SHERIFFDOM OF LOTHIAN AND BORDERS AT EDINBURGH

IN THE ALL-SCOTLAND SHERIFF PERSONAL INJURY COURT

[2019] SC EDIN 73

Court Ref: PN-2311/18

JUDGMENT OF SHERIFF PETER J BRAID

in the cause

MRS PAULINE SULLIVAN

Pursuer

against

DUNNES STORES (UK) LIMITED

Defenders

Pursuer: Conway, Conway Accident Law
Defender: Thomson, Advocates; BLM Solicitors

Edinburgh 12 August 2019

The sheriff, having resumed consideration of the cause, makes the following findings in fact:

1. The pursuer is Pauline Sullivan, designed in the instance. Her date of birth is 29 December 1977. She is employed as a bank adviser.

2. The defenders are Dunnes Stores (UK) Limited, designed in the instance. They have a place of business at Antonine Shopping Centre, Tryst Road, Cumbernauld. They are, and were at the material date, the occupiers of those premises.

3. On 7 November 2015 at approximately 4.20 pm the pursuer was within the defenders' said premises at Antonine Shopping Centre. The floor has a tiled surface. It was a wet day.

4. The pursuer was walking towards the double entrance/exit doors to make her way to the car park. In so doing, she walked on a mat, which had been laid on the floor, near the doors. However, the mat did not fully cover the entrance area, leaving a gap adjacent to the exit, which was tiled.

5. As she was walking on the mat, towards the doors, the pursuer looked in her handbag, for her car keys.

6. As she walked off the mat, on to the tiled area, the pursuer slipped on moisture which was present on the floor.

7. The tiled floor at the entrance of the premises presented a slipping hazard to visitors when wet.

8. The state of the premises was hazardous by reason of moisture on the floor.

9. The defenders knew or ought to have known that if moisture was on the floor, it represented a hazard to persons walking on it.

10. The defenders failed to take reasonable precautions to eliminate or reduce the risk thereby created.

11. Having slipped, the pursuer fell and suffered a severe injury to her left knee, leg and foot. An ambulance was called to the scene and ambulance staff reported the knee being medially deformed with no pulses, and loss of sensation. The pursuer was given gas and air, and morphine, while her leg was manipulated back into position, to restore circulation to her foot. She suffered excruciating pain. She was taken by ambulance to Accident and Emergency at Monklands District General Hospital, Airdrie. There it was ascertained that she had suffered a left knee dislocation and a severe and complex multi-

ligament injury as a result of the uncontrolled rotation inwards and axial load applied to the knee at the time of the accident. She was taken to theatre for a manipulation of the knee under anaesthetic and a temporary Plaster of Paris backslab was applied.

12. The pursuer subsequently underwent an MRI scan of her knee on 11 November 2015 which showed damage to the anterior and posterior cruciate ligaments and she was subsequently transferred to the care of Mr Mark Blyth, consultant knee surgeon, Glasgow Royal Infirmary. She underwent surgery there on 13 November 2015. This was in the form of a left knee arthroscopy and repair of the lateral collateral ligament. It was noted intra-operatively that she had ruptured both the posterior cruciate and anterior cruciate ligaments. There was also damage to the popliteus muscle and the lateral collateral ligament as well as a popliteal fibular ligament; and damage to the arcuate ligament. There was a fibular head avulsion. The pursuer underwent a lateral ligament reconstruction using hamstring tendon graft called a Larson reconstruction. This corrected hyperextension and instability of the knee. The common perineal nerve was also explored at the time of surgery and found to be intact but there were external signs of injury around the fibular and over a 15mm section of the nerve. The pursuer was placed in a cricket pad extension splint for 24 hours and then placed in a knee brace for supported mobilisation.

13. The pursuer was discharged home on 14 November 2015. She and her then seven year old daughter lived with her parents in a two storey house. The pursuer's bedroom was upstairs. At first she was completely bedridden. She required assistance from her mother with dressing, toileting, cooking, shopping and with the care of her daughter.

