

SHERIFFDOM OF LoTHIAN AND BORDERS AT EDINBURGH
IN THE ALL-SCOTLAND SHERIFF PERSONAL INJURY COURT

[2018] SC EDIN 67

PN80/18

JUDGMENT OF SHERIFF R D M FIFE

in the cause

IRENE MCTAMNEY

Pursuer

against

STEPHEN GRANT

Defender

Edinburgh, 19 December 2018

A proof in this action proceeded on 5 December 2018. Mr Bergin, solicitor, appeared for the pursuer. Miss Robinson, solicitor, appeared for the defender. Liability was admitted. The proof was restricted to quantum.

The terms of a medical report from Mr Robert Carter FRCS dated 11 December 2016, production 5/1, were agreed. Two witnesses gave evidence: the pursuer and Prof Kenneth MacKenzie, a consultant ENT Surgeon.

I found the following facts to be admitted or proved:

1. The pursuer was Mrs Irene McTamney aged 65 at the date of proof. The pursuer was employed as a chaperone for special needs children taking them to and from school.

2. On or about 21 July 2016 at around 1.15 pm the pursuer was driving vehicle registration SA55 BVK on East Wellington Street, Glasgow. East Wellington Street was a single carriageway with one lane of traffic in each direction. The pursuer was travelling west. The pursuer approached the junction of East Wellington Street and Nisbet Street. The defender was driving a Range Rover registration G13 SPG north in Nisbet Street. The defender failed to give way at the junction to the pursuer's vehicle on East Wellington Street which had priority and the defender's vehicle collided with the pursuer's vehicle. As a result of the collision the pursuer sustained injury. Liability was admitted by the defender.
3. The report from Mr Carter FRCS dated 11 December 2016, production 5/1, concluded the pursuer sustained the following injuries:
 1. Soft tissue injury to the neck with radiation into the upper back and shoulders;
 2. Soft tissue injury to the anterior chest wall;
 3. Soft tissue injury to both knees;
 4. A potential injury to the left ear.
4. Mr Carter examined the pursuer on 7 December 2016. On the balance of probabilities the injuries to the neck fully resolved within 12 weeks of the index accident; the soft tissue injuries and bruising to each knee lasted for a maximum of four weeks; and the full effects of the discomfort in the chest in relation to the sternum would resolve within six months of the index accident.
5. The pursuer had difficulties sleeping for some time following the accident taking painkillers which were of little benefit.
6. The pursuer had assistance from her son and daughter-in-law with domestic tasks, dressing and shopping for about four weeks following the accident. The pursuer's

son also assisted with gardening and cutting hedges for some months following the accident. Past services were agreed at £260 inclusive of interest to the date of proof.

7. The pursuer was restricted in pre-accident activities for some time including swimming and walking, particularly with her grandchildren.
8. The pursuer's car was written off in the accident. The policy excess was agreed at £100. The pursuer was restricted in her ability to drive until around the end of September 2016 when she acquired a replacement car. The pursuer had a loss of confidence in driving following the accident. It took until about the end of 2016 for the pursuer to regain her confidence in driving.
9. Following the accident the pursuer had the use of a hire car for about four weeks. The pursuer was without a car for several weeks before acquiring a new car in September 2016. The pursuer did not request any extension of the car hire. The pursuer could have bought a replacement car prior to September 2016.
10. The pursuer sustained a significant injury to the left ear as a result of the accident. Two reports were prepared by Prof Kenneth MacKenzie dated 15 March 2017 and 16 August 2017, productions 5/2 and 5/3. On a balance of probability as a result of the accident the pursuer sustained an exacerbation of a pre-existing condition, mild tinnitus, which maintained at a mild to moderate level at the date of proof and was likely to be permanent. The pursuer had no loss of hearing as a consequence of the accident.

Findings in fact and in law

1. The accident was caused by the fault and negligence of the defender as a result of which the pursuer sustained injury.

