on the basis of a video of 16 minutes duration. The main activities shown on the video included (a) the pursuer within his house dusting some ornaments, (b) the pursuer emerging from his front door, entering his car (a Ford Escort), and reversing out of his property onto the street, looking over his shoulders as he did so, (c) the pursuer walking (limping) from his car to a school gate, and standing there for a few minutes conversing with others, then returning to his car with his grandchild, (d) the pursuer driving his grandchild back to school after lunch, (e) the following morning, the pursuer, with his wife, driving to a relative's house, and on alighting from the car bending down to look through the lower part of a window (apparently to see under a blind) then standing up with no apparent difficulty, and (f) emerging from the house carrying a hold-all, opening the hatch-back boot of his car and placing the bag in the boot, then entering the car, and (g) alighting from the car on reaching his own house. Mr McMaster commented on the video in a letter dated 26 November 1999 (No. 7/15) that it showed the pursuer moving his head and back normally and without obvious signs of pain; that the only abnormality was "a rather non-specific limp", for which in examination of the pursuer he had found no reason; and that the video was "very suggestive that he is exaggerating his complaints and there is very little, if any, functional problem in his head or neck".

- [18] Before dealing with Mr McMaster's oral evidence, it is convenient to record what was found on the last examination of the pursuer by an orthopaedic surgeon before the proof. The pursuer was examined by Miss M. M. McQueen FRCS on 23 November 1999. Her report of that examination is No. 6/12 of process. The pursuer's complaints, as expressed to Miss McQueen, were of pain in the back and neck, worse in the back. The pain radiated from the lumbar spine into the buttocks and down the right leg to the knee. He described a burning sensation about belt level and also in his neck. Standing made his pain worse, and he was able to sit for only about ten minutes. He had to stop after walking 20 to 25 metres. He needed assistance to get out of bed, to put on socks and shoes and to pull tight clothing over his head, to get out of the bath and to dry his head and feet. He found climbing stairs a struggle. On examination, Miss McQueen found that he walked with a stick in his right hand and an antalgic gait on the right side. There was tenderness in the lumbar spine. On forward flexion he could bring his fingertips to his knees, and there was 3 cm of excursion of the lumbar spine. Miss McQueen found moderate muscle spasm. As I understood her when she gave evidence, that finding made a significant contribution to her conclusion that the pursuer was genuinely suffering pain, but she also said that she took his manner of presentation to be genuine. He had 50% of the expected range of lateral flexion but no extension. Straight leg raising was 70° on both sides, limited by back pain. On examination of the neck, there was tenderness in the lower cervical spine. Flexion and extension were limited to 75% of normal, rotation was limited to 50% of normal on the right and 75% on the left, and lateral flexion was limited to 50% on both sides. Miss McQueen found no inappropriate signs. In evidence she elaborated that by confirming that she did not elicit

from the pursuer complaints of pain along the whole length of the spine on palpation, or pain in response to a light touch, but accepted that such symptoms, if exhibited or claimed, would not be anatomically explicable by reference to the injuries which the pursuer suffered in the accident. She did not attempt to test the pursuer's reaction to axial loading of his spine. She expressed the view that the pursuer had suffered a whiplash injury to the neck and lumbar spine. So far as the lumbar injury was concerned, she reported that: "much of the injury will have been caused by a sudden extension of the lumbar spine, the subsequent flexion would be restrained by Mr Leeboddy's seat belt. The extension of the back is likely to have resulted in some damage [explained in evidence as being of a ligamentous nature] to the facet joints in the lumbar spine. ... [A]lthough I am not an expert on the mechanics of the situation I understand that whiplash injury is possibly more likely at slow speeds than at high speeds." The latter point (which Miss McQueen reiterated in firmer form in her evidence) was made in more detail in an article "What is in a Whiplash" by a solicitor, Bernie Rowe (No. 6/15 of process) which was put her. Miss McQueen concluded that Mr Leeboddy had a significant disability related to the injury sustained in the accident. It had a profound influence on his lifestyle, and was unlikely to improve to any great extent. In evidence she disagreed with the view that the pursuer's injuries would normally be expected to resolve substantially in two or three months. Her view was that improvement would continue for up to a year in those patients who were going to improve. The maximum pain would not necessarily be immediately after the accident. Those patients who have long term pain may deteriorate at a later stage.

- [19] In evidence Mr McMaster adopted the terms of his three reports, with the exception of the view about psychological distress expressed in the first one. He was asked about the extent to which those of the pursuer's complaints that he did not regard as physically justified were the result of deliberate or on the other hand involuntary exaggeration. The line of evidence was objected to, but allowed to proceed under reservation of its competency and relevancy. The view which Mr McMaster expressed was that there was a degree of deliberate exaggeration, and his estimate was that 80% of the pursuer's inappropriate symptomatology was contrived. In cross examination he accepted that that was a subjective estimate on his part, and made the point that once the view was taken that there was an element of deliberate exaggeration, it was very difficult to determine its extent. He accepted that the pursuer had suffered soft tissue injuries to his neck and lower back, and that he was still suffering a degree of discomfort in those areas. He expressed the view that the vast majority (in cross examination he said 95%) of people who suffered such injury would be fit to return to work within two or three months, although they would have gradually settling discomfort for a longer period. The quickest way to recover from such soft tissue injury was to use the relevant part of the body once the initial acute symptoms had subsided. He maintained that position in face of two papers (Nos. 6/17 and 6/18) put to him, which he acknowledged were by reputable authors, and in which reviews of a group of whiplash patients showed that a substantial proportion had persisting low back pain after ten and fifteen years. He explained that the group of patients that was the subject of the papers was not representative of the

entire range of whiplash patients, being exclusively patients seen at hospital at the time of the injury. He rejected the view put forward by Miss McQueen that the pursuer's continuing lumbar symptoms were attributable to injury to the facet joints. He accepted that that explanation for the persistence of low back pain was often put forward by orthopaedic surgeons, but said that that diagnosis was the "refuge of the uninitiated". To damage a joint, he said, it was necessary to cause it to move beyond its normal range. To damage the facet joints, the spine would require to be flexed or extended sufficiently to take them beyond their normal range of movement. That could not happen when the pursuer was sitting in his van seat. On the contrary, the seat back would act as a splint. If the facet joints had been injured the severest symptoms would have been suffered within 24 hours of the accident, and there was no record of the pursuer suffering severe symptoms in that period. He also criticised Miss McQueen's reliance on her finding of lumbar muscle spasm in support of her conclusion that the pursuer was significantly disabled by continuing lumbar pain. He found none in his examinations, and noted that Mr Marks had not reported any such finding. He described muscle spasm as a "soft sign", a finding about which it was so difficult to be objective that it would not normally be accorded a great deal of weight. Muscle spasm usually occurred in the acute rather than the chronic phase. He contrasted Miss McQueen's finding of muscle spasm with his own finding that on disguised testing a relatively normal range of pain free movement could be elicited. The movement exhibited by the pursuer on the video was not consistent with muscle spasm. There was no anatomical explanation for the pursuer's complaint of pain all the way from his neck to the base of his spine, or for pain in response to a light touch. The complaint of feeling as if his arm was being pulled off when attempting to lift a moderate weight was also anatomically inexplicable. Mr McMaster explained that after his first examination of the purs

