



OUTER HOUSE, COURT OF SESSION

[2022] CSOH 50

PD196/21

OPINION OF LORD TURNBULL

In the cause

SHARON COSSEY

Pursuer

against

THE BUCCLEUCH ESTATES LTD

Defender

**Pursuer: Galbraith QC, Langlands; Digby Brown LLP
Defender: Shand QC; DAC Beachcroft (Scotland) LLP**

27 July 2022

[1] The pursuer in this case is a 45 year old woman who lives with her husband and teenage son at the address in Selkirk given in the instance. She works, as she has done for a number of years, as a service centre manager for Yodel Delivery Network Limited at their depot in Carlisle. This action arises out of an accident which occurred on 12 August 2017.

[2] Whilst the pursuer sustained relatively minor soft tissue injuries at the time, in the claim advanced on her behalf damages are sought on the basis that she now suffers from widespread and persistent pain resulting from an exacerbation of her pre-existing somatoform symptom disorder.

[3] The defender admits liability for the accident. The issues canvassed before the court concerned the extent of the injuries sustained at the time, the extent to which the pursuer has suffered from persistent pain thereafter and whether or not her condition was exacerbated by the events of the accident. The evidence upon which the respective cases were based was led over nine days and focussed heavily on the pursuer's medical records and the various expert reports lodged. In light of the ways in which the competing positions came to be presented it will be necessary to set out parts of the evidence in some detail.

The pursuer's claim

[4] It may be helpful to begin by setting out a summary of the pursuer's account of her post-accident difficulties in order to provide an overarching picture which will inform the account of the evidence and analysis which follows.

[5] In the period immediately after her accident the pursuer was not able to attend work. She did not lose any wages however as she was allowed to work from home and was apparently well enough to do so. The period of time which the pursuer was working from home was not established with any certainty but appeared to be around four weeks. After that her employers arranged for a staged return to office duties. For a time she had a cast on her wrist which was removed on 4 October and, at least until that was removed, the pursuer's father in law drove her to work and home again. The frequency with which he did so was unclear. After around eight weeks the pursuer was back working full time at Yodel's depot in Carlisle.

[6] The pursuer's evidence was that throughout the nearly five years since her accident she has suffered from persistent pain in the right hand side of her body located in her shoulder, arm, wrist and leg. She explained that she had experienced pain in her right leg

and back since the accident, that her leg pain had been persistent throughout and had become worse over the course of that period. She was never pain free and she was “at all times in unbearable pain”.

[7] The pursuer described being restricted in the extent to which she can walk, not being able to enjoy previous hobbies such as cycling and being limited in the extent to which she can drive. Driving to work was painful and difficult for her. Her evidence was that she finds it difficult to sit or stand in the same position and continues to require support from her husband in tasks such as brushing her hair and cutting her toenails. She explained that she becomes tired easily, cannot manage ordinary domestic tasks, has difficulty undertaking household shopping and cannot lift things. She drops items easily. In her evidence the pursuer stated that she cannot put her weight onto her right leg as she can go over on her ankle. She has been unable to take her wheelchair bound mother for walks as she previously did. Her ability to perform her work has been diminished. She was not able to lift parcels and was more forgetful than she had been previously. She required to make lists to remind herself of tasks. As a consequence of her pain and associated limitations the pursuer considered that she is no longer capable of achieving promotion.

[8] In describing her circumstances to an expert medical witness who examined her in January 2021 she reported that her life had been “ruined” as a consequence of the injuries sustained in the accident and that she still required help getting in and out of the shower, getting dressed and to wash and dress her hair. At a subsequent examination in February 2022 the pursuer described her body as “feeling crippled”.

The accident

[9] In the late afternoon of 12 August 2017 the pursuer attended a barbecue at her neighbour's house, a short distance from her own. She was with her husband and son. She consumed no more than two glasses of wine. As all three were making their way home the pursuer stepped on a manhole cover which became dislodged causing her to fall down into the manhole. Quite what happened to the pursuer in this process has been described in a number of different ways and is difficult to reconcile with the dimensions of the structure.

[10] In evidence the pursuer described both of her legs falling into the manhole and managing to stop herself from descending further by putting her arms out to either side of the top of the manhole. Having halted her fall in this fashion her feet were not touching the bottom and she was in the manhole to the depth of her chest, just above the area of her ribs. She was then pulled out by her husband. Mr Cossey described a similar picture, with his wife being in the manhole with her arms out at the side and having to pull her out by her jeans, which were below the level of the lid of the manhole.

[11] At the Borders General Hospital the next day the pursuer seems to have described falling in to the depth of her abdomen. According to her work colleague Anthony Masson she told him she fell into the manhole up to her neck. When interviewed in May 2020 by Dr Stewart, Consultant Psychiatrist, she appears to have told him that she fell into the manhole to about waist height and supported her weight with her arms before being pulled free by her husband. In October of that year, when interviewed by Professor Carson, a Consultant in Neuropsychiatry and Psychological Medicine, she appears to have told him that by breaking her fall with her arms she had saved herself from falling in much further, that her feet did not touch the bottom and that her body was into the hole somewhere to around abdomen height. The first description which she gave to Mr Angus MacLean,

Consultant Orthopaedic Surgeon, when she met him in January 2021 appears to be that she fell into the manhole up to her armpits. It was rather faintly suggested to Mr MacLean that he may have been wrong about the first account given to him but the other medical witnesses were not challenged to the effect that they had misunderstood, or incorrectly recorded these aspects of the accounts given to them by the pursuer.

[12] The consistent picture which the pursuer appears to have conveyed is of her dangling in the hole whilst supporting herself by her outstretched arms on either side of the manhole. Throughout her evidence she insisted that her feet had not been touching the bottom of the manhole.

[13] Video footage of the manhole was taken by Mr Charles Bennewith, one of the Buccleuch Estate workers who was instructed to attend on the day of the accident. The footage was not taken until February 2021 but he explained that no repair had been conducted beyond replacing the cover of the manhole. The footage shows a rectangular shaped cavity, apparently constructed from breezeblock, the purpose of which is to give access to a waste pipe located at the bottom. The depth, as shown being measured, is just under 2 feet. When the pursuer was shown this video footage her initial reaction was that the manhole was not in that condition at the time of the accident but the difference she described was to do with the area around the lip of the cavity where the cover would be placed. She was unable to offer any explanation as to how her feet could not have touched the bottom given the measured depth. She explained that she was 5'2" tall.

[14] When Mr Cossey was shown the video footage in cross examination his reaction was also to suggest that the footage showed the manhole in a different condition. As he put it, if it had been the depth as shown in the footage she could not have fallen up to her waist. That seemed to me to be a correct observation, at least if her feet were not touching the

ground. Therefore the explanation must be that the depth of the manhole has changed, or that the descriptions given by the pursuer and her husband cannot be correct.

[15] It seems obvious that the footage shows the depth of the manhole as it was at the time of the pursuer's accident. Looking at the structure of the cavity seems to make that plain and the pipe to which it gives access is clearly visible at the bottom of the manhole. Mr Bennewith gave evidence that it had not been changed. No attempt was made by counsel for the pursuer to suggest there had been any change to the depth of the manhole. In this regard it may be worth noting Mr Cossey's evidence that he took pictures of the manhole the day after the pursuer's accident which he gave to her solicitors. These were not produced at the proof but, assuming his evidence to be correct, these will no doubt have influenced counsel for the pursuer's approach to this question.

[16] I therefore do not accept that the pursuer's evidence about finding herself dangling in the manhole with her feet not reaching the bottom provides a reliable description of what occurred. I accept that the pursuer did give the various accounts of the event to the medical witnesses mentioned above. I am less sure about the reliability of the account given to Mr Masson and I shall put that out of account. The first conclusion which I am therefore driven to is that the pursuer was not a reliable witness in relation to what happened in the course of her accident and has not been a reliable historian when describing it to others. Whether this is of any further consequence is something to be considered later.

The aftermath of the accident

[17] On 13 August the pursuer was in considerable pain and attended at Borders General Hospital. She was complaining of all over body pain and was found to have tenderness in the area of her neck, bruising over her right thumb, swelling with bruising over the area of

her right knee and tenderness over the area of her right ankle. It was suspected that she may have broken the scaphoid bone in her wrist, a splint was applied and it was arranged that she would be seen as a follow-up patient in the orthopaedic clinic. However x-rays of her right ankle, right hand and right knee taken that day were all unremarkable. It was noted that no head injury had been sustained. Photographs taken at this time showed obvious areas of bruising on the outer aspect of the pursuer's right calf and ankle, bruising around the outer aspect of her right knee and some bruising to the outer aspect of her right thigh a little above the knee. Bruising below her right thumb was also evident.

[18] On each of 14 and 15 August the pursuer re-presented at the Borders General Hospital complaining of pain in the area of her right arm and neck. She was treated with simple analgesia and discharged. On 23 August she again attended at the Emergency Department of the hospital complaining of pain in the area from her right elbow to her shoulder. X-rays were taken which disclosed no bony injury. Between then and late November 2017 various follow-up consultations took place at which more specialised examinations and assessments were carried out.

[19] On 28 August the pursuer saw Mr Mehdi, a Consultant Orthopaedic Surgeon at the Borders General Hospital following on from the initial referral made on 13 August. He noted that x-rays did not disclose a fracture of the scaphoid bone and that x-rays taken previously did not show any fractures or dislocation of the shoulder. As a precaution he applied a cast to the area of her wrist and arranged for a CT scan of this to take place, noting that if no fracture was identified the cast could be removed. He also arranged for an ultrasound scan of her shoulder.

[20] Mr Mehdi saw the pursuer again on 4 October on which date the cast was removed. He reported that the CT scan of her wrist did not reveal any fracture but that the ultrasound

scan of her shoulder had revealed an undisplaced fracture of the greater tuberosity. However the actual radiology report recorded that there was only a suggestion of an undisplaced fracture in this region and subsequent tests confirmed that there was no fracture.

[21] The pursuer then arranged to be seen privately by Mr Reid, a Consultant Orthopaedic Surgeon at the Murrayfield Spire Hospital. On 21 November he reported that an MRI scan of the right shoulder was entirely normal and there was no evidence of any acute fracture or injury. He went on to observe that he had reviewed all of the pursuer's x-rays and scans from the NHS and that her previous shoulder x-ray and CT scan showed no evidence of fracture. Mr Reid also recorded that the pursuer was reporting a sense of light-headedness and he wondered if she had suffered a concussion in her injury "as she is not able to remember the injury at all". In light of this he made an arrangement for the pursuer to be seen by a neurologist at the Murrayfield Hospital. He suggested that the pursuer should continue with the physiotherapy which she had just commenced and that her neck and shoulder symptoms should resolve over time.

[22] Accordingly, by a point just over 3 months after the pursuer's accident it had become clear that she had not sustained any bony injury to her hand or shoulder but was continuing to complain of pain in the region of her arm shoulder and neck. Throughout this period, with perhaps the exception of her first meeting with the physiotherapist Mr Pullman, it seems that the pursuer's complaints of pain, as recounted to her physicians, all related to her right arm shoulder or neck. No issues to do with her right leg appear to have been identified or mentioned.

The pursuer's ongoing concerns

[23] It seems clear that the pursuer was dissatisfied with, or disinclined to accept, the advice given to her by Mr Reid as to the extent of her injuries and the appropriate treatment. In her evidence she insisted that she had sustained a fracture to her shoulder and that Mr Reid's diagnosis was wrong. Her explanation was that when she had a scan of her shoulder the radiographer drew her attention to an image which showed a fracture. When I attempted to clarify with her why she did not accept Mr Reid's view she stated "I know what I saw".