2. The pursuer has proved on a balance of probability that as a result of the accident the pursuer sustained various soft tissue injuries and an exacerbation of a pre-existing condition, mild tinnitus, to her left ear. The tinnitus is now mild to moderate and likely to be permanent.
3. Solatium is assessed at £9,000 together with interest at 4% a year, two thirds to the past, from 27 July 2016 until 5 December 2018, thereafter at 8% a year until payment.
4. The past services claim inclusive of interest to date of proof is agreed at £260.
5. The policy excess is agreed at £100.
6. Grants decree in favour of the pursuer in the sum of £9,360 with interest on £6,000 at 4% a year from 21 July 2016 until 5 December 2018, thereafter interest on £9,360 at 8% a year until payment; reserves all questions of expenses.

Note

[1] This is an action for damages for personal injury arising from a road traffic accident on 21 July 2016.

[2] The circumstances of the accident were not in issue. The pursuer was driving her Honda Civic car on the major road East Wellington Street, Glasgow when the defender, who was driving a Range Rover, came out from a minor road Nisbet Street colliding with the pursuer's vehicle. Liability was admitted. The pursuer sustained injuries as a result of the accident. The proof was restricted to the assessment of damages.

Witness summary

[3] The pursuer and Prof MacKenzie were the two witnesses to give evidence.

Mrs Irene McTamney

[4] Mrs McTamney gave a brief account of the circumstances of the accident on 21 July 2016. On injuries, Mrs McTamney agreed that the terms of the report from Mr Carter, production 5/1, accurately reflected the soft tissue injuries. Mrs McTamney expanded on the injuries to her chest, neck/shoulders, knees and bruising. She had attended her GP on a number of occasions as a result of the accident. She provided some detail of the support from her son and daughter-in-law with household tasks, dressing, shopping, and gardening in the weeks and months following the accident. Mrs McTamney described difficulties with sleeping, the need to take regular painkillers, restrictions on swimming and walking, particularly with her younger granddaughter.

[5] Mrs McTamney experienced earache to the left ear immediately after the accident. That developed to a constant noise all the time, a swooshing noise. The noise in her left ear started shortly after the accident. She had had no problems with her left ear prior to the accident except when her ears were blocked. She continued to experience noise in her left ear. The pursuer had tinnitus in the left ear.

[6] Mrs McTamney had been to her GP a number of times about her ear: see GP records production 5/5/16 and entries 10 August 2016, 18 August 2016 and 25 August 2016. The GP thought there was an infection in the ear and the pursuer was prescribed antibiotics. There was no improvement to the tinnitus from Mrs McTamney taking the antibiotics.

[7] Mrs McTamney had the swooshing in her left ear continuously and in addition she now had a buzzing sound in the left ear which had been ongoing for about the past six months. The buzzing was not continuous: "comes and goes". The swooshing was constant. The buzzing episodes lasted about a couple of hours going away then coming back, for no reason. The buzzing was becoming more frequent. Mrs McTamney had had no problem

with any buzzing noise pre-accident. The swooshing and buzzing noise was distracting particularly if there was no background noise. Mrs McTamney needed background noise such as the television to take her concentration away from the noise. The noise did impact on her sleep. She would tend to sleep for a few hours then wake up, making her tired the following morning and making her irritable. Mrs McTamney was usually good natured.

[8] Mrs McTamney liked to read books but because of the constant noise in her left ear she ended up losing concentration.

[9] The condition in her left ear was constant and permanent. Mrs McTamney could not see how she was ever going to get rid of the noise:

“It can be upsetting at times”.

“It’s so annoying”.

[10] While Mrs McTamney was not aware of having had tinnitus pre-accident - her recollection was of blocked ears - she accepted the findings and conclusions of the reports from Prof MacKenzie dated 15 March 2017 and 16 August 2017, productions 5/2 and 5/3.

[11] Her car was written off in the accident. The car was replaced in September 2016 with a newer, smaller car with a smaller engine.

[12] Mrs McTamney had the use of a hire car for about 3-4 weeks following the accident. She received a cheque for the pre-accident value of her car about the end of August 2016. Mrs McTamney was without a car for some weeks which caused inconvenience. It had been pretty challenging looking after the grandchildren having no car. Mrs McTamney made no request to have the car hire extended until the new car was purchased.