- [20] The pursuer's description in evidence of his present condition accorded broadly with what he was recorded as telling Mr McMaster. His pain has never got better since the accident. He feels it is now slightly worse than before. He wears a lumbar support daily. He has at all times a burning sensation along the length of his spine, from his neck to the base of his spine, with "hot spots" at the neck and at belt level. A light touch in these areas increases the pain. The pain at belt level goes across his hips and down his right leg. The pain is worse if he moves suddenly. He takes four pain killers (Tramadol) per day, and uses a gel (Feldene) on his back at night. His pain is worse at night, and disturbs his sleep. Lying still intensifies the pain, so he has to move about a lot in bed, and sometimes lie on the floor. In bed he is able to turn to his left, but not to his right, and needs the assistance of his wife to make that sort of turn, or to assist him to get out of bed. He requires such assistance three or four times a night. He also needs help to get out of the bath. He can walk only 20 or 25 yards before having to stop. That is because of back pain, although, as I understood him, angina played a part in the matter too, in the sense that if he pressed on despite the back pain, that would precipitate an angina attack. He can, however, continue after a pause. In re-examination, when asked about the total distance he could manage, he said that he has difficulty in getting to the neighbourhood shops, which are under half a mile away. He uses a

stick when outside. He can drive, but not very far. He has difficulty climbing the stairs in his house, which he now attributes to back pain although he takes anti-anginal medication (GTN spray) before attempting to do so. His sexual relations with his wife are, as he put it, "null and void" because he cannot sustain an erection because of back pain. He cannot play physical games with his grandchildren, or go fishing, or dancing, or take part in other outdoor activities. He cannot go caravanning as he used to. He has, however, been able to go on holiday in the winter each year to Benidorm in Spain, and in September 1999 to Florida. He found the three hour flight to Spain was "very uncomfortable", and the eight hour flight to Florida was "agony". When on holiday he used a wheelchair to get about. When cross examined by reference to a "disability statement" (No. 6/8 of process), listing activities for which he required assistance, which he had prepared in about March 1999 in connection with a benefits claim, he said that the assistance he needed to get in and out of a car was not necessarily that of another person, and that it was particularly in respect of his son's car rather than his own that assistance was required. He conceded that he could sometimes manage to put his socks on. He said that he sometimes needed assistance to get up from a chair. He could stand, but had to lean on something, otherwise his back got sore. He denied that the list of disabilities was exaggerated, and somewhat curiously added that he could not scratch his head vigorously, since doing so caused neck pain. He was cross examined about his need for assistance to turn in bed by reference to hospital records (No. 7/2/147, 148, 169 and 173) which described him as independent in respect of mobility, and more particularly mobility in bed, but it did not seem to me that those records afforded a secure basis for challenging his evidence about the help he claimed to receive at home from his wife. It was put to him that he was imposing on her, which I understood to be a suggestion that he was exaggerating his difficulty to her, but he misunderstood it as a suggestion that he was a burden to her and agreed that he was.

- [21] Mrs Leeboddy said in evidence that the pursuer has had continuous problems with his back since the accident, in the form of back and neck pain which has got progressively worse. Like the pursuer she used the phrase "practically null and void", but she applied it to the pursuer's life as a whole. He was unable now to attend dances or other social functions, and was unwilling to stay overnight when visiting friends, because he had to get up so often during the night. She had to help him to turn in bed or get up. It was too painful for him to manage by himself. Until recently that happened two or three times a night, but recently it had become three or four times. She applied gel to his back when required. She also had to help him get out of bed in the morning, get into and out of the bath, and put on his socks and shoes and sweaters. Pain in his back affected his ability to go up stairs. New banisters had been installed to help him. He was unable to play ball games with his grandchildren. They still went to their caravan in Callender, but the one which they formerly kept at Coldingham had been brought home, because that was too far for the pursuer to travel. He was unable to undertake various forms of work in the house and garden, as he formerly had. He was not fit to go back to work, although he had loved his job and would go back if he could. The Scope of the Defence

- [22] As I have already mentioned in paragraph [11] above, a dispute emerged in the course of the proof as to whether the defender's pleadings were such as to entitle him to contend that the pursuer was deliberately exaggerating the extent of his disability. The pursuer's case is a simple one - in the accident he suffered soft tissue injuries to his neck and lower back, and those injuries continue to cause symptoms which disable him. It is implicit in the pursuer's case that the symptoms of which he complains are organically caused by the injuries suffered in the accident. There is no hint in his pleadings of the more complex sort of allegation that is commonly encountered in such cases, namely that the symptoms complained of, to such extent as they are not organically caused by the injuries suffered in the accident, are nevertheless attributable to the accident because they arise (or arise in the degree of severity that is present) through a genuine psychological reaction on the part of the pursuer to the injuries or their consequences - what Mr McMaster referred to in his first report as "psychological distress manifesting itself as abnormal illness behaviour". To the pursuer's simple case the defender offers an equally simple response - it is accepted that the pursuer did indeed suffer soft tissue injuries to his neck and lower back, but maintained that these were only severe enough to cause pain for two or three months, with any continuing mild pain thereafter easing with activity; pain suffered by the pursuer after that period is not attributable to the accident. The point is then elaborated in the averment that the symptoms exhibited by the pursuer are inappropriate for the injuries of which he complains. Reference is then made to what was found on examination on 3 November 1999 - a reference to Mr McMaster's second examination of the pursuer - and the findings mentioned include a normal range of neck and back movements.
- [23] Mr McEachran submitted that the defender's averments did not give the pursuer fair notice that it was to be contended that he was deliberately exaggerating the severity of his symptoms. Such a serious allegation could not be introduced by a side wind, but required to be expressly stated. The unfairness was compounded by the fact that Mr McMaster's reports had not been lodged in process in advance of the proof (they were not lodged until just before he was called to give evidence). The pursuer was thus deprived of an alternative means of being alerted to the allegation that was to be made. He was also critical of the fact that Mr McMaster had suggested video surveillance of the pursuer, but had not, at the time when in his first report he had contemplated the possibility of the severity of the pursuer's symptoms being attributable to psychological distress, suggested that that be investigated. Mr Stewart, for the defender, submitted that the averments about inappropriate symptoms opened the way to the allegation of deliberate exaggeration. There was no requirement that Mr McMaster's reports be lodged, and in any event it did not lie in the mouth of the pursuer to complain when he had failed to comply with Rule of Court 43.31(1) by lodging Mr Marks' report which was at that time referred to in the pursuer's pleadings.
- [24] In my view nothing turns on the complaints and counter-complaints about failure to lodge reports. The issue is whether the submission that the pursuer has deliberately exaggerated the severity of his disability is open to the defender on his pleadings. In my view Mr McEachran's submissions in this regard are not well-founded. The defender's pleadings, in

my view, make it reasonably clear that his contention is that the injuries suffered in the accident would only account for symptoms lasting for two or three months, and that any continuing symptoms thereafter were and are not attributable to the accident. They also make clear that it is to be maintained that the pursuer has been presenting for medical examination exhibiting inappropriate symptoms. It is not, in my view, for the defender to canvass and exclude the possibility that the symptoms complained of are the result of a genuine psychological reaction to the injuries. The defender's averments are, in my view, sufficient to put the pursuer's advisers on notice that the defender does not accept that the symptoms complained of are organically attributable to the accident. The contention has not been advanced by the pursuer that there is an alternative genuine explanation of a psychological nature for the degree of disability complained of. The issue before the court is therefore simply whether the degree of disability of which the pursuer complains has been caused organically by the accident. In these circumstances, in so far as evidence bearing on the question of deliberate exaggeration was admitted under reservation of an objection, I now repel the objection. Solatium