[24] In order to assess the extent to which the pursuer continued to suffer from ongoing pain or other issues which she attributed to the accident it will be informative to consider the medical records which were examined during the course of the proof.

[25] Towards the end of January 2018 she attended her GP complaining of worsening pain in her right arm with shooting pain from her neck down her arm and also of a sensation of feeling like walking on air and getting lightheaded. The pain was said to be interfering with her ability to work and her ability to drive. She requested a referral to an NHS neurologist and a referral back to the NHS orthopaedic team at the Borders General Hospital. The neurologist declined to see her on the basis that it was being suggested she had post concussive symptoms but no head injury.

[26] At the end of April 2018 the pursuer saw Mr Abouazza, another Consultant Orthopaedic Surgeon at the Borders General Hospital, following on from the referral made by her GP in January. A detailed report of his examination was prepared in which he noted that the pursuer had been complaining of right upper limb pains since the time of her accident. He noted that on examination she complained of right-sided neck pain radiating into the right shoulder and down her right arm which was interfering with her ability to

work and her ability to drive. She reported having trouble getting dressed and required assistance from her husband in brushing her hair and washing herself. Mr Abouazza advised that the pursuer should continue with physiotherapy and analgesia and that no orthopaedic surgical intervention was required. There is no suggestion in Mr Abouazza's report of there being any ongoing issue with the pursuer's right leg.

[27] Throughout the remainder of 2018 there seems to have been only one attempt at further investigation of the pursuer's neck, shoulder and arm complaints. On 16 October 2018 she was referred by the Orthopaedic Department at Borders General Hospital to a Consultant Neurosurgeon in order to investigate what was described as:

"... ongoing right-sided neck pain with pain radiating down into his (sic) shoulder, forearm and hand. This associated with numbness and pins and needles on the right little ring and middle finger as well as on the ulnar side of the wrist. She finds this quite debilitating."

[28] Whilst the pursuer attended at her GP on a number of occasions during 2018 concerning other complaints these upper limb problems do not seem to have been the focus of her concern on such visits. I shall return to consider these other attendances later.

[29] Moving into 2019, the pursuer was seen by a doctor from the Neurosurgery Department of the Western General Hospital on 12 April. In his report to her GP he noted that she had taken many months to gradually recover from her accident with her major symptoms being neck pain and right arm pain giving her some unusual sensory type symptoms and associated ache. Two further aspects of what was reported may be of note.

The first is the explanation that:

"These pins and needles and aching symptoms still trouble her many months after the original event the right side is always the worst. She complains of no weakness. She is back at work and manages most of the time other than these occasional instances where her symptoms stop her in her tracks."

The second is the explanation that:

“The episodes that she describes going into her right arm are not on a background of being there constantly but she can get good exacerbations a few times a week that stops her in her tracks for a moment until she continues. She has no low back pain or lower limb symptoms.”

[30] Having noted that the pursuer only takes regular paracetamol when required it was explained that there were no neurological concerns and it was suggested that she see the local anaesthetic pain team.

[31] On 26 September the pursuer consulted her GP complaining of ongoing pains in her wrist and neck which seemed to have got worse with the change in weather. She was struggling to hold the steering wheel of her car when driving. On 15 October she again attended at her GP surgery complaining of a “recurrence” of right-sided neck and arm pain. In addition to prescribing some pain medication her GP explained she would refer the pursuer back to the neurosurgeons. This led to a review of an MRI scan of her spine taken in 2017 and a new MRI scan being performed. Although there was some degenerative change noted her cervical spine was within the normal range and no cause for her presentation was identified. On 23 October she attended an appointment at the anaesthetic and pain management team as a consequence of the April referral and reported continuing to experience pain predominately affecting her neck and arm.

[32] The pursuer’s medical records as examined at proof with her do not disclose any other occasions during 2019 when she made any complaint or underwent any examination in connection with any of the symptoms which she attributes to her accident. It is worthy of note that by the end of 2019, more than two years after her accident, there was no record of her complaining of pain or weakness in her right leg.

[33] By 2020 preparations for the bringing of a claim on the pursuer’s behalf were underway and there were very few other GP or medical records identified as being of any

relevance. On 27 January she was examined, on the instruction of her solicitors, by Professor Breusch, a Consultant Orthopaedic Surgeon. Professor Breusch was not called to give evidence but passages of his report were put to the pursuer for her comment. She agreed that the account which she gave the professor of her progress after the accident was accurately recorded at paragraph 4.2 of his report. In that passage the pursuer is noted as explaining that it took about 6-8 months before her right knee “settled”, that her neck, shoulder and wrist never settled and that she can still get numbness in her leg and that her right ankle feels “wobbly”. She also confirmed having told him that she couldn’t sit or stand for more than 20-30 minutes and that this was an accurate account of her ongoing circumstances.

[34] These references to right lower limb issues in Professor Breusch’s report appear to reflect the first mention by the pursuer of any such problems since November 2017. In cross-examination she explained that she would be surprised to learn that there were no entries in her prior medical records concerning right leg symptoms. She had suffered from right leg problems involving numbness, weakness and pain since the day of the accident. The pain had worsened throughout that period.

[35] A few days after seeing Professor Breusch the pursuer attended at her GP and sought a referral to private healthcare in order to receive cortisone injections, as had been suggested to her by Professor Breusch. The GP’s record notes that the pursuer was complaining of ongoing right shoulder, elbow and wrist pain. Consistent with this account, the letter of referral to Mr Molyneux, a Consultant Orthopaedic Surgeon at the Spire Murrayfield Hospital, explained that the pursuer was suffering from right upper limb pain and wondered whether there was an orthopaedic cause for her shoulder, elbow and wrist pain.

[36] The pursuer saw Mr Molyneux on 21 February 2020 and then again on 20 March. At the first consultation she reported severe and unremitting pain over the right side of her body. She located the pain as being from her right shoulder down to her right elbow and into her wrist. She also described pain over the outer aspect of her right knee and down the outer aspect of her right calf. She explained that the pain in her leg made it difficult for her to walk and if the pain is bad it spreads down as far as the outside of her ankle.

Mr Molyneux treated the pursuer with two cortisone injections, one to her right shoulder and the other to her right knee. At the follow-up consultation Mr Molyneux reported that the pursuer had noticed an immediate improvement in the shoulder area which lasted for approximately one week before she had some mild recurrence and reported some improvement in her knee. Her account to Mr Molyneux by the March appointment was that her ankle was the biggest of her problems. Although he was not able to administer any further steroid type injection at that time, because of Covid related restrictions, the pursuer had continued to see Mr Molyneux periodically since then and had received a number of further cortisone injections.

Expert witness consultations

[37] Later in 2020, in the months of May, August and October, the pursuer was examined respectively by Dr Alexander Stewart, a Consultant Psychiatrist, Dr Jonathan Bannister, a Consultant in Pain Medicine and Analgesia and Professor Alan Carson, a Consultant in Neuropsychiatry and Psychological Medicine, each of whom gave evidence. The first two of these witnesses were instructed and led on behalf of the pursuer whilst the third was instructed and led on behalf of the defender. I shall consider some of this evidence in more

detail in due course but for present purposes it will be sufficient to set out a general account of the pursuer's condition as she reported it to each of these witnesses.

[38] On being examined by Dr Stewart the pursuer told him that when she attended at the Borders General Hospital on the day after her accident she was diagnosed with concussion akin to being in a car crash at 70 mph. She informed him she had been diagnosed with a fractured right shoulder and described current symptoms of persistent pain affecting that shoulder which radiated to her neck, arm, wrist and fingers. She reported pain in her right hip and thigh meaning that she could only walk for approximately half of a mile before having to stop due to the pain and she explained that her right ankle often gave way resulting in falls. She explained that she was never pain-free and that she was now beginning to experience a left-sided ache. As Dr Stewart recorded at paragraph 8.2 of his report: "She specifically denied any past history of chronic pain."

[39] Dr Stewart saw the pursuer again in February 2022 when she reported that her pain was becoming gradually more severe and debilitating, both knees being painful and her walking distance being restricted to around one mile before she had to stop due to knee pain. She described herself as feeling crippled, getting easily fatigued and exhausted. She struggled to concentrate and thought that she performed less well at work than she did before her accident.

[40] When she consulted with Dr Bannister the pursuer told him she had definitely sustained a fracture to her shoulder in the accident. She described continuing to suffer from pain in the neck, shoulder arm and wrist. She described pain over her right knee and over the surface of her calf and ankle which was constant and stopped her in her tracks. She explained that her walking distance was limited to around 2 miles before the pain increased, she was limited to around 10-15 minutes of standing time and to between 10 and 30 minutes

of sitting. She also complained of pain in the lower lumbar spine radiating up towards the thoracic spine. When asked about her past medical history she mentioned that she had had “bits and pieces” of pain.

[41] Professor Carson interviewed the pursuer remotely via the Zoom platform. She told him that on the day after her accident a number of clinicians at the hospital had told her that it was like she had a concussion from a car accident at 60 mph. She repeated to him that she had sustained a fracture to her shoulder. In terms of her condition at the date of this interview the pursuer explained that she still had pain in her shoulder and in her back and weakness in her wrist. She was not able to lift anything other than the lightest of objects. Her leg would get painful if she had been on it too long and it became numb and wobbly. She reported some benefit from the cortisone injections which she had been receiving and explained that she was now able to walk 2 miles. She had symptoms of forgetfulness and wrote many lists to assist with this. Professor Carson saw the pursuer again in March 2022 and I shall return to consider the evidence given concerning this consultation in due course.

[42] The final medical expert to examine the pursuer was Mr Angus MacLean, a Consultant Orthopaedic Surgeon, who conducted a video interview with her on 25 January 2021 on the instructions of the defender. Mr MacLean noted that other than having her gallbladder removed prior to the accident the pursuer informed him that she was fit and healthy. In describing her current symptoms the pursuer told Mr MacLean that she had suffered a sudden deterioration and pain in her neck and right shoulder around December 2020, that she had pain in her right arm radiating from her shoulder to her elbow and her hand. She reported weakness in her whole right arm and described ongoing back pain. She explained that she suffered ongoing pain in her right thigh, knee, calf, ankle and foot. She explained that recently the pain had radiated into her left leg involving the whole of that leg

as well. She was unable to get up from kneeling without assistance due to her leg pains. She was in constant pain.

The pursuer's pre-accident medical history

[43] Having sketched out an account of the pursuer's ongoing symptoms and complaints over the period of time since her accident it will be necessary to consider her pre-accident medical history. Contrary to what the complainer told Dr Stewart, Dr Bannister, and Mr MacLean, she did in fact have a very lengthy history of medical complaints which predated her accident.