She was unable to leave the house, other than in a wheelchair. She was unable to drive for about three months. She required mobility aids, namely a zimmer and two crutches, to get around the house.

14. The pursuer's symptoms gradually improved during the three months following her accident. For the first three to four weeks after her discharge, she couldn't walk far. She had to go up and down stairs on her bottom for about six to eight weeks. The brace was removed in January 2016. She returned to work after five months. She attended physiotherapy (16 sessions). She had to take painkillers for about eight months. When she returned to work she was still using a walking stick but discarded that in or about May 2016.

15. The pursuer has recovered well from her injury. She was able to drive her car (an automatic) after three months. She was able to walk her pre-accident distance within a year. She has recently resumed attending the gym. She has returned to most of her pre-accident activities, with the exception of running, which she does not have the confidence to do. She also no longer ice-skates or attends roller-disco. She is generally less confident when walking.

16. The operation has left the pursuer with a permanent scar on the outside of her left leg (shown in photographs 5/15/1 and 5/16/2 of process). It has also left her with a less prominent, but nonetheless noticeable, scar on the other side of her knee, shown in photographs 5/15/2 and 15/16/1 of her knee.

17. There is a 40-50% risk of the pursuer developing osteoarthritis within the next 10-20 years. If she does, there is a greater than *de minimis* risk of her requiring a knee replacement.

18. If she did require a knee replacement, she would be hospitalised for several days. If still working at that time, she would suffer wage loss. She would be able to resume her normal day to day activities within three to six months. She would require the provision of services, although it is not known who the provider of those services would be.

19. As a result of the accident the pursuer suffered net wage loss (including interest to 9 July 2019) of £4,462.80, comprising £4,096.65 recoverable sick pay and £566.15 wage loss.

Makes the following findings in fact and law:

1. This court has jurisdiction.

2. The accident was caused by the fault and negligence at common law of the defenders and by their breach of the Occupiers Liability (Scotland) Act 1960 in failing to take reasonable care for the pursuer's safety.

3. The pursuer did not breach her duty to take reasonable care for her own safety.

4. Solatium is reasonably quantified at £30,000, 80% of which is attributable to the past. Interest on that sum at 4% per annum to 9 July 2019 amounts to £3,521.75.

5. The pursuer's mother rendered services to her, reasonably quantified at £3,000. Interest thereon at 4% for three months, and 8% thereafter, amounts to £851 to 9 July 2019.

6. It is not possible to quantify the possibility of future financial loss or provision of services, in the event of the pursuer requiring a knee replacement.

THEREFORE grants decree against the pursuer for payment to the pursuer of the sum of FORTY ONE THOUSAND EIGHT HUNDRED AND THIRTY FIVE POUNDS AND FIFTY FIVE PENCE (£41,835.55) STERLING with interest thereon at 8% per annum from 9 July 2019 until payment; assigns 2 September 2019 as a hearing on expenses.

NOTE

Introduction

[1] The pursuer slipped and fell as she was about to exit the defenders' store in Cumbernauld on 7 November 2015. The accident occurred as the pursuer walked off a mat which had been placed on the floor but which did not extend to the exit doors, and on to a tiled area between the mat and the doors. As a result of the accident, she suffered a serious knee injury. The present action was raised and duly set down for proof which called before me on 9 July 2019. The pursuer was represented by Mr Conway, solicitor, and the defenders by Mr Thomson, advocate.

[2] At the commencement of the proof I was informed that primary liability, hitherto denied, was now admitted. While there was neither a joint minute to that effect, nor an admission on record, the pursuer had lodged a notice to admit, no. 14 of process, calling upon the defenders to admit for the purposes of this action that as at the date of the incident, the floor at the entrance of the defenders premises presented a slipping hazard to visitors when wet. It was accepted by the defenders that no notice of non-admission had been intimated (notwithstanding the mysterious appearance of one in process) and that the pursuer's notice

was therefore deemed to have been admitted. It was on that basis that primary liability was no longer contested.