[13] Mrs McTamney was a matter of fact witness. There was no issue about her credibility. While Mrs McTamney believed she had no tinnitus pre-accident the medical

records suggested otherwise and Mrs McTamney accepted the opinion of Prof MacKenzie.

Mrs McTamney was otherwise a reliable witness.

Prof Kenneth MacKenzie

[14] Prof MacKenzie was a consultant ENT Surgeon at Glasgow Royal Infirmary, aged 64 at the date of proof.

[15] Prof MacKenzie adopted as part of his evidence in chief the reports dated 15 March 2017 and 16 August 2017, productions 5/2 and 5/3.

[16] Tinnitus involved the patient's perception of noise in their head or ears, either one or both ears, when there were no noises present. There could be many causes. The principal cause was trauma. From the literature road traffic whiplash type injury was a reported cause of tinnitus. It was not really known why that happened as it was not possible to examine the sensory system which was intact and as such could not be examined.

[17] The classic descriptors from patients included buzzing, ringing, whooshing and rushing, any type of noise. It was extremely subjective. It was what the patient related to in real life. An examination of the ear could be normal but the patient could have tinnitus. An MRI scan could be normal but the patient could still have tinnitus. There was not an intervention which could detect where the tinnitus might have come from. Tinnitus could not be cured but could be addressed with rehabilitation such as cognitive behavioural therapy (CBT) to suppress or reduce awareness of the tinnitus. The success of rehabilitation was hugely variable but very worthwhile. There was no medical treatment to cure tinnitus.

[18] Frequently tinnitus can occur after delay. There was no specific period of delay which might lead to the onset of tinnitus.

[19] The pursuer had experienced ear popping. If the ear was popping that was normal and distinct from whooshing or gurgling.

[20] In the case of the pursuer the tinnitus was most likely to be caused by the road traffic accident rather than any infection.

[21] In the report 5/2 Prof MacKenzie described the tinnitus as a mild to moderate form of tinnitus. The pursuer had not been attending any clinics to date; she was coping with the tinnitus herself; the pursuer's rating of 6 (rating 0-10 where 0 was virtually no problem and 10 was the worst one could imagine) as at March 2017 was very subjective. The assessment of mild to moderate tinnitus depended on a consideration of all the evidence in conjunction with the interview undertaken with the pursuer. While the tinnitus was keeping the pursuer awake at night, a most important rating, she did get to sleep. For the tinnitus to be assessed as moderate to severe the pursuer would have to be awake all night. Difficulty getting to sleep and waking up in the night were common features of tinnitus sufferers. The audiometry carried out in March 2017 for both the right ear and the left ear was essentially normal for a person of the age and sex of the pursuer.

[22] The entries in the GP records for 2003 and 2016 (discomfort left ear?? early tinnitus) were sufficient for Prof MacKenzie to conclude that the pursuer may well have complained of tinnitus pre-accident and that there was a susceptibility to tinnitus.

[23] By the date of the second report in August 2017, production 5/3, the perception of the pursuer was that the tinnitus was getting worse. Further audiometry was carried out in August 2017 to identify if there were any changes. The hearing of the pursuer remained normal.

[24] By August 2017 Prof MacKenzie had no change to make to his opinion in the report of March 2017, that on the balance of probabilities the pursuer had had an exacerbation of a

pre-existing condition being mild to moderate tinnitus as a result of injuries sustained in the index accident. The exacerbation of the tinnitus was now permanent.

[25] While tinnitus generally tended to improve over time stress can exacerbate the tinnitus resulting in other noises such as buzzing. That would be regarded as just a different noise to the whooshing and not an indication of the tinnitus getting worse.

[26] The pursuer had an upper respiratory tract infection at or around August 2016. The presence of that infection was likely to have delayed the pursuer's recovery to a certain extent but that was not the cause of the tinnitus.

[27] While Prof MacKenzie accepted the possibility the whiplash injury to the pursuer in 2014 could have caused tinnitus in his opinion that was not a probability.

