



OUTER HOUSE, COURT OF SESSION

[2025] CSOH 44

PD392/24

OPINION OF LORD BRAID

In the cause

TRACY MCFADYEAN

Pursuer

against

RENFREWSHIRE COUNCIL

Defender

Pursuer: Allardice; Thompsons Scotland LLP
Defender: Smith; Ledingham Chalmers LLP

20 May 2025

Introduction

[1] On 6 October 2021, the pursuer, then aged 48, was in the garden of her brother's house in Linwood, Paisley when, suddenly and without warning, she was hit on the head, and injured, by a chisel, which had fallen some 30 feet from the roof of the house. The pursuer was at the time, and still is, employed as an orthopaedic staff nurse. She resides with her husband and two children.

[2] In this action, the pursuer sues for damages in respect of her injuries. Liability is no longer in dispute, the defender accepting that the accident was caused by the fault of its employees, who were working on the roof of the house at the time. The action called

before me for a proof on quantum, ie, the amount of damages to be awarded to the pursuer. Evidence was given by the pursuer; her husband, Mark McFadyean; and Mr Jonathan Newton, a consultant ENT surgeon, who spoke to his report dated 18 January 2024. Although she did not appear as a witness, the parties agreed by joint minute that a medical report by Dr Holly de Mora, clinical psychologist, dated 18 March 2024 should be treated as the equivalent of her oral evidence. The defender did not lead any evidence nor did it challenge the credibility and reliability of any of the pursuer's witnesses.

The facts

[3] The pursuer bent down to wipe some dirt off her trainers, when she felt the chisel, which was some 2.5 feet long and weighed about 4 kilograms, smash off the right side of her head. She believes that she lost consciousness for a couple of minutes, never having had any recollection of going back into her brother's house. Her head was bleeding and her hands were covered in blood. Immediately after the accident, she experienced a noise in her right ear which she described as being as if she was under water. She phoned her husband, who collected her and drove her to the hospital. She was upset, in shock, crying, and in a lot of pain. She was attended to by an emergency nurse practitioner, who cleaned the wound, glued it together and sent the pursuer home with head injury advice.

[4] Over the next few days the pursuer was very unwell. She slept intermittently, felt nauseous and vomited from time to time. She was confused, putting things in the wrong place and unable to speak the words that she wanted to say. She had pain in her right ear. She also had paraesthesia, numbness on the right side of her face. After 5 days, at her husband's insistence, she returned to hospital. On this occasion she was seen by a consultant and X-rayed, revealing that she had sustained a small fracture to the right side

of her skull. No treatment was prescribed other than rest. Over the coming weeks, she continued to feel the same, suffering from a continuing noise in her ear and paraesthesia. She returned to hospital again a few weeks later, when post-concussion syndrome was diagnosed. The pursuer was not fit to drive. During that time, her husband, who is a taxi-driver, had to do all the household tasks and childcare (in particular taking their daughter, then aged 6, to and from school). Sometimes that took 5 to 7 hours per day. She was able to return to work, on a phased basis, after 12 weeks.

[5] Although CT and MRI scans have revealed no brain abnormalities, the pursuer still experiences persistent headaches, approximately four times per week. She did not have headaches before her accident, which is their likely cause. However the most serious symptom from which she has suffered, continues to suffer and will always suffer is tinnitus in her right ear. Mr Newton was in no doubt that the tinnitus was caused by the accident. Tinnitus is a recognised medical condition, although those who suffer from it may subjectively experience the symptoms in different ways. Mr Newton explained that head injuries cause tinnitus by disruption of complex audiological connections in the brain, which affects the way the sound is processed. There is no treatment. The pursuer described her symptoms as a loud, persistent fuzzy noise which she experiences 24/7. The tinnitus has had a profound effect on her life, most notably that she has difficulty in sleeping. Because of her job as a staff nurse, she is unable/unwilling to take sleeping tablets. Instead, her GP prescribed an antihistamine, to cause drowsiness, to little effect. As a result, she is constantly tired and irritable. Both she and her husband described how her personality has changed, whereby she has gone from being a happy-go-lucky laid-back unargumentative person to someone who suffers from panic attacks and anxiety, who gets very uptight and who flies off the handle at her husband and children at the least thing. (That said, it was the

former version of the pursuer, judging by her pleasant demeanour, who appeared in the witness box, but I accept that in a home environment she is snappier with her family than before.) She is unable to do all the household chores she previously did, including washing, shopping, cooking and dealing with the household finances. Instead her husband has had to do most of those tasks.