[3] The issues for resolution at the proof were, therefore, those of contributory negligence, and quantum. Before addressing those, I should say, for completeness, that the defenders' negligence lay in the fact that they knew, or ought to have known, that the tiled floor constituted a hazard when wet. On the day in question, the floor did constitute a slipping hazard because there was moisture on it. Counsel for the defender submitted that it was not known why the pursuer slipped; but given that there was evidence that it had been raining all day and that there were signs in place warning of a slippery floor (albeit those signs were not visible to the pursuer) it is possible to, and I do, infer that the pursuer did slip on moisture on the floor of which the defenders were, or ought to have been, aware. It would have been a simple matter for the mat to have extended all the way to the door, covering the wet tiled area, but it did not. There is no doubt that the defenders' concession of primary liability was wisely made.

The proof

[4] Before the proof began, Mr Conway for the pursuer tendered a brief minute of amendment, proposing two brief averments to be inserted into paragraph 5 of the statement of claim. The first was that "As a result of the leg surgery, the pursuer has a permanent scar". The second was that the pursuer "may suffer further wage loss and require personal services as before" in the event of a knee replacement operation. The second of those amendments was opposed. It became apparent on hearing counsel for the defender that his submission more

appropriately belonged to a hearing on submissions on the evidence. Accordingly, I allowed the record to be amended in terms of the pursuer's minute of amendment, which counsel for the defender confirmed he did not require to answer.

[5] Evidence was then led, from the pursuer and her mother. The pursuer gave her evidence in an entirely straightforward, uncomplicated and understated way. She did not seek to exaggerate the effects of the injury in any way. She was also willing to make concessions which might have been to her disadvantage (for example, that she had been looking in her handbag shortly before she slipped and fell); and if anything she tended to minimise the lasting consequences of the accident (for example in relation to the effect of the permanent scar on the outside of her knee). Accordingly, I accepted the pursuer as an entirely credible and reliable witness.

[6] As far as the circumstances of the accident are concerned, the pursuer said that she had been walking through the store, from her work at the bank, intending to exit into the car park. She had entered the store via the shopping mall of which the store forms part (having entered the mall from her place of work). She was however aware that it had been raining all day and that it was wet outside. As she was walking towards the exit doors, she slipped and fell. She was shown CCTV footage of the incident. This showed her walking towards the automatic exit door. There was a mat which came to an end a short distance before the door. She slipped when she stepped onto the tiles between the mat and the door. The pursuer said that the CCTV confirmed her recollection of what had happened.

[7] In cross-examination the pursuer agreed that she was assuming that she had slipped on water on the floor. She acknowledged that the mat was damp or wet. She couldn't remember if

it was soaking. She agreed that the CCTV showed that as she was walking along the mat she was looking in her handbag and that she wasn't looking where she was going. She agreed with the proposition that if she had not been looking in her handbag she would have been looking where she was putting her feet, although she also said that it was normal to walk looking straight ahead rather than at one's feet, which is true. She had not seen any sign warning that the floor was wet. The CCTV showed that there was such a sign, which was moved into a more prominent position by someone shortly after the accident. At the time she had not noticed any water on the floor. She had not seen wet footprints[1].

[8] As far as the consequences of the accident are concerned, it is unnecessary to rehearse the pursuer's evidence in detail since it is largely reflected in the findings in fact. Of note, however, was that when she looked down at her leg immediately after the accident, it was twisted out of position. The pain she described as "excruciating", the worst pain she had ever experienced. She described her post-accident convalescence in some detail. She acknowledged that she had made a good recovery and could do most of her pre-accident activities, other than that she no longer ran, because she lacked confidence. She spoke to photographs showing a large scar on the outside of her knee, which she said caused her some embarrassment, although, as I have already remarked, she tended to play this down in a good-natured and philosophical fashion. In cross-examination she acknowledged that she had seen Mr Hazarika, consultant orthopaedic surgeon, on 11 July 2018 for the purposes of an expert report (no. 5/1 of process). She confirmed that she had told him the truth. As such she also confirmed that the effects of the