[44] Although the pursuer did not accept this, she has had a long-standing history of somatoform symptom disorder. That proposition is set out on her behalf in statement 5 of the record and it was a diagnosis with which both Dr Stewart and Professor Carson agreed. In Professor Carson's view her condition tended more to the somatisation disorder end of the spectrum which denoted the more severe cases of somatoform presentations with multiple symptoms in a variety of body areas on a long-term course. Somatoform symptom disorder is a condition recognised and defined in the Diagnostic and Statistical Manual of Mental Disorders, 5th Edition (DSM-5). For present purposes it may be understood as a condition which causes pain to be experienced in parts of the sufferer's body without there being an organic or neurological cause. It causes an individual to experience physical bodily symptoms in response to emotional or psychological drivers. In the course of the proof no attempt was made to identify the original trigger for the pursuer's underlying condition and, out of an appropriate sense of respect for her dignity, her early medical records were not examined with her or explored in any detail with any of the expert witnesses. They were however relied upon by both Dr Stewart and Professor Carson in arriving at their

diagnosis. These records stretched back to the pursuer's teenage years and identified serious issues and concerns in her health and circumstances at that time. She had required intensive inpatient and outpatient treatment at Child and Adolescent Psychiatric Services. An early indication of the presence of her underlying condition might be thought to be seen in a letter of discharge from the Young People's Unit at the Royal Edinburgh Hospital where the pursuer had been receiving treatment as an inpatient. It was dated 17 June 1992, circulated to the other medical professionals involved in her care at that time, and mentioned the extent to which she displayed symptomatology as a means of influencing those involved in her care.

[45] It will not be necessary to list in detail the pursuer's subsequent medical history leading up to the accident. A summary of the relevant complaints which she presented with and the various treatments undertaken will be sufficient. With one exception, these references are all taken from the medical records lodged. The entries which I will mention were not the subject of any dispute.

[46] On various occasions up until 1998, the pursuer continued to consult with psychiatric services concerning depressive symptoms and issues with poor memory and dizzy spells. She also began to suffer from what was described as non-specific abdominal pain and vomiting. By 2001 a scan showing no abnormality had been performed and a diagnosis of irritable bowel syndrome was reached. As explained by Professor Carson, terms such as this and "functional" were previously used as indicators of a somatoform symptom disorder.

[47] From at least 1994 the pursuer also began to complain of pain and other issues associated with her limbs for which no organic or neurological cause could be identified.

Between May and June 1994 she complained of pain in her right ankle causing her difficulty in walking. In January 1998 she complained of her right leg giving way and having cramps.

[48] In the evidence given by Professor Carson he explained that he had carried out a review of the pursuer's medical records and noted that she was complaining of neck pain radiating into her shoulder as early as the year 2000 and that there were repeated complaints of pain in that area in the years between 2001 and 2003. This evidence was given in cross examination by way of response to a suggestion made to him by senior counsel for the pursuer. Although he did not identify any particular entries in any of the records counsel subsequently accepted in submissions that this evidence was not challenged or contradicted.

[49] Between September 2004 and April 2008 the pursuer was examined and treated by her own GP, a podiatrist, a physiotherapist and a neurologist in relation to problems with her ankles and leg. She complained of going over on both of her ankles quite a lot and with increasing frequency. She described her left leg becoming heavier and displaying decreased sensation. On being seen in the physiotherapy department of the Borders General Hospital in October 2007 she was described as being confused and describing left or right lower limb weakness dependent upon supine or prone position. Despite these complaints the pursuer's gait was described as being undisturbed and an MRI scan of her brain and whole spine taken in 2005 showed no abnormality.

[50] By December 2007 the pursuer had been seen at the obstetrics department of the Borders General Hospital in relation to upper quadrant abdominal pain and was referred to the gastroenterology department for further assessment. This became an ongoing and repeated problem for the pursuer resulting in her being hospitalised in April 2009 and undergoing radiological examination in 2011 and 2013, all with normal results. By December 2013 the gastroenterology department of the Borders General Hospital reported

to the pursuer's GP that she had cancelled planned endoscopy examinations and failed to attend other appointments.

[51] By January 2015 she had been referred again to the Borders General Hospital with recurrent and increasingly severe symptoms over the previous two years suggestive of gallbladder disease. Whilst endoscopy and other examinations had shown no abnormality, an ultrasound scan of her gallbladder suggested a 5mm polyp. In February 2015 she was admitted to hospital with abdominal pain and subsequently had her gallbladder removed. In September 2015 her consultant surgeon Mr Mustafa wrote to her GP explaining that after removal the pathology results of her gallbladder examination disclosed that it was normal and there were no gallstones or polyps. By this stage the pursuer had additionally arranged a private MRI scan concerning her ongoing symptoms which likewise disclosed no problems.

[52] Despite this surgical intervention and reassurance, the pursuer continued to present with abdominal pain throughout the later part of 2015 and into 2016. She had various tests, including an upper gastro intestinal endoscopy performed privately. These continued to show normal results. In his letter reporting the outcome of these tests to the pursuer's GP dated 2 November 2015, Mr Casey, a Consultant Surgeon at the Spire Murrayfield Hospital, noted being informed by the pursuer that after surgery she was told by her surgeon at the Borders General Hospital that she did in fact have some gallstones in her gallbladder. If she did convey this information it was not correct.

[53] In December 2015 the pursuer saw Dr Trimble, a Consultant Gastroenterologist at the Spire Hospital, again complaining, amongst other things, of abdominal pain. Again various tests appeared to disclose no abnormality. On 4 January 2016 the pursuer attended at the Emergency Department of the Borders General Hospital complaining of right

abdominal pain. She saw Dr Casey again on 13 January explaining that she was still suffering from recurrent bouts of abdominal pain. On 13 February she contacted NHS 24 complaining of pain in her lower abdomen and side and issues to do with passing urine. On 10 March she saw Dr Casey again who reassured her that the tests carried out had shown no problem to account for her ongoing symptoms and discharged her from his clinic at that stage.

[54] During the course of this period when the pursuer was undergoing examinations in relation to the complaints of abdominal pain she also continued to report other symptoms. By April 2008 she had undergone a number of sessions of physiotherapy in relation to her complaint of left or right lower limb weakness but reported no improvement.

[55] On 25 February 2011 she was referred by her GP to the Orthopaedic Surgery department of the Borders General Hospital with a two month history of pain in her right knee, which was described as a lot of pain whenever she flexes it at work. A report of her examination at the hospital on 17 March noted her reporting that her right knee gave way approximately once a week and that although it had settled a little there was still intermittent pain increasing with bending and twisting or ongoing use towards the end of the day. An MRI scan and a further review was planned. By letter dated 4 May it was reported to her GP that the MRI scan was normal and that following review at the clinic her knee had almost completely settled.

[56] In January and March 2013 the pursuer was complaining of having a chest infection and feeling very unwell. A radiology report noted lung fields were clear. In January 2014 she attended at the Emergency Department of Borders General Hospital complaining of palpitations and chest pain over the last few days. All tests disclosed normal results.

[57] In March 2014 the pursuer attended at the Emergency Department of the Borders General Hospital explaining that she had been in a minor vehicle accident the previous evening causing her no pain at the time but that she had woken up in the morning with stiffness in the right side of her neck radiating to her upper arm.

[58] On 3 August 2016 the pursuer was referred by her GP to the orthopaedic department at the Spire Murrayfield Hospital in relation to a complaint concerning her left knee. It was reported that she had injured that knee around the middle of June by staggering and “went over on the knee”. The referral was on the basis that the pursuer still felt as though her knee was going to give way and that it had been clicking. The subsequent report from Mr Moran, Consultant Orthopaedic Surgeon, was dated 17 August 2016 and reported that the injury to the pursuer’s left knee was said to have occurred around 10 weeks before that. At examination Mr Moran noted that the pursuer was still describing a feeling of instability when going downstairs and clicking of the knee with limitation of walking. She described the knee both locking and giving way and that it was swelling up and down. He explained he intended to arrange an MRI scan. It is not clear from the records whether this was done or what the outcome was.

[59] On the same day that the pursuer’s GP made a referral to Mr Moran he also referred her to the orthopaedic hand and wrist department at the Spire Hospital. In this referral the GP explained that the pursuer had been suffering from pain in her right forearm for the previous 4 weeks and she herself had raised the question of whether she might be suffering from carpal tunnel syndrome. The GP noted that the pursuer was reporting that the pain was worse as the day went on and when her thumb was actively extended. It is not clear what the outcome of this referral was but no further complaints of right arm pain appear to have been made until the pursuer’s accident in August 2017.

[60] Drawing this history together, it can be seen that over the years prior to her accident the pursuer presented with a range of medical complaints on different occasions concerning pain or weakness in her abdomen, both ankles, chest, right hand and arm, left knee, right knee, left leg, right leg, neck and shoulder. She also complained of memory issues. When asked about these episodes in evidence the pursuer stated that she had gallstones, which was incorrect. She rather dismissively stated that she couldn't remember as far back as the 2004 to 2008 examinations in relation to her ankles and legs. When taken through the entries relating to the 2011 right knee issue, the 2016 left knee issue and the 2017 right arm and wrist issue she simply stated that she didn't recall any of this as she had attended at quite a few medical consultations over the years. However, it was not the appointments that the pursuer was being asked about, she was being asked about the extent and nature of these previous complaints and the disabilities which she then seemed to be suffering from.

Other post-accident medical issues

[61] The pursuer continued to present with abdominal complaints in the period after her accident. On 9 February 2018 she attended her GP complaining of abdominal pain. She was then admitted to Borders General Hospital where she appeared to remain between 11 February and 19 February, although it was not clear whether she was there consistently throughout that period or whether she was discharged and returned. Various tests were carried out including an endoscopy with no obvious abnormality recorded. She remained off her work for a period of about six weeks until April 2018.

[62] In May, June and July 2018 the pursuer complained of ongoing abdominal pain at visits to her GP. She was seen again at the Borders General Hospital and by letter dated 18 December 2018 a Consultant Physician in the gastroenterology department informed her

GP that she had a background of functional bowel disorder, that colonoscopy examination had shown unremarkable results and that biopsies taken at that time fell well short of a diagnosis of inflammatory bowel disease.

[63] On 25 May 2019 the pursuer contacted NHS 24 concerning ongoing bowel issues and was then admitted to hospital with severe abdominal pain. She was off work until 12 July during which period a further colonoscopy showing normal results was carried out. On 15 August she had an MRI scan of her bowel as a consequence of complaining of abdominal pain and bloating. The report of the scan noted the unremarkable appearances of the small and large bowel with no evidence of active inflammation and no definite cause for symptoms demonstrated.

[64] In addition to these matters the pursuer attended her GP in January of 2019 complaining of pain and problems with her left knee which had been present for the previous 18 months. She accepted that this was unrelated to her accident. She was referred to a physiotherapist who subsequently reported on 30 April that early osteoarthritic changes in the knee had been confirmed by x-ray, that she had poor lower limb biomechanics, weak quads with muscle imbalance and reduced movement control. In between the appointment with her GP which triggered the referral and the report of 30 April the pursuer appears to have had contact with the physiotherapist. On 15 April she consulted with her GP suggesting that her physiotherapist thought she might have "hypermobility syndrome". The GP's examination note states that "elbows and knees hyperextend, can touch wrist with thumb etc. Has been aware of this for a while does get achey joints".

[65] These records show ongoing investigation and treatment of left knee issues between January and April 2019 on a background of these problems having been present for many months before.

Somatic symptom disorder

[66] I have set out above a working understanding of somatic symptom disorder. It will be helpful to set out a little more about the condition before proceeding further. Each of Dr Stewart and Professor Carson have expertise in the field of diagnosing and treating patients with this disorder. There was no substantial disagreement between them in their descriptions of how the disorder operates and what its features are.