- [25] Mr McEachran advanced a radical submission about the proper approach to the assessment of solatium , but before I turn to consider that submission it is appropriate that I should express my conclusion about the extent to which the pursuer has been disabled by the injuries which he suffered in the accident.
- [26] I have no difficulty in accepting that he suffered a soft tissue injury to the cervical spine. The mechanism by which such an injury would be suffered is readily understandable in the context of an accident of the sort that happened. I also accept, as does the defender and as did Mr McMaster, that the pursuer suffered a soft tissue injury to the lumbar spine. I have more difficulty, however, in understanding the mechanism by which that injury was suffered and the nature of the damage done. I accept Mr McMaster's evidence that to cause damage to a joint there must in principle be something that causes the joint to move beyond its normal range of movement. Held in place as the pursuer would have been by the seat belt that he was wearing, he would not have been thrown forward in such a way and to such a degree as to cause hyper-flexion of his lumbar spine. With his back against his seat, it is difficult to see how his spine could have been subjected to hyper-extension. There was no evidence of any damage to the seat, and in any event the severity of the collision does not seem to me to have been sufficient to cause such damage. If there was enough force in the impact to cause some movement of the seat back, it would have been at the point where it is attached to the base of the seat, not at the level of the pursuer's lumbar spine. I therefore find it difficult to accept Miss McQueen's theory that the low back injury was caused by sudden extension of the lumbar spine. I accept that there is evidence, in Miss McQueen's acceptance of the view expressed in the article by Mr Rowe (No. 6/15 of process), that whiplash injury is more likely at low speeds. There is also evidence that a surprisingly high proportion of a certain sample of whiplash patients had lumbar symptoms persisting many years after the accident (Nos. 6/17 and 6/18 of process). But the fact remains that the evidence in the present case does not offer a readily understandable explanation of how the

accident that happened could have caused material damage to the pursuer's lumbar spine. The nature of that damage is also controversial. Miss McQueen posited ligamentous damage to the facet joints. That theory was, as I understood it, dependent on there having been hyper-extension of the lumbar spine, and I have already noted that Miss McQueen did not offer any persuasive explanation of how that could have happened. Mr McMaster rejected the facet joint theory, although he accepted that many orthopaedic surgeons would accept it. He expressed his views, as I have mentioned, in terms that might be thought to be arrogant or discourteous to professional colleagues, but undoubtedly held the views which he expressed very firmly and spoke from a position of great experience and indeed eminence in his profession. I find myself unable to hold it proved, on the basis of Miss McQueen's evidence and in face of Mr McMaster's, that the nature of the injury suffered by the pursuer was ligamentous damage to the facet joints of his lumbar spine. Unfortunately, Mr McMaster's evidence offers no competing explanation of the nature of the soft tissue injury to the lumbar spine which he accepted that the pursuer had suffered. The result is that, while I am able to find that the pursuer did suffer soft tissue injury to his lumbar spine, I am unable on the evidence to make any positive finding as to the mechanism by which that injury was suffered or the nature of the damage done. The pursuer, of course, does not necessarily fail because he has not proved the mechanism of injury or the anatomical nature of the damage, but the absence of findings on these matters is in my view something that must be borne in mind in assessing the evidence of continuing disability.

- [27] I accept the pursuer's evidence that at the time of the accident he suffered severe pain in his neck and in his lower back. He made complaints consistent with that state of affairs both to the ambulance crew and on admission to hospital. Although I have found that he mentioned angina to the defender at the scene, and probably complained of anginal symptoms in hospital, I do not consider that these findings in any way undermine the conclusion that the pursuer did indeed suffer injury to and pain in his neck and lower back. Dr Selfridge certified the pursuer as unfit for work and referred him for physiotherapy. By mid-September, however, the neck pain at least was lessening. That was recorded by Dr Selfridge, and was accepted by the pursuer in evidence. At that stage the possibility of the pursuer returning to work was canvassed. I leave aside for the present the question of fitness for work as such, but as a measure of the degree of continuing disability it is in my view relevant to note that the pursuer's recovery by September was such as to prompt Dr Selfridge, who did not appear to be an unduly severe judge of such matters, to suggest the possibility of return to work. By November there were still continuing symptoms. Dr Selfridge's evidence was that he did not certify the pursuer as fit for work at that stage because he understood that light duties were not available. I infer that he regarded the pursuer as by then fit for light duties, albeit not wholly symptom-free. Dr Pugh expressed a similar view on examination of the pursuer in about January 1998, and the pursuer in evidence indicated that at that stage he wanted to return to light duties.

- [28] There then followed a period when the focus of attention was on the pursuer's angina and the measures being taken to cure it, rather than on the condition of his neck and back. It is convenient to resume consideration of the evidence about the extent of the pursuer's disability with the competing views expressed by Miss McQueen and Mr McMaster. I do not repeat here the entirety of the respective findings which they made on examination of the pursuer, and which I have summarised in paragraphs [15], [16] and [18] above. Miss McQueen's view that the pursuer's complaints of disability were genuine depended inter alia on her finding of moderate muscle spasm in the lumbar spine. However, I found persuasive the reasons given by Mr McMaster for regarding that finding as one on which little reliance could be placed. He maintained in particular that muscle spasm was normally a feature of acute rather than chronic injury, and that it was a difficult sign to assess objectively. He pointed to the fact that in his examinations he found none, and that the pursuer's movements as shown on the video were not indicative of muscle spasm. Miss McQueen also relied on the facts that she regarded the pursuer's manner of presentation as genuine, and that she did not find any inappropriate symptoms. I accept, of course, that such were Miss McQueen's clinical findings and impressions. I note, however, that Miss McQueen did accept that a complaint of pain on palpation along the whole length of the spine, or of pain on light touch, would have no anatomically sound basis, and could therefore be described as inappropriate. The pursuer made such complaints, not only to Mr McMaster, but also in the course of his evidence. Thus, although Miss McQueen did not herself elicit complaints of inappropriate symptoms, she confirmed that symptoms of which I find that the pursuer has complained on other occasions fall into that category.
- [29] It is, in my view, significant that the view of the pursuer that Mr McMaster expressed in evidence evolved over a period of time. His conclusion that the pursuer was deliberately exaggerating his symptoms was by no means a snap judgment. On his first examination he noted (a) a tendency on the pursuer's part to "sigh and groan", (b) a normal range of neck movement during interview, without obvious pain or discomfort, but active restriction of the range of movement by 50% on formal examination, (c) an absence of muscle wasting in both areas, (d) severe restriction of lumbar movements, but a much freer range of movement on disguised testing, (e) complaints of pain, when there should have been none, on simulated movement and axial compression of the spine. At that stage his conclusion was that the complaints were out of proportion to the injury, and suggestive of psychological distress manifesting itself as abnormal illness behaviour. On his second examination he noted further material which cast light on the question of the genuineness of the pursuer's complaints. Two symptoms, in particular, of which the pursuer complained were, he said, inexplicable in anatomical terms. These were the complaint of pain along the whole length of his spine, and the complaint of feeling that his arm was being pulled off when he lifted a modest weight. The complaint of only being able to climb twelve steps of the staircase in his house without stopping was inconsistent with his performance in the exercise tolerance test carried out in March 1999 for Dr Kennedy. His complaint that he needed help to put his socks on was not borne out during the examination. A greater freedom of movement than

he claimed to have was graphically demonstrated by the incidents involving his holding up his vest with his teeth and his bending his neck downwards to read the scales. Disguised testing elicited the same results as before, and in particular on straight leg raising elicited an improvement from 50° to 90° bilaterally. It was in light of that additional material that Mr McMaster progressed to the view that there was either a considerable degree of psychological distress manifesting itself as abnormal illness behaviour or an element of deliberate fabrication.