[1] I allowed this question to be asked, despite an objection, because the issue of wet footprints was raised in the affidavit of Nicola Pender, lodged by the pursuer. However, there is no record for there being wet footprints, and in any event, no evidence of where any such footprints might have been.

injury were accurately set out in section 3 of that report. Thus, she acknowledged that her difficulties with activities of daily living lasted for up to three months after the accident, and similarly difficulties with personal hygiene activities for up to three months. She was able to walk her usual pre-injury distance by one year post-event, return to her gym activity (recently) and able to drive her car, an automatic, after three months. Paragraph 3.17 of the report accurately recorded that she had a resolution in pain with no residual significant functional problems with her left knee. These concessions have likewise been reflected in the findings in fact.

[9] The other witness called by the pursuer was her mother, Helen Young. She, too, was an entirely credible and reliable witness. She corroborated the pursuer's account of her injuries. She also spoke to the services which she had had to provide for a period of weeks after the pursuer was released from hospital. In particular, she had to help with the pursuer's personal care, help her shower, wash and dress and make her food. This was all quite time consuming. In the mornings it could take up to two hours, including the time taken to take the pursuer's daughter to school in between. It would be the same again at night. Mrs Young also had to do all the pursuer's shopping and a lot of Christmas shopping. She didn't think the pursuer had completely recovered. The pursuer still walked as though she had a disability. She used to like running but hadn't resumed that activity, nor had she resumed ice skating or roller disco. Mrs Young was not cross-examined.

[10] As regards expert evidence, the pursuer's expert, Mr Hazarika, a consultant orthopaedic surgeon, gave evidence on commission. No. 24 of process is a report by the commissioner. Mr Hazarika spoke to his report, no. 5/1 of process. The defenders had also lodged an expert

report, prepared by Mr Brian Syme, also a consultant orthopaedic surgeon (6/2 of process). That report is agreed in the joint minute of admissions to be the equivalent of his oral evidence (albeit the joint minute mistakenly refers to it as 6/3 of process and also contains an erroneous date). It is unnecessary to go into those reports in detail since there is no disagreement between the experts as to the nature of the injuries suffered by the pursuer, which is accurately set out in detail in the pursuer's statement of claim, and reflected in the findings in fact, nor is there any disagreement regarding their prognosis.

[11] The main factual issue arising out of the expert evidence is the risk of degeneration/osteoarthritis. This is covered by Mr Hazarika at paragraph 4.04 of his report where he referred to certain studies. Based on those studies and the nature of the pursuer's injuries, he estimated that the pursuer had an overall risk of developing osteoarthritis as high as 50% over a 10-20 year period.

[12] Mr Syme agreed with that assertion, at paragraph 7.1 of his report, where he stated that the risk of the pursuer developing osteoarthritis within the next 20 years would on the balance of probabilities be somewhere around the 40-50% mark. This theme was picked up in the evidence of Mr Hazarika taken on commission. At pages 11 and 12 of the commissioner's report, Mr Hazarika confirmed that the chances of the pursuer developing osteoarthritis were as high as 50%, over a 10-20 year period. At page 12, he said that if the arthritis was severe enough, it could restrict the pursuer's mobility. There was a spectrum of severity which didn't necessarily correlate with what was seen in x-rays. It was very much down to a patient's perception of their condition so while signs in x-rays may correlate with quite severe symptoms, it could be the same with quite severe signs in the x-rays which show mild symptoms or

translate to mild symptoms. He went on to say that the pursuer fell into the category of someone who *might* (emphasis added) require a knee replacement within 10-20 years. That would require surgical intervention, admission to hospital as an outpatient for three to five days and a recuperation period of one year to 18 months in total and the patient would return to their normal day to day activities usually between 3-6 months. Mr Hazarika also spoke to a supplementary letter which he had written, 5/17 of process in which he stated that the risk of secondary knee osteoarthritis may be greater than 50% over a 10-20 year period. That letter is dated 29 May 2019.