[67] Patients with somatic symptom disorder present with physical symptoms which cannot be explained by organic cause. The patient's nervous system is normal but is not functioning properly and the symptoms perceived are emotionally driven. In patients with the condition somatoform symptoms may be triggered by almost any form of life event, including difficulties at work, feelings of being overlooked or problems with childcare. In essence, anything which can produce human emotion in the positive or negative sense can trigger the presentation of a somatoform symptom. Emotional change can affect the presentation of the symptoms. Trauma can have the same effect.

[68] Patients with the disorder often think the worst about their health and the symptoms can dominate their lives. They may frequently tell their doctors how bad things are and will take a long time trying to persuade their doctors that they are ill. The patients will often feel that something has been missed or seek a further opinion and will constantly report their perceived medical problems. The symptoms which a patient presents with can change and it is not unusual for such patients to be poor historians or to provide a description which can be difficult to follow. Inconsistency of account is a typical feature. Within somatisation disorder, the more severe form of somatic symptom disorder, the focus of the patient's

symptoms will change frequently. It is in the nature of the condition that it presents as perceived pain in one location and then in another.

[69] A further feature of the condition, as described by Professor Carson, was what he called the tendency towards re-attribution. What he meant by this was that a patient has symptoms which have been present for a long time but comes to be of the view that they all happened after a single more recent event and everything is then configured or blamed as occurring since that particular episode. He explained that this is a common feature in his clinics where patients will insist that all of their symptoms have occurred since a particular event, even if they are shown records demonstrating that the same symptoms were present a number of years previously.

[70] The condition can be very challenging to treat as the patients will often find it very difficult to accept that their symptoms are being psychologically driven.

[71] In the pursuer's case it is clear that so far she has not been willing to engage with psychological treatment. The evidence of both experts was that since her underlying condition had never been treated she would have continued to present with varying symptoms even had she not had the accident. They agreed that her inability to accept the diagnosis of somatic symptom disorder means that the prognosis for her recovery is poor. Without acceptance of the diagnosis and appropriate psychological treatment it is unlikely that she will see a change in her underlying condition.

The issues between the parties

[72] Both counsel prepared written submissions which they took me through at the stage of explaining how they wished me to view the evidence and the conclusions which they

invited me to reach upon it. I am grateful to each for the helpful assistance which was provided in this exercise.

[73] It appears to me that there are three questions which require to be considered. The first is the extent to which the pursuer has suffered persistent or constant ongoing pain in the areas of her shoulder, arm, wrist and leg. The second is whether the presence of any such pain can properly be viewed as an exacerbation of her pre-existing condition. The third is whether any such exacerbation was caused by her accident. The conclusion in relation to the first question will inform the resolution of the second which, depending on the answer, may go to determining the third.

[74] In order to decide how to determine the first question it is necessary to come to a view as to the reliability of the evidence given by the pursuer. Understandably, counsel for the pursuer invited me to treat her as an honest and generally reliable witness. In doing so she reminded me of the evidence that it is a feature of somatoform symptom disorder that sufferers will often give accounts of their condition which contain discrepancies and that they may find it difficult to give a coherent description or history of their symptoms.

[75] Counsel for the defender submitted that the pursuer ought not to be accepted as a credible and reliable witness. She submitted that the importance of a careful assessment of the reliability of her evidence as to the extent and persistence of her symptoms was illustrated by what Professor Carson said at page 11 of his first report:

“The nature or (sic) any functional symptom is that they break the normal rules of pathophysiological disease One is entirely dependent on the reliability of the Claimant.”

[76] I accept that a common feature of somatoform symptom disorder is that those affected may provide inconsistent accounts containing discrepancies, or accounts which lack coherence. However, that does not make it any easier for the court to treat the pursuer's

own evidence as providing a reliable body of testimony upon which it can proceed. The opposite may be the case. Nor do these features of the pursuer's condition serve to reduce the burden which she must discharge of establishing her case.

[77] I should note at this point that during the leading of evidence, and in her final submissions, counsel for the pursuer submitted that if it were to be contended that the pursuer had exaggerated or fabricated symptoms such propositions would require to be explicitly pled, argued and put to the pursuer. Counsel submitted that at no stage was it put to the pursuer that she was exaggerating or not telling the truth. Quite what the import of this submission came to be was somewhat elusive, as counsel accepted that the reliability of the pursuer's evidence could be explored in cross examination and would be a relevant issue for me to determine after submissions.

[78] The defender's case has never been one of fabrication. The pursuer was not accused of lying or of exaggerating in the course of cross-examination. The focus of the defender's case was to examine the extent to which the claim of exacerbation could be made out. Nevertheless, I would find it difficult to accept that I was disabled from concluding that any witness had exaggerated, or not told the truth, about an aspect of his or her evidence if that appeared to be to be plain having listened to the testimony, simply because such a proposition was not foreshadowed in the pleadings or put directly to the witness. I do not consider that anything which was said in the single judge decision of *Grubb v Finlay* [2017] CSOH 81 relied upon by counsel for the pursuer suggests otherwise. The comments there made were dealing with the specific aspects of that case. The reliability of the pursuer's evidence is a crucial aspect of the present case and, by way of example, it does not appear to me to matter why she gave the varying accounts concerning the extent to which she fell into the manhole. She may be exaggerating or she may have come to believe that she was indeed

dangling up to chest height in the hole without her feet touching the bottom. The simple question is whether that account can be accepted as reliable. The same applies to her evidence as to the extent and persistence of her symptoms.

The first question - the extent to which the pursuer has suffered persistent or constant ongoing pain in the areas of her shoulder, arm, wrist and leg

[79] It is plain that the soft tissue injuries sustained by the pursuer in the accident would cause a degree of pain and limitation over a period of time, albeit a relatively short one. I also accept that after the recovery of the soft tissue injuries the pursuer has, at times, continued to perceive pain in various parts of her body including her right shoulder, arm, wrist and leg as a consequence of her underlying somatic symptom disorder. The first question which I require to come to a view upon is the frequency with which she has been exposed to pain in these areas, in other words, whether this has been of an intermittent or of a more constant nature. Taking the pursuer's evidence at face value and without taking account of any apparent inconsistencies or discrepancies, the picture painted would be of constant debilitating pain throughout.

[80] In determining whether I can accept this as reliable evidence upon which to proceed I have to take account of the picture as illuminated by the whole of the pursuer's evidence and measure her evidence against any other testimony which may support or undermine it. There are a number of sources of evidence to take account of in this exercise.

The pursuer's own evidence and accounts

[81] The pursuer has insisted throughout that her shoulder was fractured in the accident. This was her position in evidence. She repeated this claim to Dr Stewart, Professor Carson

and Dr Bannister. She has been told that it was not fractured and it is accepted on her behalf that the orthopaedic evidence makes it plain that it was not. Nor has there ever been a suggested mechanism which would account for any such injury in the accident which she described. It is interesting to explore why the pursuer insists on this account. Whilst it is a feature of somatoform symptom disorder that sufferers will be convinced that there is an organic cause for their pain, the pursuer's explanation is rather more elaborate. Her evidence was that she was shown an image by a radiographer in which the broken bone could be seen. It was clear enough for her to be able to see the break herself. The medical records demonstrate that x-rays, an ultrasound scan and an MRI scan of the pursuer's shoulder were all undertaken. It was not plain in her evidence on which occasion she claims this event took place. However, the pursuer gave an account of this episode to Professor Carson which is referred to at page 11 of his first report. As recorded there, the account was of the scanning being halted midpoint and a radiographer diagnosing a fracture to the shoulder on an image which was shown to the pursuer but which image could not subsequently be located. Professor Carson give a general description in his report of how such a scan would be carried out and he amplified this in evidence. In short, his explanation of the process involved meant that the pursuer was describing an incident which was impossible. No contrary explanation of the process was suggested to Professor Carson which could account for the description given by the pursuer. Accordingly, the evidence of this episode demonstrates that the pursuer has come to create for herself an explanation of an event which she is convinced of, to the extent that she will not accept contrary expert medical evidence, but which is entirely incorrect.

[82] According to Dr Stewart, the pursuer told him that when she attended at the Borders General Hospital the day after the accident she was diagnosed with concussion akin to being

in a car crash at 70 mph. According to Professor Carson she told him something similar but at 60 mph. According to Professor Carson the pursuer repeated this to him a number of times throughout his first interview with her. Neither witness was challenged on this evidence.

[83] The report of her attendance at Borders General Hospital records that the pursuer suffered no head injury. There is no record of her being diagnosed with concussion of any sort, and there would be no basis for doing so. The reason why the NHS Neurologist refused to see the pursuer in 2018 was because there was no basis for considering concussion in the absence of a head injury. The injuries which she was suffering from when she first attended at the hospital are shown in the photographs which she took. They show some painful looking bruising but it would seem incredible that anyone could describe them as being comparable to injuries sustained in a high-speed car accident. I therefore have significant doubt as to whether this was said to the pursuer by any of those involved in her care on her initial presentation to the Borders General Hospital. I cannot identify any sensible explanation for her telling Dr Stewart and Professor Carson what she did.

[84] In Professor Carson's report of his examination of the pursuer conducted on 25 October 2020 he recorded an account of what he was told by the pursuer about her ability to continue in her pre-accident employment. He noted being told that she was allowed to work from home after the accident and that remained the case as at the time of his examination some years later. He also noted being told that she had moved to a less demanding role because she was not able to undertake some of the more cognitively demanding and manual handling tasks of her previous role. The consequence of this, as he noted her telling him, was that she required to take a reduction in salary of some £20-£30,000 per year.

[85] With the possible exception of manual handling, which I will address later, none of these comments would have been correct. In her evidence the pursuer's position was that she told Professor Carson that the reduction in salary was a reference to what she would have been receiving had she been promoted. This was in turn explored in evidence with the Professor. He gave a convincing explanation of why he paid close attention to what the pursuer told him about her employment circumstances. This included the importance to him of understanding how well or otherwise a patient with somatoform symptom disorder was coping with aspects of their employment and his surprise at the level of remuneration associated with the pursuer's position. He also rejected, for equally convincing reasons, the suggestion that he had misunderstood what the pursuer had said to him about working from home. I had no difficulty in concluding that Professor Carson's evidence should be accepted on these points and that he had accurately recorded what he was told by the pursuer. This is another example of an account being given by the pursuer of incorrect consequences associated with her accident.

[86] These examples, when taken along with the pursuer's account of her accident, vouch that she has demonstrated a history of providing inaccurate information on matters affecting the claim advanced on her behalf. Whether that is explained by a symptom of her underlying condition or some other reason does not really matter. What it demonstrates is that her evidence cannot always be treated as reliable. That conclusion has to be kept in mind in assessing the pursuer's evidence as to the persistent nature of her pain.

[87] As noted at paragraph [34] above, the medical records disclose that the pursuer only began to complain to any of her doctors about right leg pain in January 2020. When asked about this in cross examination she said that she would be surprised if there were no earlier entries concerning pain in this region. At a different point in evidence she said that the

absence of any such entry in the records was because she was on what she called “heavy medication” which was working. Her attention was drawn to the entry in her GP records of 10 January 2019 recording pain in her left knee for the previous 18 months. In response the pursuer stated that the painkillers were not working for her left knee but were for her right knee. It was very difficult to accept this as a credible or reliable explanation.

[88] The pursuer’s account of persistent right leg pain appears to be inconsistent with the content of the letter to her GP following her examination at the neurosurgery department of the Western General Hospital on 12 April 2019 in which, as noted above, it is recorded that she reported “no low back pain or lower limb symptoms”.