- [30] Having reached that stage in his assessment of the pursuer, Mr McMaster pointed out that he could not take the matter further without what he described as "occult surveillance". Mr McEachran was critical of Mr McMaster for having suggested that course, when he had not earlier suggested further investigation of the possibility of illness behaviour. I do not regard that criticism as well founded. Mr McMaster had reached the point of concluding that there were two possible explanations for the pursuer's presentation. I see nothing improper in his identifying what further material would be required before he could reach a conclusion as to which was the correct explanation. In the event video surveillance was carried out and evidence of the result was led without objection. I have already discussed what it shows (see paragraph [17]). Mr McMaster regarded it as justifying the conclusion that there was deliberate exaggeration. The essential component in his reasoning, it seems to me, is his view that a person exaggerating involuntarily as a result of psychological distress in the form of abnormal illness behaviour will maintain the exaggeration whether he thinks he is under observation or not, whereas the person voluntarily exaggerating may not maintain the exaggeration when he does not think that he is under critical observation. The video shows the pursuer going about his daily life, in circumstances in which he did not at the time appreciate that he was under observation. I accept Mr McMaster's evidence that it shows him exhibiting a significantly greater range of neck and back movement than he claimed on examination to have. In my opinion, his conclusion, that the pursuer voluntarily exaggerates his symptoms, is one that I should accept.
- [31] There remains for consideration the question of the extent to which the symptoms and disabilities of which the pursuer complains are genuine and the extent to which they are the result of deliberate exaggeration. As I understood him, Mr McMaster expressed the view that about 80% of the pursuer's inappropriate symptomatology was deliberately contrived. In cross examination he accepted that that was a subjective estimate on his part. It seems to me that, as the subjective estimate of an experienced clinician, it is entitled to considerable weight. The problem, however, as Mr McMaster explained, is that once the view is taken that there is a degree of deliberate exaggeration, it is very difficult to tell how far the complaints made have a genuine foundation and how far they are deliberately contrived. Some assistance can, in my view, be obtained from the evidence of the pursuer and his wife. In his submissions Mr McEachran relied very heavily on the evidence of the pursuer and his wife about the pursuer's need for assistance to turn in bed and get up from bed. I agree that it is improbable that that evidence is false, or that the pursuer maintains a pretence to his wife of need for such assistance. I am therefore prepared to accept that the pursuer does suffer

pain in his back on attempting to turn in bed, and needs assistance in that connection. Other aspects of the pursuer's evidence seem to me, on the other hand, to support the inference that to a degree he exaggerates the extent to which such pain as he suffers affects his activities. The so-called statement of disabilities (No. 6/9 of process) can, in my view, be seen to be exaggerated. Only some of the points listed in the statement were examined in evidence. It seems to me, however, that the claim to need help to get into and out of a car is manifestly disproved by the video. He was able to put on his own socks after examination by Mr McMaster. His claim to be unable to climb more than twelve stairs without pausing cannot, in my view, stand with the result of Mr Kennedy's exercise tolerance test. The claim to be unable to walk more than 20 metres was modified in evidence to the effect that that was the distance he could travel without stopping. That too, even in the modified form, sits ill with the exercise tolerance test, and with the evidence of the video. While, as the pursuer said, the video shows him "hirpling", the impression given is not of a man who can only manage 20 metres before having to stop for a rest. His handling of the bag which he is shown in the video lifting into the boot of his car was not consistent with his complaint of severe pain on lifting a light object such as a carton of milk. In my view the nature and degree to which the pursuer has exaggerated his disabilities are more than can be explained and excused by the consideration mentioned by Mr McEachran, namely that an anxious patient will exaggerate his symptoms in order to be sure that the doctor does not overlook something of significance. On the other hand, I do accept that the pursuer suffers from symptoms sufficient to militate against his undertaking activities such as dancing, physical play with his grandchildren, and car and home maintenance work. I also accept that the symptoms which the pursuer suffers are sufficient to interfere with his ability to have sexual relations.

- [32] The picture which in my view emerges from the evidence is of an anxious man with a tendency to worry about his health; who was involved in a collision of only moderate severity; who suffered as a result soft tissue injuries to his neck and lower back, sufficient to cause quite severe pain at the time; and whose condition improved over the following three to six months, with the help of physiotherapy, not to the point of complete resolution of the symptoms, but at least to the point where his return to light work was contemplated. At that point, his heart condition took over as the main focus for concern. By the time that had been satisfactorily resolved, and attention was once again brought to bear on the condition of his neck and back, he was presenting exaggerated symptoms for which organic damage suffered in the accident could not afford an adequate explanation. Although he does continue to suffer from discomfort, at least in his back, sufficient to disturb his rest and call for assistance to move in bed, and sufficient to prevent him from pursuing more energetic physical activities, the movements of his neck and his lumbar spine are neither as restricted nor as painful as he claims. His general mobility is materially less affected by his injuries than he claimed on examination by Miss McQueen and Mr McMaster and in evidence.

- [33] Mr McEachran submitted that the appropriate award of solatium would be of the order of £40,000. That figure related, of course, to the view that the pursuer was not to any material extent exaggerating his disability. The submission fell into two parts, one of which remains for consideration even in the context of the assessment only of that portion of the pursuer's disability that I find to be genuine. The first part, which related to the view that the pursuer was not guilty of exaggeration, involved reference to a number of cases which might be taken to suggest that an award of the order of £20,000 would be appropriate in such circumstances. The cases mentioned were *McWhinnie v British Coal Corporation* 1993 SLT 467, *Burke v Royal Infirmary of Edinburgh NHS Trust Limited* 1999 SLT 539, *McNulty v Marshalls Food Group Limited* 1999 SC 195, and *Grassie v MacLaren* (Lord Cameron of Lochbroom, 26 March 1999, unreported).
- [34] The second part of Mr McEachran's submission, which requires to be considered whatever view is taken of the genuine extent of the pursuer's disability, was to the effect the level of award made by judges in Scotland was too low and ought to be doubled. In support of that proposition he submitted that in assessing solatium it should be borne in mind that in terms of section 11 of the Court of Session Act 1988 actions of damages for personal injuries are, in the absence of special cause, to be tried by jury. The danger of judges becoming increasingly out of touch with awards made by juries had been noted by Lord Hope of Craighead in *Girvan v Inverness Farmers Dairy* 1998 SC (HL) 1 at 12G, referring to his own opinion in *Currie v Kilmarnock and Loudoun District Council* 1996 SC 55. Mr McEachran was, however, unable to refer to any recent jury award in circumstances comparable to those of the present case. Judges' awards had not only fallen behind those of juries, they had also failed to keep pace with inflation (see for example *Allan v Scott* 1972 SC 59, where £20,000 was awarded to a 16 year old who was rendered quadriplegic, the equivalent of which would now be of the order of £165,000). Mr McEachran also referred to a report by the (English) Law Commission on "Damages for Personal Injury: Non-Pecuniary Loss" (Law Com. No. 257), in which it was recommended that the level of damages for pain, suffering and loss of amenity should be increased by a factor of between 1.5 and 2. It was by the application of those considerations to the cases mentioned in paragraph [33] that Mr McEachran sought to justify his submission that the appropriate award in the present case would be £40,000.
- [35] Mr Stewart submitted that the appropriate award of solatium would be of the order of £8000 (c.f. *McKay v City of Glasgow Council* 1998 Rep LR 23).
- [36] I do not consider that it is appropriate that I should approach the assessment of solatium by first identifying the sum that I would consider, by reference to current standards, to be a fair and reasonable measure of the award that the pursuer should receive, and by then multiplying it by a factor of 1.5 or 2. A step change of that sort in the level of awards of solatium is not, in my view, a matter for a single judge. (I note in passing that, subsequent to the hearing on evidence, the Court of Appeal in England has declined to adopt the increase recommended in Law Com. No.257.) On the other hand, I do accept Mr McEachran's submission to this extent, that I should do my best to guard against any tendency to fail to