[13] The final passage of Mr Hazarika's evidence worthy of mention appears at page 4 of the commissioner's report, where he was referred to page 3 of his report in which he recorded that the pursuer had sustained a severe and complex multi-ligament injury to her left knee. When asked why he had categorised the injury as severe he replied that a multi ligament injury is by definition a severe injury to the knee because more than one ligament has been damaged. The knee was at risk of damage to other vital structures which was the case for the pursuer.

[14] Finally, in relation to the evidence, mention must be made of the affidavit by Nicola Pender, who had not witnessed the accident but heard the pursuer scream and went to her aid. She confirmed that her knee was swollen and twisted to the side. The affidavit contained the following passage:

> "The floor was wet from people going in and out. There were no puddles as such but you could see wet footprints on the floor".

As I have recorded above, in the footnote at the end of paragraph 7, there was no record for any case that there were wet footprints, let alone wet footprints at the door or wet footprints which

the pursuer could or should have seen. The lack of record is in any event academic, since Ms Pender did not state in her affidavit where the wet footprints were, and that evidence, even if relevant, is of little value and I attach no weight to it.

The issues

[15] Against all of that background, there were three main issues between the parties. The first was whether there was any degree of contributory negligence on the part of the pursuer. The second was how the pursuer's injury fell to be categorised having regard to the Judicial College guidelines. The third was how, if at all, to quantify the risk that she may require a knee replacement in the future. There is also a relatively minor issue between the parties, namely, how the claim for loss of services should be quantified.

Contributory negligence

[16] As regards contributory negligence, Mr Conway referred to two cases – *Green* v *Dunnes Stores* [2016] IEHC 338 and the unreported Outer House case of *Milne* v *Rank City Wall Ltd* (27 March 1987) which, like the present, involved slipping and in which no contributory negligence had been found, but each case must turn on its own circumstances and I do not derive any real assistance from those cases. He further submitted that in the present case, there was no hazard which was there to be seen, and no evidence of anything which might have put the pursuer on notice that there was a hazard. Mere momentary inadvertence did not amount to contributory negligence. If I was of the view that the pursuer had failed to take reasonable care for her own safety, then in assessing the amount of contributory negligence I should have regard both to

causative potency and blameworthiness. Both of those factors pointed to the defenders bearing the greater share of the blame and any contributory negligence should be assessed at no more than 10%.

[17] In response, counsel for the defender submitted under reference to *Clerk & Lindsell on Torts* that a common sense approach should be taken to what was essentially a jury question. The pursuer knew that it was wet outside, and yet had not been looking at the floor as she walked towards the doors. She had accepted in evidence that if she had been looking she would have seen wet footprints. She could not be devoid of some responsibility for her accident. When one was exiting a shop, knowing that it had been raining, one should pay proper attention to where one was putting one's feet. Contributory negligence should be assessed at between one quarter and one third.

[18] In a brief riposte, Mr Conway said that it was not enough to say that there were wet footprints. The defenders (although they had no record for this in any event) would have to show that there were wet footprints between the mat and the exit, and there was no evidence of that.

[19] On this matter, I prefer the pursuer's submissions. The pursuer was walking at a normal speed through the store. There was, on the evidence, nothing to alert her to the fact that the tiles between the end of the mat and the doors could be slippery. As Mr Conway submitted, there was no evidence that there were wet footprints there, and so I attach no weight to the pursuer's answer in cross-examination that if she had been looking, she would have seen them: since she did not in fact see them, she cannot know what she would or would not have seen. The most that could be taken from that answer is that *if it were proved that wet footprints were*

there, she would have seen them. However, that has not been proved. The fact that the pursuer was momentarily looking in her bag for her car keys is nothing to the point. Even had she been looking ahead, she may have noticed that the mat came to an end but that was not an obvious hazard. There was nothing there to be seen. There was no means of getting to the door other than by walking over the tiles. There was no handrail to hold on to. The pursuer's momentary inadvertence did not cause her to fall, nor contribute to her slipping in any way and I am therefore unable to hold that there was contributory negligence on her part to any degree.