[89] There were also various other examples in the accounts which the pursuer had given over time which demonstrated inconsistency, such as the various different accounts she gave as to how far she was able to walk or for how long she was able to stand or to sit. There was also a passage in her evidence where an entry from page 5 of Mr MacLean’s report was examined with her. He had noted that in January 2021 she told him that the leg pain which she suffered had recently radiated into her left leg involving that whole leg as well. When she was asked about this the pursuer’s response was rather evasive. At first she stated that she would deny having any issues other than with her left knee. When pressed on what Mr MacLean had recorded she continued to respond as if being asked about saying she had pain in her left knee and seemed unwilling to engage with the proposition that she had mentioned radiating pain into her whole leg. Eventually she simply said that she would not be able to answer the question of whether she told him what was recorded or not.

The various medical records

[90] It will also be instructive to take account of the pursuer's medical records to assess whether they provide any overall support for the reliability of her account that she had suffered from persistent pain since the time of the accident. It is perfectly clear that she has made complaints of suffering from pain in her shoulder arm and wrist and I accept that she has perceived pain in these regions. The question is whether the records support her account of this being persistent or suggest a more intermittent problem.

[91] As noted at paragraphs [25-27] above, the pursuer spoke to her GP in January 2018 about pain and sought a referral to the NHS orthopaedic team, subsequently seeing Mr Abouazza in April and then being referred to a neurosurgeon in October. In submissions counsel for the pursuer suggested that she also presented for medical examination and treatment in relation to right-sided pain associated with the accident on 5 February, 8 February, 29 May, 17 September and 1 December. It is correct that she attended for physiotherapy on 5 and 8 February. The physiotherapist was not called to give evidence but the record for the consultation on 8 February records that the pursuer was improving, getting better sleep and had better movement but some stiffness undressing. As far as I can interpret it, the record for her attendance at her GP on 29 May relates principally to a complaint of urinary tract infection, which was a further regular difficulty for the pursuer. I can detect no entry for 1 December. It is correct to note that she consulted with her GP on 17 September, again in relation to urinary tract issue and a backache but also commented that she had ongoing pain in her right wrist and was back to using a splint at night. There is no note in this record of ongoing pain in any other area.

[92] This appears to suggest a picture of improvement by February, general right arm and shoulder pain being complained of again in April, a complaint of wrist pain only in September and a complaint of ongoing neck and arm pain in October.

[93] In paragraphs [29-31] above I have summarised the evidence concerning the pursuer's attendance for examination or treatment in relation to right-sided pain in 2019. The first record seems to be of the attendance at the Neurosurgery Department of the Western General Hospital on 12 April, around 6 months after the pursuer's last complaint. Albeit the report of that examination notes that her symptoms still troubled her at that stage it is noted that the problem at work is the "occasional instances where her symptoms stop her in her tracks". It is specifically noted that the arm pain is not constant – "she can get good exacerbations a few times a week that stops her in her tracks for a moment until she continues". By September she seemed to be explaining that the colder weather had caused the symptoms to worsen and in October she was talking of a "recurrence" of right-sided neck and arm pain. By later October she was being reviewed at the Neurosciences Department of the Western General Hospital in connection with minor degenerative changes in her cervical spine and then at the Chronic Pain Clinic to which she was referred after her April consultation at the neurosurgery department. This appears to paint a picture of a few attendances scattered throughout the year with language being used which was suggestive of intermittent problems. In submissions counsel for the pursuer also referred to entries in the medical records for 10 January and 11 February as supporting the complaints of right sided pain but these entries plainly relate to issues with the pursuer's left knee.

[94] As noted above, by 2020 the pursuer was beginning to see the various experts instructed in preparation for the case and the complaints of her symptoms came to include right leg problems.

The evidence of the pursuer's husband

[95] The pursuer's husband gave evidence which in part addressed the extent of her ongoing difficulties. Generally speaking he did paint a picture of the pursuer having changed since the accident and of her being restricted in the activities which she could now engage in. However, other than when describing the first few weeks after the accident, his account of how the pursuer was affected was generalised, vague and sparse. His evidence certainly supported an account of the pursuer continuing to suffer from pain since the accident. I was not persuaded though that it assisted much in assessing the question of the extent to which that pain was present intermittently or continually after the later months of 2017.

The evidence of the pursuer's work colleagues

[96] Three of the pursuer's work colleagues gave evidence, Mr Cowan, Mr Lee and Mr Mason. Mr Cowan was previously employed by Yodel as a senior HR business partner for the north network and had known the pursuer between 2010 and April 2018 when he left to take up employment with a different company. Mr Lee was a regional director for the company. The pursuer's depot in Carlisle fell within his region and he had known her since around 2012. Mr Mason worked in the same office as the pursuer and had known her for around 15 years.

[97] These witnesses provided a combination of evidence describing the pursuer's working routine and the regard with which she was held within the company.

[98] Mr Cowan explained that the pursuer's duties concerned managing service performance against budget, controlling costs and ensuring that staff achieved their key

performance measurements. It was obvious from his evidence that she was well regarded and that from time to time she might step up to fulfil the role of regional manager to cover holiday commitments. Before he left the company she had been identified as a candidate who was suitable for promotion. This witness was not in a position to offer much evidence as to how the pursuer coped after her return to work since she was off work with abdominal pain issues for a period of around six weeks prior to him leaving in April 2018. He was only able to comment on her performance in the few months after the accident. His evidence was that she was not able to participate in what he called "floor activity".

[99] Mr Lee was a service centre manager before he was promoted to regional manager in 2017. At that point he became the pursuer's line manager and in that role would attend at the pursuer's centre in Carlisle approximately once a month. He moved on from being her line manager in 2021. Prior to her accident he considered the pursuer as his number two in the region. Since her accident Mr Lee considered that the pursuer had abandoned her career aspirations. She stopped discussing promotion in the mentoring discussions which he had with her whilst he was her line manager and she seemed no longer to have any mental ability to cover roles other than that of service centre manager. Another service centre manager was now his number two. In terms of how she coped, he considered that she restricted herself to the office side of her work and didn't do as much travelling as she previously had.

[100] Mr Mason was the witness who had most contact with the pursuer. He shared an office with her and held daily briefings with her. He described her job as involving her being out of her office for about 20% of the time. When she returned to work after her accident she was wearing a wrist bandage and was on medication. She no longer went on to what they called "the floor", the area where parcels were unloaded and loaded other than to

speak to the drivers. He gave evidence that she was no longer able to carry a parcel and mentioned an incident in 2021 when he observed her trying to pick up a small package which she dropped, causing her obvious embarrassment.

[101] Counsel placed significant reliance on this chapter of evidence in submitting that the picture of ongoing limited ability presented by the pursuer had been established. It did not seem to me that the evidence of the pursuer's working conditions and circumstances had the effect contended for.

[102] The first point to note is that, other than for a short and uncertain period after her accident, the pursuer has only been unfit to attend work for three periods in the four and a half years which followed. She was off work for six weeks between February and April 2018 with abdominal pain and again in May to June 2019 with a similar complaint. In October to November 2021 she was off work with a chest infection for a period of three weeks. The pain and disability described as associated with her right upper and lower limbs does not seem to have resulted in a requirement to take any time off work at all.

[103] The second point is that other than for a period after her accident the pursuer has continued to drive from her home in Selkirk to Carlisle and back each day. This is a journey of around 50 miles each way which the pursuer explained took her just over an hour to travel in each direction.

[104] The third point is that the pursuer has continued to perform her pre-accident employment. There was no evidence of any significant adjustments being made to allow her to continue or to assist her. There was no evidence of her performance being unsatisfactory. On the contrary, the Carlisle depot which she managed continued to operate as a high-performance depot which exceeded in all key performance indicators that were set for it. The pursuer received bonuses of more than £10,000 in each of the years 2020/2021 and

2021/2022 over and above her annual salary of £42,000. In February of 2022 the pursuer was asked to accept a temporary role of depot manager at the company's much larger service centre in Livingston. She was asked to take over this role as the depot was underperforming and operating in a dysfunctional manner. She was given a pay rise to £55,000 and was offered the position on a full-time basis having shown herself to be a success in the task of turning the centre's performance around. The pursuer declined to accept this offer and was due to return to her position as service centre manager in Carlisle at the end of April 2022.

[105] The evidence as to why she declined this position was very sparse and contradictory. The pursuer herself said that there were too many stairs for her to get up and down in an effective manner without expanding or explaining this to any extent. As counsel for the defender observed, there was no explanation of what the difficulty was. Was it for example because of the osteoarthritic changes in her left knee which had previously caused long lasting pain, reduced movement control and mobility issues which required physiotherapy, or was it simply to be assumed that the difficulty was to do with her right leg?

[106] Mr Lee explained that his understanding was that the pursuer's reluctance to accept the position related to the distance involved between her home in Livingston and the fact that the journey involved her having to drive on dual carriageways. As was contended in submissions, the distance to travel from Selkirk to either Livingston or Carlisle appears to be similar. There was no explanation as to why dual carriageway driving would make any difference.

[107] Much was made by the pursuer in her own evidence of the proposition that her job as service centre manager involved a hands-on role, by which she meant that she was expected to assist with packages and parcels on the "floor" of the depot. Some similar evidence was given by the other witnesses. However, when this evidence was properly

analysed what it came to was that the service centre manager might be expected to help out occasionally by offloading or loading parcels if the need arose. Parcels would be delivered to the depot early each morning and unloaded by the inbound team who remained on duty until 11am. If a delivery arrived late and after the inbound team had left then the drivers who were still in the depot and others would assist to unload that delivery. My assessment of the evidence is that there is no sense in which it was the service centre manager's function to unload or load parcels. Other workers were employed specifically to do this. Whilst a given manager might help out from time to time as part of maintaining good relations within the workforce it cannot be said that this was an integral part of the manager's function. The fact that the pursuer has maintained her position as service centre manager without any criticism and has plainly been seen as a manager who can be relied upon supports this interpretation. Such evidence as there was concerning the pursuer's post-accident work activity was that she did not pick up parcels within the depot. It is obvious that she may have had difficulty in doing so in the immediate aftermath of her accident when she had a cast on her right arm. She may subsequently at some point have worn some form of splint or bandage. The fact that she did not engage in moving parcels after the cast was removed does not of itself demonstrate she was unable to do so. The only evidence covering this issue was given by Mr Mason who spoke of observing her attempting to pick up one parcel on an occasion in 2021 which she dropped.

[108] Overall, it seems to me that the pursuer has continued in her employment, without any associated absences, in a well-paid and responsible managerial position which requires a two-hour drive each day on top of her working hours. She has performed with success in the eyes of her employers and without any adjustments requiring to be made. It does not seem to me that this evidential picture provides support for an account of constant

debilitating pain. Whilst there was some evidence of a need for a service centre manager to drive to other locations to attend meetings or larger company conferences from time to time, there was no evidence as to whether such practices had or would continue after the national COVID restrictions were removed. More importantly, perhaps, there was no evidence of the pursuer ever missing any specific meeting that she was expected to attend, other than one on the day after her accident.

Surveillance evidence

[109] A further chapter of evidence which is available to weigh alongside the other testimony is evidence of covert surveillance undertaken on 12 and 13 August 2021 and again on 4 March 2022.