take proper account of inflation, and should take proper account of any relevant jury awards. The first of these points seems to me to be axiomatic. The second is in accordance with what Lord Hope said in *Girvan*. It seems to me, however, that in the absence of jury awards made in comparable circumstances, there is limited scope for following the guidance given in *Girvan*. Even if there were available a number of comparable jury awards, the guidance which they would offer would not be particularly clear. Jury awards are, by their nature, more opaque than awards made by judges, because a jury's verdict does not disclose what view was taken of the evidence. Thus, for example, if a jury made an award in the present case, it would not be evident whether it proceeded on the view of the evidence contended for by Mr McEachran, or that contended for by Mr Stewart. As matters stand, in the absence of any comparable jury award, I do not consider that any particular assistance is to be obtained by adopting the approach suggested by Mr McEachran of asking myself what would have been awarded in the present case by a jury.

- [37] In my view the proper approach for me to adopt is to remind myself that I should award such a sum as will represent and be generally regarded as reasonable compensation to the pursuer for the non-pecuniary elements of the loss which I have held that he has suffered as a result of the accident. In doing that, I should be alive to the need to take proper account of changes in the value of money, and to the risk that if guidance is sought in past awards there may be a tendency for the level of awards to stagnate. Making allowance as best I can for such considerations, I am of opinion that the appropriate award of solatium in the present case is £15,000. Loss of Earnings to Date
- [38] The relevant wage rates to be applied in calculating any award of loss of earnings are largely matter of agreement. It is agreed, first, that at the time of the accident the pursuer was earning £17,900 net per annum. Secondly, it is admitted that he would have received an increase of 3% on 1 April 1998. That would have taken his net annual earnings to £18,437. Thirdly, it is agreed that his net earnings from 1 April 1999 would have been £18,270 per annum. There was evidence that from that date the pursuer would, as a supervisor, have been entitled to have a car provided, or in lieu of that a cash allowance of £2283 net per annum. The total from 1 April 1999 would therefore have been £20,553 per annum. It is further agreed that between the date of the accident and the date of his retirement from the employment of ESW the pursuer received net pay (including sick pay) of £17,501.88. The pursuer maintains that, of that total, he is obliged to repay £11,217.69 in the event of his recovering damages, but that point is disputed.
- [39] On those figures Mr McEachran advanced a claim for wage loss to date (which for the purpose of calculation was taken as the end of December 1999) amounting (after correction of what appears to me to be an arithmetical mistake in relation to the period from January to March 1999) to £24,887. He accepted that there was a period when the pursuer would have been unfit for work in any event on account of his angina. He submitted that the period that should be left out of account for that reason was from 15 February 1998 to 31 December 1998. Apart from that period, however, Mr McEachran submitted that the pursuer was

entitled to recover loss of earnings in respect of the whole period from the accident to date. His (arithmetically corrected) calculation can therefore be set out as follows: 21.6.97 - 15.2.98: say 7.5 months at £17,900 per annum £11,187.00 16.2.98 - 31.12.98: no loss attributable to the accident 0.00 1.1.99 - 31.3.99: 3 months at £18,437 per annum (corrected) 4,609.00 1.4.99 - 31.12.99: 9 months at £20,553 per annum 15,414.00 Sub-total: 31,210.00 Deduct: payments received £17,501.00 Less amount refundable to ESW 11,217.00 6,284.00 Total: £24,926.00

- [40] Mr Stewart's submission was that the pursuer had suffered no recoverable loss of earnings. His primary submission was that the pursuer was truly unfit for work only until September 1997. At best, the pursuer would be entitled to recover loss of earnings for the period to February 1998, when the angina supervened as the primary cause of his unfitness. At most, therefore, the gross claim, before taking sick pay into account, was £11,187. The pursuer had, however, failed to establish a proper basis for treating part of the sick pay as refundable. The whole sick pay therefore fell to be set off against the loss of earnings. That had the effect of eliminating any loss.
- [41] The pursuer was, despite the angina from which he had for a time been suffering, fit for work on the day of the accident. I have no hesitation in finding it proved that the accident rendered him unfit for work. I do not consider that on a proper view of the evidence I should conclude that he was fit to return to work in September 1997. At that stage his symptoms were improving, but he was still suffering pain. Dr Selfridge raised the question of his returning to light duties, but the discussion of whether such duties were available and whether he would be fit for them then dragged on inconclusively until February 1998. The pursuer continued to undergo physiotherapy until November 1997. In the event he was not certified as fit for work of any sort at any time prior to mid-February 1998. It is clear, in my view, that at some stage shortly before he underwent angioplasty, the pursuer reached a condition in which, irrespective of the effects of the accident, he was unfit for work because of his heart condition. Dr Selfridge identified mid-February as the relevant date, and that was the date adopted by Mr McEachran in his submissions. It is somewhat arbitrary to set a specific date, but mid-February seems to me on the evidence to be broadly right. In these circumstances I am of opinion that the pursuer is entitled to recover any wage loss that he suffered in the period from the accident until mid-February 1998.
- [42] The question which then arises is whether the pursuer has proved that from some subsequent date he ought to be regarded as again unfit for work by reason of the consequences of the accident. According to Dr Kennedy, by July 1998 the pursuer's cardiac pathology had no effect on his ability to work. I accept that that evidence is objectively sound. The fact is, however, that the pursuer continued to regard himself as disabled by angina at least until the end of 1998. Indeed by the date of the proof he was still on a substantial quantity of cardiac medication. Whether the heart symptoms of which he complained in the period after the operation had any organic basis seems to me, on the evidence, to be highly doubtful. It is, however, in my view difficult for the pursuer to say that

he was once more unfit solely because of the consequences of the accident, when he was continuing to complain of material cardiac or quasi-cardiac symptoms. It was, no doubt, in recognition of that difficulty that Mr McEachran excluded the period to the end of 1998 from the claim which he advanced. It is not, in my view, clear that that can be regarded as a cut-off date for the effects of the cardiac condition. But the more important question is whether the evidence demonstrates that latterly the pursuer has been unfit for work by reason of the consequences of the accident.