[28] The pursuer may have had two transient episodes of tinnitus pre-accident. There was no further mention of tinnitus in the medical records, see reports 5/2 and 5/3 and a letter dated 2 October 2017, production 5/4. On a balance of probability it was the accident in July 2016 which caused an exacerbation of the existing tinnitus. Prof MacKenzie did not accept the proposition that the ear discomfort reported in 2003 was tinnitus and that the pursuer continued to have that tinnitus as at the date of accident.

[29] Prof MacKenzie was an impressive witness. He rejected any of the alternative propositions put to him in cross examination as to the cause of the tinnitus from which the pursuer continued to suffer discomfort. Prof MacKenzie had a robust position that, on the balance of probabilities, the accident on 21 July 2016 had caused an exacerbation of the tinnitus as a mild to moderate form of tinnitus and that tinnitus was permanent. In the absence of any contradictory medical opinion the views of Prof MacKenzie were persuasive and accepted by the court.

Submissions

[30] Both parties lodged written submissions briefly expanded upon at the hearing on submissions.

Submissions for pursuer

[31] The pursuer adopted the written submissions.

[32] At page 4 of the submissions for the defender it was stated:

“the Pursuer had tinnitus for 13 years before the index accident...”

That statement was not accurate. It was not in accordance with the evidence of the pursuer or Prof MacKenzie.

[33] At page 7 the defender stated:

“... and the exacerbation of her tinnitus cannot, on the balance of probabilities, conclusively be said to be a result of the index accident”.

That statement was inaccurate. It was not the evidence of Prof MacKenzie. There was no contradictory medical evidence to support that statement.

Submissions for defender

[34] The defender adopted the written submissions. The defender was prepared to concede getting older was not a cause of the tinnitus. Prof MacKenzie had ruled that out.

[35] At page 5 of the pursuer’s submissions reliance was placed on the Judicial College (JC) Guidelines but the guidelines referred to included noise-induced hearing loss (NIHL). The audiometry was normal. The pursuer had not sustained any hearing loss. Further, none of the cases for the pursuer took into account the pursuer had pre-existing tinnitus.

Discussion

[36] Mrs McTamney was a matter of fact witness. There was no issue about her credibility. Mrs McTamney accepted the opinion of Prof MacKenzie.

[37] Prof MacKenzie rejected any of the alternative propositions put to him in cross examination as to the cause of the tinnitus from which the pursuer continued to suffer discomfort. Prof MacKenzie had a robust position that, on the balance of probabilities, the accident on 21 July 2016 had caused an exacerbation of the tinnitus as a mild to moderate form of tinnitus and that tinnitus was permanent. There was no contrary medical evidence.

[38] The various propositions put by the defender on causation of the pursuer's tinnitus are rejected. The pursuer has not had tinnitus since 2003, for 13 years prior to the index accident. Damages fall to be assessed on the basis of the following:

1. Agreed medical report from Mr Carter production 5/1;
2. Evidence of pursuer;
3. Evidence of Prof MacKenzie, medical reports productions 5/2 and 5/3 and letter from Prof MacKenzie production 5/4.

[39] I was referred to a number of cases and the JC Guidelines (14th Edition) on the assessment of solatium (refer to the written submissions). A number of these cases were of some assistance. The assessment of solatium is fact specific.

[40] The cases and the JC Guidelines provide a general indication of the range of awards for solatium. I comment briefly on these:

Tinnitus

1. JC Guidelines at Chapter 5(B) provide a useful range of awards for general damages;

2. *Warne v Octavius Hunt Ltd* [2002] 1 WLUK 40:

This case was not comparable being more serious than the present case. There was significant hearing loss in addition to tinnitus. The tinnitus was in both ears. There was a significant deterioration in hearing loss. The consequences were far worse than in the present case;

3. *Dyer v Metropolitan Police* (1998) Kemp & Kemp:

This case was not comparable as damages were agreed. There was very little detail of the injuries sustained. It appeared from the brief report that the injuries were more serious than in the present case;

4. *Williams v Baker* [2004] 5 WLUK 733:

This case was of some assistance. The plaintiff sustained multiple injuries in a road traffic accident. He first noticed symptoms of tinnitus two days after the accident. He became aware of a gushing noise in both ears. The noise persisted thereafter. Initially the noise was intrusive but the plaintiff was able to adapt. The noise occasionally disturbed him at night, but he sought to mask its presence by keeping on the television. There was no associated hearing loss. The prognosis was that the tinnitus would be permanent. General damages were assessed at £5,000 for the tinnitus with an up-to-date value of £7,716.62. The present case was less serious as the tinnitus was only in the left ear and there was an exacerbation of a pre-existing tinnitus;

5. *Allan v Halsey* [2018] 10 WLUK 483:

This case was of some assistance. The plaintiff suffered symptoms of tinnitus following a road traffic accident. At the assessment of damages hearing it was agreed that the correct JC Guideline was Chapter 5(B)(d). There was no specific bracket for tinnitus without noise-induced hearing loss (NIHL). The plaintiff's symptoms were found to be tinnitus alone,

which was mild to moderate. There had been no change to the plaintiff's hearing. The court found the condition of tinnitus itself was an impairment – an annoyance. The plaintiff had permanent tinnitus for life, at only 48 years old. Using a “common-sense approach” and considering the guidance in Chapter 5, a figure that centred around £10,000 met the right level of compensation for lifelong tinnitus where there was no certainty of improvement. General damages were assessed at £10,000 for the tinnitus. Adopting a common-sense approach may be appropriate in the present case. The plaintiff was aged 49 at trial. The pursuer in the present case was aged 65 at the proof. That case was more serious. There was an exacerbation of tinnitus in the present case.

[41] The pursuer stated a reasonable starting point for solatium for the tinnitus alone would be £10,000. The defender assessed solatium for the exacerbation of the tinnitus at £2,000.

Soft tissue injuries

[42] The assessment of solatium for the soft tissue injuries was separated by both parties from the tinnitus. That was a matter for parties. Both parties relied on the JC Guidelines: Chapters 6(A)(g), 7(A)(c)(iii) and 13.

[43] While the pursuer provided separate figures for neck/back, chest and knee injuries once the claim for tinnitus was taken out, assessed at £10,000, solatium for a combination of the soft tissue injuries was assessed by the pursuer at around £3,000.

[44] The defender submitted an appropriate award for the soft tissue injuries would be £3,000.

[45] The defender relied on the following cases:

1. *Catlow v Kemeney* [2017] 6 WLUK 370:

This case was of some assistance, perhaps slightly more serious than the present case but not materially more serious. The plaintiff suffered soft tissue injuries to the left shoulder, arm and knee. The plaintiff also experienced moderate travel anxiety. Household activities were restricted for some time as were swimming, walking and surfing. The plaintiff was expected to make a full recovery of all injuries within eight months from the date of accident. General damages were assessed at £3,000 (updated value £3,130).

2. *Moore v Bangajaena* [2017] 7 WLUK 5:

This case was of assistance with a slightly longer recovery period. The plaintiff suffered soft tissue injuries to the neck, back and chest with a full recovery anticipated within 10 months from the date of the accident. General damages were assessed at £3,000 (updated value £3,123.12).

Decision

[48] There is no specific bracket in the JC Guidelines which applies to an exacerbation of tinnitus without noise-induced hearing loss. There was no material difference between the parties on the value of the soft tissue injuries. Ultimately, each case turns on its own facts and circumstances. A global award for solatium is to be made.

Solatium

[49] I assess solatium at £9,000 with interest on two thirds to the past (interest on past loss agreed by parties), namely interest on £6,000 at 4% a year from 21 July 2016 until 5 December 2018, thereafter at 8% a year until payment.

Past services claim

[50] The past services claim inclusive of interest to date of proof was agreed at £260.

Loss of use/inconvenience

[51] I am not persuaded any loss of use claim has been established on the evidence. The pursuer could have asked to extend the car hire period until she purchased a new car. She did not do so. Any inconvenience claim was very modest and is taken into account in the assessment of solatium.

Policy excess

[52] The policy excess was agreed at £100.

Expenses

[53] The parties were agreed all expenses should be reserved. The sheriff clerk will fix a hearing on expenses.