[110] On 12 August, amongst other observations, the pursuer was seen standing outside her car in conversation with a man whom she appeared to know. The interaction was recorded on a video clip lodged as a production which I have watched in its entirety a number of times. The two were engaged in a convivial and animated conversation which lasted in the region of 25 minutes. Throughout the conversation the pursuer appeared entirely comfortable and relaxed, engaged in ordinary looking bodily movements and displayed no apparent signs of discomfort or pain. Having got into her car to leave she stretched out with her right arm to reach the fully open car door and pull it closed before waving goodbye with that same hand.

[111] On 13 August she was observed in a supermarket in Langholm where she stopped off on her way to work to buy some groceries. She was seen to be carrying a basket in the crook of her right arm which contained a number of purchases including what looked like a large carton of milk. Again she displayed no signs of apparent discomfort and when she

removed her purchases from the counter to place them into her shopping bag she picked each up rapidly with her right hand with no apparent difficulty. In Professor Carson's second supplementary report, at page 7, he notes having viewed this surveillance footage and states his opinion that there is really no sign of any disability at any stage.

[112] The video footage of 4 March 2022 showed the pursuer driving to her appointment at Professor Carson's clinic and walking around the car park trying to identify which part of the building to access. By this time the pursuer knew of the previous surveillance and suspected, correctly, that she had been followed from her home on this occasion. At various times, both before and after the consultation, she can be seen looking around her as if attempting to identify the location of those carrying out the observations.

The evidence of the expert witnesses who examined and observed her

[113] Professor Carson was able to conduct an examination of the pursuer using zoom on 25 October 2020 and saw her face to face at the Department of Clinical Neurosciences Outpatient Clinic in Edinburgh on 4 March 2022. He was struck by how difficult it was to obtain an understanding from the pursuer of where her pain was. She was not able to localise her symptoms and tended to focus on what she couldn't do rather than explain what the reason for this was. He considered that the pursuer's account was unusual in that if a patient was experiencing pain, even somatoform pain, he would expect them to be able to give a clear description of that pain and to be able to localise it. As he explained, the typical characteristic found in patients suffering from somatic pain is that they tend to give too much detail. During his examination on 4 March Professor Carson was able to conduct a physical examination and noted that the pursuer had an exceptionally sensitive reaction to fine touch on her spine which he considered very exaggerated. As he explained in evidence,

his concern was that her reaction was so extreme that it didn't look credible to him as someone who had examined thousands of patients.

[114] At that same consultation Professor Carson noted that the pursuer walked with what was an obviously disabled gait. When he had the opportunity to view the video footage taken on 12 and 13 August and the footage taken on 4 March showing the pursuer arriving at his clinic he was able to compare her gait as shown in the video footage with what he saw for himself at consultation. His evidence was that the pursuer's gait was completely different in the 2021 footage as compared to how she presented to him. On looking at the footage of her attending at the clinic he explained that there was a range of gait types shown. For a period she appeared to show significant gait disablement but for the rest she did not.

[115] The pursuer consulted with Dr Bannister at his clinic in Glasgow on 24 August 2020. He was able to observe her gait as she walked to and from the consultation room. It was normal. Despite the pursuer telling him that her standing time was limited to around ten to fifteen minutes and her sitting time between 10 and 30 minutes he noted that she sat apparently comfortably for forty minutes or so during the interview session which he conducted. He observed no difference between the ways in which she used her right hand or her left hand when talking. He concluded that he was seeing someone who was comfortable with no pain and was talking to him and moving in all directions.

[116] During his examination he noted an exquisite tenderness in the neck and the trapezii muscles which was not consistent with the neck movements he observed when he was sitting consulting with the pursuer. She also displayed a global reduction in the power of all the muscle groups in her right lower leg which was inconsistent with the even gait he had observed when she was walking.

[117] The final matter to which I should draw attention in this chapter is the fact that the pursuer gave evidence standing in the witness box throughout two whole court days. She did not express discomfort at any point and, to my admittedly untrained eye, did not appear to be in any sort of pain at any stage. As far as I could determine, her movement and manner of interacting was entirely normal and unrestrained. I attached very little of any moment to these views but they do fall to be added to the collective weight of evidence available.

Conclusions

[118] It is informative to reflect on the information concerning the pursuer's left knee and the steps which she took in that regard in early 2019, all as summarised in paragraph [64] above. It is really very difficult to accept that the pursuer would not have raised the subject of constant right leg pain along with these enquiries and associated treatment. The fact that she seems not to have is consistent with the information recorded after her visit to the Neurosurgery Department of the Western General Hospital on 12 April when she expressly communicated that she had no lower leg symptoms. Nor had she made a complaint of any such symptom to any of the various other doctors with whom she had consulted prior to then. The absence until 2020 of a complaint about the lower limb which now features so largely in the pursuer's account of her symptoms is difficult to square with the evidence of Professor Carson. He explained that patients with somatoform symptom disorder tend to give too much information to their doctors and go into detail about every aspect of their symptomatology. Having taken all of the relevant evidence into account I am unable to accept that the pursuer began to experience somatoform pain in her right leg until around this time.

[119] The extent to which this pain is constant or intermittent can be assessed by considering the fact that it has not prevented the pursuer from driving to and from her work on a daily basis. In August 2020 she told Dr Bannister that she was limited to 10 to 15 minutes of standing time. That proposition stands in stark conflict with her observed conduct on the 12 August 2021 surveillance video. The inconsistencies in gait noted by Professor Carson and Dr Bannister also feed into this assessment. Putting aside for the moment the question of how somatoform pain commencing some two years or so after the pursuer's accident could be seen as an exacerbation of her pre-existing condition, the overall conclusion which I draw from the evidence which is undisputed, and from that which I consider can be treated as reliable, is that the somatoform pain experienced by the pursuer in her right leg has been on an intermittent basis. I cannot accept her evidence of constant pain as being reliable.

[120] I accept that the pursuer has continued to experience somatoform pain in the area of her right shoulder and arm at times since her accident. The inconsistencies in her own evidence and in the accounts which she has given make it difficult to accept the reliability of her evidence as to the constant nature of this pain. An examination of the content of the medical records and the frequency of presentation points towards a more intermittent problem. The language used at times is to the same effect. A sudden deterioration was said to have occurred in December 2020. My assessment of the import of the evidence about the pursuer's employment circumstances points in the same direction, as does the surveillance evidence and the evidence of the examinations conducted by Professor Carson and Dr Bannister.

[121] In my view, the available evidence which is reliable demonstrates that the pursuer has suffered somatoform pain in her right upper limb on an intermittent basis since the time

of her accident. To the extent that her own evidence was to a different effect I do not accept it. I have not ignored the evidence of the pursuer's husband in this exercise. The conclusions which I have arrived at in relation to the other evidence are sufficient to outweigh the alternative view which was suggested in a general way by his evidence.

The second question – has the pursuer's pre-existing somatoform symptom disorder been exacerbated

[122] The answer to this question turns largely, but not exclusively, on the evidence given by Dr Stewart and Professor Carson as seen in the light of the conclusions I have arrived at on the evidence pertaining to the first question. Both experts are highly experienced in the diagnosis and treatment of somatoform symptom disorder and, putting it shortly, Dr Stewart considered that the pursuer's pre-existing condition had been exacerbated, or become worse, whereas Professor Carson considered that it had not.

[123] The CVs of these two experts were lodged as productions and they both make impressive reading. In concluding that Professor Carson has the greater expertise and reputation within this field I mean no disrespect to Dr Stewart. The extent to which Professor Carson has conducted research and published in the areas of neurological disorders and neuropsychiatry is remarkable. He has taught and lectured internationally and has received "markers of esteem" identifying him as a world leading authority in neurological disorders and somatoform disorders in general. He is one of, if not the, leading world authority in neuropsychiatry. Nevertheless, regardless of the standing of an expert witness, what carries weight is the reasoning not the conclusion (*Dingley v Chief Constable, Strathclyde Police* 1998 SE 548, Lord Prosser at page 604, as quoted with approval in the decision of the Supreme Court in *Kennedy v Cordia (Services) LLP* [2016] UKSC 6 at

paragraph 48). It follows that even although an expert witness may express his view in a way that addresses the issue before the court, the witness does not supplant the court as the decision maker and I cannot delegate the decision which I require to make in this case to either of the experts in this field.

[124] On behalf of the pursuer I was invited to prefer and give effect to the evidence of Dr Stewart. Counsel invited me to accept that the pursuer had developed new somatoform symptoms since her accident and that an overview of the whole evidence would show that there had been a change in her condition since the accident. This conclusion, it was suggested, should be drawn from the pursuer's own evidence of constant pain as taken along with the evidence of her husband and her work colleagues. That combined evidence demonstrated a change in her overall ability to function which was consistent with and supported the view arrived at by Dr Stewart. Professor Carson's view should be rejected as he had based his assessment purely on the pursuer's own account and her medical records. He had failed to take account of the other evidence which demonstrated a difference between her pre and post-accident circumstances.

[125] On behalf of the defender I was invited to reject the evidence of Dr Stewart. It was submitted that his reasoning was unsatisfactory and had changed over the course of giving evidence. He had been prepared to proceed on the basis that the pursuer's account should be accepted as credible and reliable, whereas he ought to have looked more critically at what he was told. The evidence of Professor Carson should be preferred and accepted. Not only was he a worldwide expert on somatoform disorder but he had correctly taken a more critical approach to his assessment and had provided an informed and reasoned basis for coming to the view which he did.

[126] It is interesting to note the extent to which the competing views expressed by Dr Stewart and Professor Carson came to be based on judgement. To an extent this may not be surprising, in that pain cannot be independently assessed or measured in the way that muscle deterioration or organ function may be. Nor does there seem to be a standardised or scientifically based agreed process, or protocol, for determining whether the extent to which the condition of a patient suffering from somatoform symptom disorder had worsened. That may reflect the extent to which the precise mechanism of the condition remains poorly understood. Each of Dr Stewart and Professor Carson approached the matter differently. It will be helpful to look at the approach of each in turn.

Dr Stewart

[127] Dr Stewart interviewed the pursuer remotely by video in May 2020 and February 2022. He did not record having carried out any form of examination or assessment of her mobility or susceptibility to pain.

[128] In evidence in chief Dr Stewart spoke to the conclusion set out in paragraph 17.11 of his first report which is in the following terms:

“Therefore, from a diagnostic perspective I think it likely, on the balance of probabilities, that the impact of the index accident has been to cause an exacerbation of Mrs Cossey’s pre-existing Somatic Symptom Disorder with the development of widespread pain.”

[129] He explained that he arrived at that conclusion because after the accident the pursuer continued to present with chronic pain in her arm and her leg with no history of doing so prior to it. Whilst he noted that before her accident she had presented with a variety of symptoms, that had not included chronic pain. He also took account of what he understood the ongoing impact had been for the pursuer both at home and at work, giving the examples

of her being unable to lift her right arm over the horizontal level, being unable to do washing, having reduced strength in her right hand, having difficulty in lifting things in shops with her right hand, being unable to go cycling, lift boxes or drive longer distances.

[130] In cross-examination Dr Stewart agreed that irrespective of the accident the pursuer would have continued to present with varying somatoform symptoms, since her underlying condition had not been treated. When asked to consider whether her disorder had been exacerbated, or whether it was just that the focus for her symptoms had changed, he displayed the start of a tendency to avoid engaging with difficult questions. When pressed on this point he conceded that he found it hard to separate the two concepts. He repeated his view that the difference between her pre and post-accident circumstances was that she now spoke about pain affecting her right leg and arm which led to disability at home and work which she hadn't mentioned before. He agreed that in arriving at his view he had accepted the pursuer's account of her complaints and their persistent nature at face value.