- [43] As I have already indicated in discussing solatium, the view which I take of the medical evidence is that the pursuer continues to suffer some symptoms of pain in the neck and back which restrict to some extent his range of activities, but that the full extent of the symptoms and disability of which he complains is the result of voluntary exaggeration on his part. I have also already adverted to the difficulty, in such a situation, of identifying with any certainty where the genuine continuing symptoms end and the exaggeration begins. It seems to me, however, to be reasonable to conclude that the pursuer has failed to prove that he is any more disabled by the consequences of the accident now than he was immediately before he underwent the angioplasty. At that stage his fitness for work was under consideration. The correspondence between Dr Selfridge and Dr Pugh was inconclusive, the latter looking to the former to certify the pursuer's fitness for light duties and the former looking to the latter to confirm that light duties were available. It seems to me, however, that the discussion culminated in Dr Pugh's letter to Dr Selfridge dated 23 March 1998 (No. 7/1/29 of process), in which he wrote: "Having [assessed Mr Leebody] I formed the opinion that he could return to work providing that the amount of walking and climbing he is asked to do is kept to an absolute minimum. ... East of Scotland Water have assured me that it is possible to accommodate Mr Leebody on the above restrictions and having talked things through with him he himself feels able to return to work on this basis. With your agreement therefore I would be grateful if you could sign him off ..." There was, of course, no question of Dr Selfridge signing the pursuer off as fit for work at that stage because he was awaiting angioplasty, but if it had not been for the coronary condition, it seems to me that Dr Pugh and Dr Selfridge would have been in agreement that the pursuer could return to his work with ESW on the basis that his avoidance of walking and climbing could be accommodated.
- [44] In these circumstances, while I accept that the pursuer has some continuing symptoms and some restriction of the activities that he can undertake, I am not satisfied that it has been proved that he has since the beginning of 1999 been unfit for work of the sort which he formerly did by reason of residual effects of the injuries he sustained in the accident. I therefore do not consider that the pursuer has made out his claim for loss of earnings in respect of the period after 1 January 1999. The gross amount of the loss of earnings to date which the pursuer has established is therefore £11,187. The remaining question is to what extent the payments which he received from ESW after the accident fall to be set off against that figure.

- [45] Paragraph 6 of the Joint Minute records that it is agreed: "That between 20 June 1997 and the date of his retirement from the employment of [ESW] the pursuer received net pay of £17,501.88 containing an element of sick pay, all as detailed in the [ESW] wage records relative to the pursuer from 22 June 1997 to 31 July 1998 comprised within no. of process". The documents referred to in that paragraph (although the reference has been left blank) are to be found in No. 6/3 of process. In addition to that agreement, there was evidence from Karen Devlin, ESW's payroll manager, by reference to her letter to the pursuer's solicitors dated 31 July 1998 (contained in No. 6/3 of process), to the effect that the total sick pay paid to the pursuer was £12,777.29, of which £1559.60 was statutory sick pay, leaving the amount of occupational sick pay at £11,217.69. It can be seen from the other documents in No. 6/3 of process referred to in the Joint Minute that those figures are gross.
- [46] It is in my view necessary to go behind the gross figures mentioned in the letter of 31 July 1998 and the total net figure mentioned in paragraph 6 of the Joint Minute, and the terms of that paragraph enable me to do so. In my opinion, in calculating the pursuer's loss of earnings, sick pay received by him *prima facie* falls to be set off against the calculation of the earnings which he would have received if he had been at work. It is the net amount of sick pay after tax that would fall to be so set off, because the calculation of the earnings which the pursuer would have received if he had been at work is based on net wage rates. And it is only sick pay received for the period in respect of which wage loss is held to be recoverable that falls to be set off. Whether any payments, other than sick pay, received by the pursuer fall to be set off in the same way depends in my view on the nature of the payment in question. Where, however, the pursuer is under an obligation to reimburse payments to his employer in the event of his recovering damages, no set-off takes place (Administration of Justice Act 1982, section 10(e)).
- [47] In this case Mr McEachran maintained that the pursuer had established that he was under an obligation to reimburse sick pay to ESW. Mr Stewart maintained that he had failed to do so. The pursuer identified his signature on a docquet dated 1 June 1998 attached to a letter from Mrs Devlin (No. 6/16 of process). The docquet is in the following terms: "I understand that I am liable to repay East of Scotland Water the sickness allowance paid (or proportion thereof) from any damages which I may receive from a Third Party on (sic) accordance with Para 52.4(3) APT&C of the NJC Conditions as explained in the original of this letter." The letter states: "Under the [sickness allowance] scheme, if eventual damages are paid to you by a third party because of the incident then, strictly speaking, you are not entitled to receive Sickness Allowance. However, as it is never possible to anticipate the outcome of any claim you may make and so as to try and avoid placing you at a financial disadvantage the following procedures are adopted. East of Scotland Water has paid the Sickness Allowance you would normally be entitled to but this will be treated as an advance in accordance with Para 52.4(3) APT&C of the NJC Conditions. In turn you are required to sign an undertaking indicating that if you ultimately receive damages then you will repay all the Sickness Allowance (or a proportion if that is appropriate) in which case your absence will be treated as Special Leave and not deducted from your Sickness Entitlement." Paragraph 52.4(3) is in

inter alia the following terms: "Where ... an intention [to pursue a claim against a third party] is indicated the authority may, having regard to the circumstances of the case, advance to the officer a sum not exceeding the sickness allowance provided under this Clause, subject to the officer undertaking to refund to the authority the total amount of such allowances or such proportion thereof represented in any amount of damages received." Mr Stewart's submission was that the obligation undertaken by the pursuer in the docquet did not bring the case within section 10(e), because it post-dated the relevant payments. To come within section 10(e), he submitted, the obligation had to be in existence before the payments by the employer were made.

- [48] In my view, Mr Stewart's submission involves an over-technical approach to the application of section 10(e) to the arrangements between the pursuer and ESW. It may be, although I do not need to decide the point in this case, that, if a payment was originally made in circumstances where no one contemplated reimbursement, an obligation to reimburse entered into after the payments had been received would not serve for the purpose of section 10(e). But where, as here, there was in existence before the payments were made a collective agreement which applied to the employment contract of the individual and contemplated the making of reimbursable payments, the fact that the pursuer's signature on the acknowledgement of the obligation to reimburse was obtained after the payments had been made is not in my view fatal to the application of section 10(e).
- [49] In these circumstances, I take the question of the extent to which the payments referred to in paragraph 6 of the Joint Minute fall to be deducted in calculating the pursuer's loss of earnings to date in stages. First, I hold that, but for the application of section 10(e), the net amount of the sickness allowance paid by ESW to the pursuer in respect of the period during which I have held that he was unfit for work as a result of the accident would fall to be set off against the net amount that he would have earned if he had been working during that period. Secondly, I hold that in the circumstances section 10(e) does apply, and that it follows that no such set-off requires to be made. Thirdly, I hold that the net amount of the statutory sick pay that the pursuer received during the relevant period does fall to be set off in calculating the loss of earnings. By reference to the gross amount stated in Mrs Devlin's letter of 31 July 1998 (£1559.60), I estimate the net amount at £1200. Apart from sickness allowance and statutory sick pay, the sums which go to make up the total in paragraph 6 of the Joint Minute appear to comprise (i) pay arrears, including arrears of overtime, in respect of periods before the accident (paid in July and August 1997), (ii) accrued holiday pay of £3357.93 gross (paid in July 1998), and (iii) pay in lieu of notice on termination of the pursuer's employment (also paid in July 1998). Neither the first nor the third of these payments seems to me to be a proper deduction in calculating loss suffered by the pursuer between the date of the accident and mid-February 1998. So far as the second item is concerned, part of the amount in question will have accrued in respect of the period for which I have held that the pursuer is entitled to recover loss of earnings. The gross amount of £3357.93 yields a net figure which I estimate at £2585. Assuming that it accrued at a flat rate throughout the year, the portion attributable to the period from the date of the accident

to mid-February 1998 would be approximately two thirds of the total (£1723), which would be deductible in the calculation of loss of earnings.