Solatium

[20] As regards quantification of solatium, the main area of controversy between parties was how the injury falls to be categorised in terms of the Judicial College guidelines, which both parties accepted was the primary source to which regard should be had in assessing solatium. Mr Conway submitted that it fell within Chapter M(a)(iii). Chapter M applies to knee injuries generally. Category (a) is for "severe" injuries; and (iii) is for:

> "Less severe injuries than those in (a)(ii) above and/or injuries which result in less severe disability. There may be continuing symptoms by way of pain and discomfort and limitation of movement or instability or deformity with the risk that degenerative changes and the need for remedial surgery may occur in the long term as a result of damage to the kneecap, ligamentous or meniscal injury or muscular wasting."

The range given for such injuries is £20,880 to £34,660. Mr Conway submitted that the pursuer's injury fell near the top of that range, although perhaps not at the very top.

[21] Counsel for the defender, by contrast, submitted that the injury was more appropriately categorised as a "moderate" injury falling within paragraph (b)(i), which states:

> "Injuries involving dislocation, torn cartilage or meniscus which results in minor instability, wasting, weakness or other mild future disability. This bracket also includes injuries which accelerate symptoms from a pre-existing condition over a prolonged period of years."

The range for this bracket is £11,820 to £20,880. Given the good recovery which the pursuer had made and the lack of any day to day deficit, that was where the pursuer's injury lay, albeit towards the upper end. Counsel suggested a figure of £18,000 for solatium.

[22] On any view, the pursuer suffered a severe knee injury and it was described as such by Mr Hazarika. Although I accept that his view was not expressed with the guidelines in mind and is not definitive in categorising the injury, it is nonetheless relevant that an eminent orthopaedic surgeon described the injury as severe. As Mr Hazarika pointed out, it involved not merely dislocation of the pursuer's left knee, but multi-ligament damage. It was excruciatingly painful. It rendered the pursuer immobile for several weeks; and unable to resume her normal daily activities for three months. It has left her with a risk as high as 50% of developing osteoarthritis (and a further unquantified risk of requiring a knee replacement). She has a permanent and obvious scar on her leg. In these circumstances I am in no doubt that the injury sits comfortably in the Judicial College Guidelines Category M(a)(iii) rather than (b)(i). It is a severe rather than a moderate injury. While the pursuer does not have continuing symptoms (other than a continuing loss of confidence, and a non-resumption of ice-skating and roller disco, which the pursuer did not speak to but her mother did) the other boxes in the description, so to speak, are all ticked. To classify it as a moderate injury would in my view be to seriously underestimate the gravity of injury as described above. The next question is where, in the bracket of £20,880-£34,660 it lies. Given that there is no continuing disability, even with

the risk of future osteoarthritis, I do not consider it can be at the very top of the bracket. On the other hand there is, as I have said, a substantial risk that the pursuer will suffer osteoarthritis and there is also the permanent scar to take into account. Weighing everything in the balance, I consider that the injury lies closer to the top end of the range than the bottom, and in my view solatium is reasonably assessed at £30,000, 80% of which is attributable to the past. Interest to the date of proof, at 4% on £24,000, amounts to a further £3,521.75.

Future financial loss

[23] The third issue is quantification of the risk that the pursuer may require a future knee operation, thereby incurring future financial loss consisting of loss of wages and provision of services. Mr Conway submitted for the pursuer that this had a value. There was a 50% risk of the pursuer developing osteoarthritis. If she did, there was then a further risk that she might require a knee replacement. If so, she would then suffer further wage loss and require future services. The basic point made by counsel for the defender, developing the theme he had begun in opposing the minute of amendment at the outset of the proof, was that it was not possible to tell, from the evidence, what the percentage chance of the pursuer requiring a knee replacement was. Further, there was insufficient evidence of what loss she might suffer if she did. Nothing should be allowed under this head of claim, albeit it was accepted that, in principle, the chance of future financial loss was something for which compensation could, in appropriate circumstances, be awarded.