[131] In light of his evidence counsel for the defender took Dr Stewart through the pursuer's medical records in order to demonstrate that the first complaint of right leg pain was made in 2020. At this stage Dr Stewart's position seem to modify, and he responded by saying that the pursuer persisted in her complaint of pain which fluctuated and she was never pain free. At the conclusion of this lengthy exercise Dr Stewart was reminded of his initial explanation for his view that her condition had worsened, namely that she presented with persistent chronic pain in her arm and leg. On being asked if that remained his position he gave a lengthy and unfocused response which failed to address the question. When this was pointed out to him by counsel he came to accept that the pursuer's account of presenting with persistent pain was not reflected in the records canvassed with him. As he put it himself: "If you take what she told me against the GP records they don't add up."

[132] On then being pressed as to whether he maintained that the evidence of the pursuer's whole medical records supported an account of persistent chronic pain affecting the pursuer's right arm and leg he acknowledged that they did not.

[133] Despite this, he maintained his view that the pursuer's condition had been exacerbated. In explaining why, he appeared to rely on the account as given to him by the pursuer of constant pain and the impact on her domestic and work life which she explained this had caused. It should be noted in this context that Dr Stewart understood that the pursuer was able to continue to work because adjustments were made for her and she no longer did the same job. He also understood that she was able to work from home resulting in fewer symptoms being present.

Professor Carson

[134] Professor Carson identified the concerns which arose in his mind out of his consultations and examination of the pursuer which are referred to at paragraphs [113 and 114] above. He explained that incompatibility between described disability and observed disability can inform whether a complaint is genuine or not. He also explained that he was interested in obtaining an overall picture of how the pursuer had coped at work because assessment of disability was a complex issue which benefited from having an understanding of the wider picture. The pursuer's work records indicated that she was managing her work and was achieving her "stretch targets". He treated these as positive indicators.

[135] Having conducted an examination of the pursuer's medical records Professor Carson's view was that, in essence, the complaints which the pursuer now makes have all been made in the past. In particular it seemed to him that prior to the accident she had protracted problems with her knees, wrists and limbs. In his view, there was nothing in

the medical records which could genuinely be said to be new and not pre-existent and he could see nothing in her records to support the view that her pre-existing somatic symptom disorder had been made any worse by the accident. The way in which he approached this question was set out in his supplementary report at page 14 where he explained:

“I think if one was simply to read her case records without knowing the accident date, one would struggle to spot any worsening of symptoms; which is my usual thought experiment in order to answer such a question. I certainly could not see a difference in terms of overall rate of presentation and general extent of total bodily symptomatology.”

[136] In his second supplementary report, after his in-person examination of the pursuer, Professor Carson reported that he still struggled to see her presentation as being markedly different from the presentation recorded in her medical records over a prolonged period of time. He concluded by stating:

“I would acknowledge it is possible that an accident has linked with a stepwise deterioration in the extent of her somatoform symptoms, but I cannot really find any evidence to support that other than her personal testimony hence why I say her reliability is so important. Even within her work performance, it would appear that she has had pay rises and met her ‘stretch’ targets, and as noted the General Practice records do not backup a picture of substantial change.”

[137] Professor Carson explained that within somatisation disorder, the more severe form of the condition which he considered the pursuer to be nearer, the focus of the patient’s symptoms is always changing. He observed that before her accident the pursuer did not have the same symptoms all of the time, they varied. It is in the nature of the condition that the symptoms will move. The problem is in the brain and it depends where the attentional spotlight is at any given time. His evidence, with which Dr Stewart agreed, was that it was not possible to predict what area of the body will be the focus of somatic symptoms at any given time.

[138] In cross-examination Professor Carson was challenged on whether he had misunderstood what the pursuer had told him about working from home and about her salary deductions (as mentioned in paragraph [85] above). However none of his analysis or reasoning was challenged. The only contention advanced was that other evidence, from perhaps the pursuer's husband or work colleagues, which demonstrated that her abilities post-accident were diminished might require to be taken into account in determining whether there had been a deterioration in her somatoform condition. His response to this was that he would need to understand what any such witness thought was wrong with the pursuer and in general he would be looking to take account of hard evidence rather than a subjective view.

Conclusions

[139] The question of how to assess the evidence of these two expert witnesses is intertwined with the assessments which I have made as to the import of the other evidence.

[140] I am unable to give effect to Dr Stewart's evidence on the issue of exacerbation. Generally speaking, he had difficulty in addressing the issues raised with him in cross-examination about this issue. Looking at the question in more detail, the initial premise which underpinned his view that the pursuer's condition had worsened was flawed. She had not complained of persistent pain in her leg since the time of the accident. Having accepted this Dr Stewart did not appear to re-assess what his view ought to be, nor did he provide any explanation of what had caused the pursuer's leg pain to manifest itself.

[141] His modified position that the pursuer had persisted in her complaint of pain and was never pain free is not supported by the evidence as I have assessed it to be. Nor, as he

accepted, is it supported by the medical records. His opinion was dependant on there being reliable evidence of constant rather than intermittent symptoms of pain .

[142] Furthermore, I do not accept his assessment that the pursuer had no history of presenting with chronic pain in her arm or leg. He did not actually explain what he meant by the term “chronic” but I have assumed that he used it in the same sense as Professor Carson, meaning a complaint made over more than six months duration. I therefore do not accept the contention advanced in closing submissions that the pursuer has developed new somatic symptoms of pain in her right side. In any event, the assumption that a new symptom equals an exacerbation is misplaced given the evidence that it is in the nature of the condition that symptoms develop in different parts of the body unpredictably.

[143] Dr Stewart’s assessment is also undermined by the extent to which he proceeded upon an untested acceptance of the information given to him by the pursuer. As set out earlier, there were good reasons for treating aspects of the pursuer’s account with caution. Apart from these general concerns, Dr Stewart was wrong in thinking that adjustments had been made for the pursuer at work and wrong in thinking that she continued to work from home to any real extent. It was not at all clear why he thought that the pursuer had difficulty in driving longer distances or, for that matter, what he meant by this. As mentioned earlier, there was no evidence that the pursuer had missed or been unable to travel to any of the company meetings. The only evidence which was given about distant meetings came from Mr Lee who mentioned that quarterly meetings had taken place in Alfreton in the Midlands after he became regional manager. He explained that he understood the pursuer travelled to these meetings the night before. No evidence was given as to the distance involved but it is self-evident that a journey to the Midlands from Selkirk would be a lengthy one.

[144] I am not sure what Dr Stewart understood in thinking that the pursuer was unable to lift her right arm over horizontal, as it was not canvassed with him. In the video recording of 12 August 2021, during the course of the lengthy discussion mentioned, she can be seen adjusting her hair on the top area of her head and removing and replacing her glasses from the top of her head, all with her right hand. She also had no apparent or described difficulty in attending to shopping with her right hand as seen in the video recording of 13 August.

[145] The consequence of this decision would be that the pursuer has failed to establish the essential element of her case. However, I am prepared to go further and to accept the assessment set out in the evidence of Professor Carson. In my view he was correct in concluding that there was nothing in the pursuer's medical records post-accident which could genuinely be said to be new and not pre-existing. His assessment that there was no difference in terms of overall rate of presentation and general extent of total bodily symptomatology seemed to me to be broadly accurate. The test which he applied of hypothetically assessing the medical records without knowing the date of the accident seemed to me to be instructive and useful.

[146] Neither Professor Carson's approach nor his assessment was undermined in cross-examination. He had in fact taken some account of the pursuer's ability to perform at work. In assessing what to make of the points relied upon in his cross-examination I have taken account of the import of the evidence of the pursuer's husband and work colleagues as I have held it to be.

[147] Overall, Professor Carson was an expert witness of impeccable standing who gave cogent and impressive evidence on a well-informed and reasoned basis. For the reasons which I have set out I accept his evidence that the pursuer's pre-existing somatoform symptom disorder has not been exacerbated.

[148] Some further points arising out of closing submissions by counsel for the pursuer may best be mentioned. No submissions were made concerning the pain and limitation which the pursuer had complained of concerning her left leg and knee. Throughout the evidence, and in submissions, I assumed it was accepted that these issues were due to the osteoarthritic changes identified and were not connected in any way to the accident. No submissions were made as to how the pursuer's complaints of pain and limitation in her right leg could be seen as constituting an aggravation caused by the accident if I was to accept the proposition that these somatoform symptoms only commenced in around early 2020.

[149] Attention was drawn to the evidence given by Mr Mason of the pursuer having dropped a parcel. As counsel correctly identified, Professor Carson had explained in evidence that dropping things was a common feature of somatic symptom disorder. The dropping of the parcel can be accepted as an adminicle of evidence going to demonstrate that the pursuer suffered from ongoing somatic symptom disorder. It does not however demonstrate the exacerbation of a pre-existing condition.

[150] Attention was also drawn to the evidence of abdominal pain issues suffered by the pursuer in the early part of 2018 and which it was said she attributed to "heavy" pain medication. I was invited to conclude that the pursuer had been prescribed opiate based medication between October 2017 and January 2018 and to accept the evidence of Dr Stewart that opioid analgesia could be associated with side effects including constipation. Since no organic cause was identified for these 2018 issues it was submitted that this was another somatoform symptom and should be treated as being attributable to the accident. I rather doubt whether there is any basis in the record for this proposition but I cannot give effect to it in any event. The evidence as to the extent to which, and when, the pursuer was

prescribed with opiate based analgesics was vague and confusing. Nor was there any acceptable evidence that any of her abdominal issues were caused by any prescribed medication. This episode, along with the subsequent similar episode in 2019, did both appear to be the consequence of somatoform symptoms but were examples of the ongoing symptoms of this sort which had been present for years.

[151] Counsel also presented a submission based on re-attribution. She suggested that if her primary submission was not given effect to the court could nevertheless conclude that the pursuer's accident had caused a re-attribution of her somatic symptom disorder to new areas in a chronic way. I do not consider that the submission fits with the concept of re-attribution as described by Professor Carson. The areas of pain which the pursuer complained of were not new areas. As Professor Carson explained, patients with somatoform symptom disorder sometimes attribute their symptoms of pain to a particular event and refuse to accept that these same symptoms were present before that point.

The third question - has any exacerbation of the pursuer's condition been caused by the pursuer's accident

[152] This does not arise in light of my other conclusions. However this would not have been a straightforward question to answer. Whilst it was accepted that trauma could trigger a deterioration in a patient's somatoform condition it was plain that many other factors could have the same effect. As Professor Carson explained, difficulties at work, feelings of being overlooked, problems with childcare or anything else that could produce human emotion could trigger a deterioration in a somatoform condition. In this context it may be worthy of note that the pursuer mentioned to Dr Stewart at both of her meetings with him that she was stressed by her involvement in the ongoing litigation and concerned that her

decision to pursue compensation might result in the defender declining to renew the rental agreement on her cottage.

[153] Furthermore, Professor Carson expressed some doubt as to whether the sort of accident which the pursuer suffered could have led to a deterioration given that it was a relatively minor accident. In giving this evidence he drew a contrast with other examples of patients he had encountered who suffered from somatoform symptoms as a consequence of injuries themselves likely to lead to long-term organic pain. Separately, Mr Lee explained that there had been a lot of pressure on service centre managers and he had encouraged the pursuer to obtain further qualifications.