- [50] I therefore calculate the net loss of earnings which the pursuer is entitled to recover in respect of the period to date at £8264 (i.e. £11,187 - (£1200 + £1723)). Future Loss of Earnings
- [51] Mr McEachran submitted that the pursuer was entitled to future wage loss of approximately £140,400. That figure was derived from (i) the multiplicand of £20,553 calculated in the manner indicated in paragraph [38] above, and (ii) a multiplier of 6.831 drawn from the 3% column of Table 13 of the Ogden Tables, with appropriate adjustments. The essential substratum for that submission, however, is a finding in fact that the pursuer is, by reasons of the injuries suffered in the accident, permanently incapacitated from work. Had I made a finding to that effect, I would have given effect to Mr McEachran's submissions as to the proper calculation of the sum to be awarded. As I have already indicated, however, I am unable to make such a finding. Mr McEachran made no alternative submission based on the hypothesis that the pursuer was fit for some form of work, but had suffered a diminution in earning capacity. Although on record there is an averment that the pursuer, if fit for work, would be seriously prejudiced in the labour market, no evidence was led which addressed that eventuality and which would enable me to quantify the value of such prejudice. It would not, in my view, be appropriate in these circumstances for me to speculate on that subject, particularly where the finding that the pursuer exaggerates his disability makes it difficult to reach any clear conclusion as to whether and, if so, to what extent his working capacity is genuinely diminished as a result of the injuries which he sustained in the accident. In the result I do not consider that the pursuer has established that he is entitled to recover any damages in respect of future loss of earnings or loss of future earning capacity. Services
- [52] Mr McEachran presented an undifferentiated claim under sections 8 and 9 of the Administration of Justice Act 1982 in respect of necessary services rendered to him by his wife and his inability to render personal services to his wife. The claim was for £5000 per annum. The claim to date was thus calculated at £12,250, and the claim for the future was brought out at £82,400 by the application of a multiplier of 16.48 derived from the 3% column of Table 11 of the Ogden Tables.
- [53] As I have said more than once before, I am of opinion that a distinction must be maintained between section 8 and section 9 of the 1982 Act and separate sums awarded under each. That is because by virtue of section 8(2) the pursuer comes under an obligation to account for the sum awarded under section 8 to the relative who provided the necessary services. That obligation cannot be fulfilled if an omnibus award is made under both sections. When I pointed that out to him, Mr McEachran sought to separate the two claims.
- [54] Dealing first with the claim under section 8, Mr McEachran submitted, by reference to a document (which was not introduced in evidence) showing charge rates for various forms of care, that Mrs Leeboddy should be remunerated at the rate of £5 per hour for two hours per day, i.e. some £3640 per annum. It seems to me that the main service which Mrs Leeboddy

performs for the pursuer, which I accept on the evidence is necessary, is the provision of assistance to enable him to turn in bed or get up from bed. Her evidence was that she did that two or three times a night. I have no doubt that is very wearing for her, but it does not seem to me to be something that is very readily computed by reference to an hourly rate. I would assess it as meriting remuneration of the order of £1000 per annum. Making a modest additional allowance for the first few months after the accident when the pursuer probably needed somewhat more assistance, I would therefore award £3000 to date. For the future, I do not consider it appropriate to apply the whole life multiplier from the Ogden Tables, partly because the duration of the services may be restricted by Mrs Leeboddy's ability to continue to provide them, and partly because, although I have accepted that these services are and require to be provided, the long term position is in my view rendered somewhat uncertain by my view of the extent to which the pursuer exaggerates his condition. I take the view that a future award of £5000 would be fair and reasonable.

- [55] Turning to the section 9 claim, Mr McEachran began by submitting that it should be assessed at £5 per hour for one hour a day, but later accepted that it might be as little as two hours a week. The evidence in respect of this claim was in my view rather vague. There was reference to the pursuer carrying out decorating, plumbing, minor car maintenance, gardening and building fences. The evidential basis for valuing those services in the way suggested was even vaguer. I accept that the pursuer's capacity for heavier physical tasks has probably been somewhat reduced, but again the difficulty is in knowing just how far that reduction genuinely goes. Making a very broad assessment as best I can, I shall award £750 for the period to date (bearing in mind that for almost a year of that period the pursuer was in any event incapacitated by his cardiac condition), and £5000 for the future. Pension Loss
- [56] The facts relating to the pursuer's claim for loss of pension benefits were agreed, in paragraph 8 of the Joint Minute, as follows: "(a) That the difference in present day value between the pension the pursuer would have received under the Lothian Pension Fund Scheme, in terms of the Local Government Pension Scheme (Scotland) Regulations 1998 (S. I. No. 336), had he retired at age 65 and the pension he will receive from age 65 under actual retirement arrangements is £10,000;
- (b) that the present day value of pension received and receivable under the actual retirement arrangements (being £5,418 per annum index linked from 19 July 1998) up to age 65 is in total more than £10,000;
 - (c) the pursuer is currently in receipt of the same level of pension as he would have been entitled to if he had continued working until or about his 61 st birthday, being the earliest point he could have retired at without sustaining pension loss;
 - (d) that had the pursuer worked to age 65 he would have obtained an increased pension benefit valued at £2815 in respect of his AVC pension with CGU."

- [57] Mr McEachran submitted that those agreed figures disclosed that the pursuer will suffer a loss of pension benefits amounting to £12,815 (the aggregate of the figures in paragraphs 8(a) and (d) of the Joint Minute). Mr Stewart submitted that they showed that the pursuer will suffer no such loss. The defender did not, as I understood Mr Stewart's submissions, dispute that it was appropriate to regard the pursuer's early retirement as causally related to the accident. In short, the defender's submission was that against any reduction in pension benefits to be received in the period after the pursuer's 65 th birthday there required to be set the pension benefits received and to be received in the period up to that birthday.
- [58] The pursuer's submission on this aspect of the case were made by junior counsel, Miss Cherry. She referred to Bennett, Personal Injuries Damages in Scotland , 47, to three recent Scottish cases, Cantwell v Criminal Injuries Compensation Board (28 July 1998, Lord Milligan, unreported), Logan v Strathclyde Fire Board (12 January 1999, Lord Eassie, unreported) and Grassie v MacLaren (26 March 1999, Lord Cameron of Lochbroom, unreported), and to one English case, Longden v British Coal Corporation
- [1998] AC 653 . Before turning to the cases, it is as well to note that section 10 of the Administration of Justice Act 1982 provides inter alia as follows: "Subject to any agreement to the contrary, in assessing the amount of damages payable to the injured person in respect of personal injuries there shall not be taken into account so as to reduce that amount - any contractual pension or benefit (including any payment by a friendly society or trade union)". The effect of that provision, it was submitted, was to prevent a pension obtained on early retirement being brought into account so as to reduce loss of earnings. It was not to be construed as requiring, in the calculation of pension loss in respect of the period after the normal retiring age, any lesser pension actually received in that period to be left out of account. The ridiculous consequences of such a construction were pointed out in argument in Cantwell (see page 11). The live issue related to whether, in determining whether there had been a loss of pension benefits, the proper approach was (a) to compare the pension which would have been received after normal retirement age if the accident had not happened with the pension actually received after that age, or (b) on the other hand to compare the pension which would have been received after normal retirement age if the accident had not happened with the aggregate of the whole pension benefits actually received, both before and after normal retirement age. In Logan , Lord Eassie adopted the latter view. In Grassie , Lord Cameron of Lochbroom adopted the former. Miss Cherry's submission, for which she also sought to derive support from the speech of Lord Hope of Craighead in Longden at 669D, 670F and 672D, was that Logan was wrongly decided, and that I should follow Grassie .
- [59] Mr Stewart submitted that there was no loss of pension benefits because the additional pension benefits received through early retirement more than outweighed those lost through early retirement. The effect of Parry v Cleaver