[24] I accept on the basis of *Davis* v *Taylor* 1974 AC 207, and the extract from "Personal Injury Schedules, Calculating Damages" (4th Edition) referred to by Mr Conway, that a legitimate

approach is to assess what the current cost to the pursuer would be of a knee replacement operation; then to adjust that to reflect early receipt, by applying a discount factor; and then to discount it by applying a percentage to reflect the chances of an operation being required. The first problem with that approach in this case is that there is no reliable evidence as to what wage loss the pursuer would suffer. It was suggested that I use the wage loss incurred to date as a guide but I do not think that necessarily follows. There is moreover some uncertainty as to whether the pursuer will still be in employment when a future knee operation is required, or who will be available to provide services. Given the uncertainty as to when any operation might be, it cannot simply be assumed that her mother will again be able to provide services, and the feasibility or otherwise of her doing so was not explored in evidence. The point must also be made that simply because osteoarthritis might develop within 20 years does not mean that a knee operation will also be required within that time. The pursuer might develop osteoarthritis within 20 years but not require a knee operation for another ten years. The second, albeit relatively minor, problem is that no reference was made to the Ogden Tables. I therefore do not know what discount factor to apply, to reflect payment now of costs which may not be incurred for 20 years or more into the future. Third, while I accept that there is a greater than *de minimis* chance of the pursuer requiring a knee replacement, there is no evidence as to what the probability of her doing so is. It seems to me that this is a matter on which the medical experts could have been pressed to give a percentage but were not. For me to pluck a percentage out of the air would be mere speculation. I have come to the view, therefore, that there is no reliable basis on which I can award the pursuer any sum to reflect the possibility that she may suffer financial loss in the future due to requiring a knee replacement. Any future pain

and suffering which she will suffer either from a knee replacement or osteoarthritis itself, is of course reflected in the award of solatium. Finally, lest it be thought that this is unfair, I would point out that, contrary to what Mr Conway stated in the course of submissions, it would have been open to the pursuer, in theory at least, to have sought provisional damages: section 12 of the Administration of Justice (Scotland) Act 1982 applies not only to a pursuer developing some serious disease, but also suffering some serious deterioration in his physical or mental condition, which the development of osteoarthritis arguably would be.[2] I should not be taken as suggesting that such a claim ought to have been pursued. Rather, I simply point out that there is a remedy available where it is impossible adequately to quantify a possible future loss at the present day. (For completeness, I should also point out that if the case had been approached in that way, the pursuer would have received a lesser sum by way of solatium since the award of £30,000 takes into account the possibility that she will develop osteoarthritis, and so I do not criticise in any way the decision to seek damages on a "full and final" basis.)

Loss of services

[25] As regards loss of services, Mr Conway suggested a figure of £3,500 under reference to *Kirk* v *Fife Council* 2002 SLT (Notes) 21 in which a similar broad brush approach was taken and a sum of £2,500 (present day value £4,200) awarded. Mr Thomson for his part submitted that a lower figure was appropriate based upon a notional hourly rate and two hours per day. However, I accept that on average, more time than that was involved, particularly in the early

[2] Assuming, as I do, that the defenders are insured in respect of the claim. As an example of such a case, see *Robertson* v *British Bakeries Ltd* 1991 SLT 434.

days following the pursuer's return home. I therefore consider that a broad brush approach is appropriate. The pursuer valued this aspect of the claim at £3,000 in the statement of valuation lodged in process and I can see no reason to depart from that figure in either direction. Having regard to the level of services provided, over a period of about three months, it seems to me that is a reasonable figure to award. Interest on that sum, calculated in the manner suggested by counsel (that is, 4% for the first three months and 8% thereafter) comes to a further £851.

[26] I have awarded wage loss in accordance with the joint minute, in the sum of £4,462.80 including interest to 9 July 2019.

[27] The total sum awarded to the pursuer in respect of solatium, wage loss and provision of services, plus interest to the date of proof, is therefore £41,835.55, plus interest from that date.

Expenses

[28] I will assign a hearing of expenses.