Damages

[154] The pursuer sought an award of damages under four heads:

1. Solatium
2. Loss of earnings
3. Pension loss, and
4. Necessary services

1. Solatium

[155] The submissions presented on behalf of the pursuer under this head assumed a finding that she had suffered an exacerbation of her pre-existing somatoform symptom disorder and would be entitled to an award in respect of psychiatric injury. Reliance was placed on the 16th Edition of the Judicial College Guidelines Chapter 4 (A) Psychiatric Damage Generally (b) Moderately Severe, showing a range of awards between £17,335 and £49,840. Relying on the case of *Josefa De Oliveira Malvicini v Ealing Primary Care Trust* [2014] EWHC 378 an award in the region of £40,000 was said to be appropriate.

[156] Counsel for the defender submitted that an appropriate award for the relatively minor injuries for which liability was admitted would be in the region of £1,245. This was vouched by reference to the Judicial Studies Guidelines Chapter 14 in the subcategory of minor injuries that settle within three months and the cases of *Manton v Commissioner for Northern Lights*, *McEwan and Paton* chapter CN 30-02D, *Duffy v Diamond*, *Kemp & Kemp* M1-027.1 and *Grubb v Finlay* [2017] CSOH 81.

[157] The witness best qualified to give evidence as to the nature and extent of the physical injuries sustained by the pursuer was Mr MacLean. He described these as being simple soft tissue injuries to her right leg with bruising and contusions, a simple soft tissue contusion to her shoulder and a soft tissue injury to her wrist and hand. He would have expected the symptoms arising from the physical injuries to have settled within a matter of weeks.

[158] Taking account of Mr MacLean's evidence and of the evidence as to the treatment received by the pursuer shortly after her accident, I consider that the submission presented on behalf of the defender does not adequately reflect the value to be attached to the injuries caused directly by the accident. I note that the Judicial College Guidelines, 16th edition Chapter 7 Section H subparagraph (f), provides a range of between £3,208-£4,308 (after adjustment) for minimally displaced wrist fractures and soft tissue injuries necessitating the application of plaster or a bandage for a matter of weeks and a full virtual recovery within up to 12 months or so. The pursuer's wrist injury might be thought to fall at the bottom end of this range and taking account of the other bruising which she sustained a total sum of £4,200 would seem to me to be appropriate. This also fits with the larger sum of £6,500 awarded to the claimant in the case of *Pepper v Gibson* *Kemp & Kemp* G2-040.1 who suffered injuries which were similar to but worse than those suffered by the pursuer and which had some similar consequences stretching over a lengthier period of time.

[159] Had I concluded that the pursuer had established the principal element of her case, namely that her condition had been exacerbated to the extent that she suffered from constant pain in different parts of her body, I would have found the question of assessing solatium to be a very difficult one. In the first place, the case relied upon by counsel for the pursuer concerned a claimant who suffered far more serious symptoms than those contended for on behalf of the pursuer. Secondly, there was no exacerbation of an underlying condition in that case. This is where the greatest difficulty in quantification arises. The undisputed evidence was that the pursuer would have continued to present with somatoform symptoms causing pain, even had the accident not occurred. Her diagnosis placed her at the more severe end of the condition. Counsel for the pursuer was unable to offer any suggestion as to how I should assess the extent to which the symptoms described by the pursuer were different or worse than they would have been in any event, even had the accident not occurred. Counsel's submissions took no account of the proposition that the pursuer's right leg symptoms only manifested themselves some 2 years after the accident and that by March 2020 she was describing her right ankle as being the worst of her problems. No method of linking these symptoms to the accident was suggested, beyond simply accepting the pursuer's evidence of constant pain throughout. There was no suggestion as to how this might be factored into an assessment of solatium if treated as a reflection of the pursuer's underlying condition rather than an exacerbation of it. Neither counsel had been able to identify any case in which damages had been awarded on the basis of an exacerbation of an underlying somatoform symptom disorder.

[160] Had I been required to do so I could only have approached matters with the broadest of brushes. I would have assessed the symptoms relied upon by the pursuer and their consequences for her as being no more than half as serious as those in the case of *Josefa De*

Oliveira. I would then have assessed the effect of the pursuer's pre-existing condition as accounting for half of her symptoms. The consequence would have been a net award of £10,000 for psychiatric injury, three quarters of which I would have allocated to the past.

2. *Loss of earnings*

[161] The pursuer lost no wages as a consequence of her accident but it was contended that, had it not been for her the accident, she would have been promoted. This proposition falls away in light of my other findings. It did not seem to me that the proposition was well-founded in any event. The pursuer gave evidence that she was keen to be promoted to the position of regional manager. The evidence was that there were eight regional managers within the company. There was no vouching of any post having become available since the pursuer's accident. The number of service centre managers available to apply for any post which might become vacant was not identified.

[162] More importantly though, Mr Lee gave clear evidence that he had been promoted from the position of service centre manager to that of the pursuer's regional manager, replacing in Mr Kernahan, at a point in 2017 prior to her accident. The pursuer's evidence took no account of this occurrence. She appeared to think that Mr Kernahan's position only became available after her accident. However Mr Lee gave clear evidence about being contacted following her accident and of the steps which he required to take to make sure her duties were covered in the Carlisle depot. The implication would appear to be that the pursuer did not apply for promotion when her previous line manager's post became available. None of this was canvassed or explained in evidence. Having been offered a form of promotion to service centre manager at Livingston there was no meaningful

explanation as to why she declined this offer. What this demonstrates is that the pursuer's employers were prepared to promote her despite what she thought of as her limitations.

3. *Pension loss*

[163] The submissions on pension loss were all predicated upon the assumption that the pursuer would have obtained promotion of some sort, either to the better paid position of service centre manager at Livingston or to the role of regional manager but for her accident. This head of claim also falls away for the same reasons as does the claim in relation to promotion.

4. *Necessary services*

[164] The evidence as to services provided to the pursuer by her husband and her parents-in-law was, for the most part, vague and contradictory.

[165] Both the pursuer and her husband gave evidence to the effect that his parents provided help in the aftermath of the pursuer's accident by assisting with housework and cooking. Each also mentioned that the pursuer's father-in-law had taken their son to school, but it became clear that this was something he had been doing on a daily basis since before the pursuer's accident in any event. This was necessary as the pursuer left home at around 6.00am and her husband started work at 8.00am.

[166] Looking to the period of eight weeks after the accident, which would go to just beyond the point at which the pursuer's cast was removed, the pursuer's evidence was that both of her parents-in-law assisted for around 2 hours each day and her husband assisted for 4 hours a day. At this time he was helping her to shower and with other aspects of personal care, such as brushing her hair in addition to attending to household tasks.

[167] Mr Cossey's evidence was that his parents assisted for perhaps 2-3 hours a week and that he assisted his wife for around 3-4 hours each week. These estimates are significantly different from that provided by the pursuer.

[168] There was no evidence which would enable me to understand what services the pursuer's parents could have been providing to the extent of 28 hours each week. It seems to me that to the extent that any evidence was led about what services were being provided, either by his parents or by Mr Cossey, his estimates of time are the more reasonable ones.

[169] Although the pursuer was asked in a general way about ongoing assistance provided by her husband's parents through 2018 and 2019, it was impossible to understand what assistance she was claiming they provided and for how long. Mr Cossey's evidence concerning some aspects of this period simply made no sense. For example, he suggested that his father continued to drive the pursuer to work and also took their son to school. He could not have done both on the same day given the timing and distances involved but additionally there was no suggestion from the pursuer that her father-in-law drove her to work other than over a short period of time when she first returned to work. There would be no reason for him continuing to drive the pursuer to work in 2018 and 2019 and none was suggested.

[170] The pursuer's evidence as to the assistance provided by her husband beyond the first 8 week period and into the following years was also unclear. She explained that he was preparing meals and doing domestic duties, such as washing and helping to look after their son. In terms of time, she considered that these duties took him in excess of an hour every day and, as far as I could understand it, this seemed to have remained the position until the proof. His evidence was equally vague as to what ongoing assistance he provided and with what frequency.

[171] It seemed to me that the evidence as to assistance provided by Mr Cossey had to be viewed in the context of a working couple with a teenage son where the husband would be expected to share household duties in any event. This would be consistent with the evidence given by Mr Cossey who explained that before the accident he and the pursuer shared all of the housework duties 50/50. The extent to which he was explaining that he provided what would qualify as necessary services was therefore unclear.

[172] The pursuer's claim for necessary services also included an element to reflect the times when her father-in-law drove her to work. This was perhaps the most uncertain area of all in this chapter. The evidence of the pursuer, her husband and her work colleague Mr Masson, combines to establish that the pursuer was on occasions driven to work by her father-in-law. The evidence as to the frequency with which that happened, and during which period, was both confusing and contradictory. The evidence of Mr Masson would suggest that this occurred on some occasions prior to the pursuer's cast being removed. The most reliable aspect of the pursuer's testimony as to when she started to return to the Carlisle depot was after the first 4 weeks. That account chimed with what Mr Masson said. Her evidence was that her father-in-law drove her to work in this period for about one day a week. Her husband explained that his father would wait for two to three hours in Carlisle until the pursuer was ready to be driven home again.

[173] Accepting as I do that that the process of thinking back over a number of years to estimate how much time was spent providing assistance to the pursuer, and on what tasks, is a difficult one, it nevertheless remains for the pursuer to establish her claim on the balance of probabilities. The submissions for the pursuer as to how the claim for necessary services should be quantified did not identify which parts of the often conflicting evidence they were based upon. Nevertheless, taking account of the extent of the soft tissue injuries sustained,

and Mr Maclean's evidence as to the time required for recovery, I am prepared to proceed upon the basis that the pursuer's husband and parents-in-law did provide assistance such as would fall within the definition of necessary services up until the point at which her cast was removed. I consider it would be appropriate to consider this to be a period of 8 weeks.

[174] I therefore calculate this aspect of the pursuer's claim as follows. For the period of eight weeks after her accident the pursuer's parents-in-law provided necessary services to the extent of 3 hours each per week giving a total of 48 hours. Her husband provided necessary services for a period of 3 hours each week giving a total of 24 hours. In addition, the pursuer's father-in-law provided the necessary service of driving her to work one day each week for 4 weeks, a round trip of 2 hours and 20 minutes' drive and spent about 3 hours waiting for on top of this. This amounts to a total of 5 hours and 20 minutes on four occasions rounded up to a total of 22 hours. In terms of valuation counsel for the pursuer suggested an hourly rate of £9 whereas counsel for the defender suggested the then national minimum wage rate of £7.50 per hour. I am content to adopt the suggestion made by counsel for the pursuer. This brings out a total award for services of £846.

[175] A claim was also advanced under section 9 of the Administration of Justice (Scotland) Act 1982 on the basis that the pursuer was no longer able to take her wheelchair bound mother out for visits as she had previously or to care for her over a period of a few days to allow her father some respite. A lump sum award of £10,000 inclusive of interest was suggested as being appropriate. Given that I have rejected the pursuer's case on exacerbation and accepted that the injuries caused by the accident ought to have resolved within a matter of weeks there is no basis upon which this award can be made. The same applies to the small claim for expenses in relation to miscellaneous items purchased by Mr Cossey.

Award

[176] For the reasons explained above, the total award made for solatium is £4,200, all of which is allocated to the past. Interest will run on this sum at 4% per annum from the date of the accident. In addition, a sum of £846 is awarded in respect of necessary past services. Interest will also run at 4% per annum on that sum from the date of the accident.