[1970] AC 1 was that pension benefits should not be brought into account so as to diminish a loss of earnings (see Law Commission Consultation Paper No. 147, "Damages for Personal Injury: Collateral Benefits", paragraph 2.32). *Parry v Cleaver* was not concerned with whether pre-retirement age pension benefits should be set off against post-retirement age pension loss. Section 10(a) of the 1982 Act was concerned with the same subject matter as *Parry v Cleaver*, namely whether one kind of benefit could be set off against a different kind of loss. The issue in the present case concerned the set-off of pension benefits against pension loss. Longden was of no application in Scotland, because it was expressly recognised that the matter was resolved for Scotland by statute (per Lord Hope at 670F). In any event it was artificial to look at the matter period by period as Lord Hope did in Longden at 669A. The reference there to the concept of accounting periods was inappropriate. Lord Hope's reference at 669C to its being unreasonable to expect a plaintiff to set aside sums received as incapacity pension in the period before normal retiring age in order to make good his loss of pension after that age overlooked the fact that the court was considering the award of a lump sum of damages. Where at 669G Lord Hope said that in *Parry v Cleaver* it was held in relation to incapacity pension benefits that: "It was because they were receipts of such a nature that - except in so far as they fell to be set against a loss of pension arising in the same period - they should not be considered at all in computing damages", it was not clear that that was what had in fact been decided in *Parry v Cleaver*. Where what was under consideration was whether the pursuer would suffer a loss of pension benefits, there ought to be brought into account all pension benefits which he would in fact receive, whether before or after the normal retirement age.

[60] In my opinion the pursuer's submissions are to be preferred on this aspect of the case. I do not consider that section 10(a) provides a complete answer to the issue which has to be decided in the present case. What that section makes clear, in my opinion, is that pension benefits must not be brought into account so as to diminish a claim for loss of earnings. Neither party contended that the effect of the section was also to prohibit wholly the bringing into account of pension benefits so as to diminish a loss of pension benefits. The absurdity of adopting that view of the effect of the section was clearly pointed out in *Cantwell* at 11. The issue which requires to be addressed in the present case is the extent to which pension benefits actually received or to be received ought to be brought into account so as to diminish pension loss suffered or to be suffered. In my opinion the proper approach is to examine the loss claimed period by period. In respect of the period up to normal retirement age the pursuer may be able to point to a loss of earnings (although the pursuer in the present case happens not to have established such a loss). If he does so, any pension benefits which he is entitled to receive in that period cannot be brought into account so as to diminish the loss of earnings. That is the effect of section 10(a) (in Scotland) and *Parry v Cleaver* (in England). Attention can then be turned to the period after the normal retirement date. In respect of that period the loss is of pension benefit. A loss of pension benefit can only be calculated by comparing the pension benefit to which the pursuer would have been

entitled if the accident had not happened with the pension benefit he will actually receive in the events which have happened. It therefore seems to me to be inevitable that the actual pension received during that period should be brought into account in the computation of the loss. But it seems to me to be a very different matter to suggest that there should also be brought into account in respect of the period after normal retirement age pension benefits which (i) were received before that age, and (ii) had to be left out of account in calculating the loss suffered in that earlier period. To leave such benefits out of account in the earlier period but roll them up and carry them forward into the calculation in respect of the later period seems to me to be unfair.

[61] The conclusion which I have reached on this issue accords with the views expressed by Lord Cameron of Lochbroom in *Grassie*. I also find support for my conclusion in Lord Hope's speech in *Longden*. I do not consider that Mr Stewart was right in suggesting that *Longden* was of no assistance in Scotland because Lord Hope recognised that in Scotland the matter was regulated by statute. Although Lord Hope noted (at 670F) the existence of section 10(a), he also pointed out (at 671A) that it did not appear that in the other jurisdictions mentioned (including Scotland) the issue then before the House of Lords had been considered. In my view Lord Hope's reasoning affords helpful guidance as to the correct solution to the issue in Scotland. I mention three passages from his Lordship's speech: "But what the defendants are seeking to do is to bring into account income receipts arising in one period, which cannot as a result of *Parry v Cleaver* [sc. in Scotland section 10(a)] be set against the wage loss arising in that period, in assessing the loss of income arising in another period. That seems to be in conflict with basic accounting principles. But in the legal context it is also open to objection on the ground that it is unfair" (669A); "I think that it would ... strike the ordinary man as unjust if the plaintiff's claim for loss of pension after his normal retirement age were to be extinguished by capitalising sums paid to him before that age as an incapacity pension to assist him during his disability" (669D); "It is impossible to reconcile the defendants' argument that at the end of the whole exercise one must stand back and assess the net loss, and in doing so make the deduction for which they contend, with the decision [in *Parry v Cleaver* and *Smoker v London Fire and Civil Defence Authority*

[1991] 2 AC 502] that these payments cannot be deducted against a claim for loss of income arising in the same period. The only reason why incapacity and disability pension payments received after the normal retirement age must be brought into account in computing the claim for loss of pension after that age is that the claim at this stage is for loss of pension, so one cannot properly calculate the loss of pension arising in this period without taking into account receipts of the same character arising in the same period" (670A-B). In the result, therefore, I find that the pension benefits which the pursuer has received and will receive before he reaches the age of 65 do not fall to be brought into account in calculating the loss of pension benefits which he will suffer after that age. I therefore find that the pursuer will suffer a loss of pension benefits in the sum of £12,815. Interest [] It is in my view appropriate to award interest on that part of the award of solatium that relates to the past. Mr McEachran submitted that 60% of the total should be

treated as relating to the past. Although I have awarded solatium on a factual basis very different from that proposed in Mr McEachran's submissions, I am of opinion that that apportionment between past and future remains appropriate. I therefore award interest on £9000 from 20 June 1997 to date at 4% a year. That amounts to £990. Past wage loss also in my view attracts interest. Since the whole of the loss which I have awarded (£8264) accrued between 20 June 1997 and mid-February 1998, I consider it appropriate to award interest on that sum at 8% a year from the mid-point of that period. That amounts to about £1600. The past element of the section 8 services award (£3000) in my view attracts interest at the rate of 4% a year from the date of the accident. That amounts to £330. So too, in my view does the past element of the section 9 services award (£750). That amounts to about £80. Result

[62] I therefore assess the damages to which the pursuer is entitled as a result of the accident as follows: 1.0 Solatium £15,000.00 1.1 Interest on 60% thereof 990.00 £15,990.00 2.0 Wage loss to date 8,264.00 2.1 Interest thereon 1,600.00 9,864.00 3.0 Section 8 services to date 3,000.00 3.1 Interest thereon 330.00 3,330.00 3.2 Future section 8 services 5,000.00 4.0 Section 9 services to date 750.00 4.1 Interest thereon 80.00 830.00 4.2 Future section 9 services 5000.00 5.0 Pension loss 12,815.00 TOTAL £52,829.00

[63] I shall therefore sustain the pursuer's first plea-in-law, sustain the defender's second plea-in-law, and grant decree for payment by the defender to the pursuer of the sum of £52,829.
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