[6] The pursuer has sought medical advice for her condition. She was prescribed a masking device in an attempt to mask the tinnitus but that was ineffective: she could still hear the noise in her ear, the device merely amplified the noises around her and she felt it was making the tinnitus louder also. She was given sleep apps in an attempt to address her problem with sleeping. She was also referred to a counselling service, Doing Well, and attended an 8 week course, to help her live with tinnitus. None of these measures have had any beneficial effect.

[7] Although the pursuer had assessed the severity of her tinnitus as 5/5 on a scale of 1 to 5, or catastrophic, Mr Newton assessed it as severe, or 4/5, on a recognised grading tinnitus scale. The description of grade 4 is as follows:

“Almost always heard, rarely, if ever, masked. Leads to disturbed sleep pattern and can interfere with ability to carry out normal daily activities. Quiet activities affected adversely. There should be documentary evidence of the complaint having been brought to the general (or some other) medical practitioner (prior to any medico-legal claim). Hearing loss is likely to be present but its presence is not essential.”

Although some aspects of the description of grade 5 could be said to apply to the pursuer, Mr Newton said that he would uncommonly say that tinnitus was truly catastrophic, which implies that the patient is struggling to live with it. He pointed out that tinnitus at grade 4 is still quite severe, and he was not sure that the pursuer was quite at grade 5.

[8] The other condition from which the pursuer suffers is a psychological one. This was described by Dr de Mora in her report. The pursuer has experienced and continues to experience significant intrusive thoughts and memories relating to the accident, for which there are several triggers, including her tinnitus, seeing scaffolding and talking about what happened. When triggers occur the pursuer can feel her heart beginning to jump out of her chest and feelings of panic, sometimes panic attacks. She experienced nightmares for a time although these stopped from January 2022. In Dr de Mora's opinion, the pursuer's ongoing symptoms are indicative of PTSD. Her symptoms continue to have a negative impact on her general well-being and functioning. Dr de Mora has suggested psychological intervention in the form of Cognitive Behavioural Therapy or Acceptance and Commitment Therapy. In her opinion, approximately 16 to 20 sessions would likely be required (taking around 6 to 9 months) for her to return to pre-accident functioning. The pursuer is currently on an NHS waiting list for CBT but it is unclear when that is likely to take place, although she received a letter in January 2025 informing her that she is moving up the list. In cross-examination the pursuer was asked if she had considered paying privately for CBT. She said she had not because she could not afford it although she accepted that she had not looked into the cost of private CBT sessions.

[9] Insofar as employment is concerned, the pursuer spoke warmly of her employers (the NHS) who have been very supportive in assisting a phased return to work and in accommodating the pursuer's difficulties. She decided that she could no longer continue as a staff nurse in an orthopaedic trauma ward, where she worked before her accident and in August 2023 she transferred to an elective orthopaedic ward, which she finds less stressful. She is employed at the same grade and on the same salary as before her transfer. Since April 2025 the pursuer has also reduced her hours, resulting in a net decrease in her monthly

pay of about £200. Her job is secure; in answer to a question put to her in cross-examination the pursuer expressly acknowledged that there is no prospect of her losing her job as a result of the accident or otherwise. She is able to continue working until retirement age.

[10] Socially, the pursuer can no longer do the things she did before, or at least not with the same frequency, including going to the park, the cinema, socialising occasionally with friends, bowling and swimming.

Submissions

Pursuer

[11] In line with the pursuer's pleadings, counsel for the pursuer sought damages under four heads, namely *solatium*; loss of employability (or, as the summons puts it, disadvantage on the labour market); a claim for necessary services under section 8 of the Administration of Justice Act 1982; and a personal services claim under section 9 of that Act. (A fifth head is averred in the summons, treatment costs, but no evidence was led that any such costs had been incurred.) As regards *solatium*, he submitted that the correct approach was to have regard to the Judicial College Guidelines for (i) brain and head injury (Chapter 3(A) - Injury Resulting from Brain Damage) and (ii) psychiatric and psychological damage (Chapter 4(B) - PTSD. Chapter 3(A) was a better starting point than Chapter 5(B), which provided guidelines for deafness/tinnitus, since it avoided any need to try to assess separately the skull injury (for which there were no guidelines). As regards the pursuer's brain injury, the case fell somewhere between bracket (c)(iii), having a range of £52,550 to £110,720, and bracket (d) having a range of £18,700 to £52,550, suggesting a figure of £52,550, being the figure common to both brackets. As regards the pursuer's PTSD, the likelihood was that she would make a good recovery but probably not within the next year and so her symptoms

fell either at the top of the moderate bracket (£9,980 to £28,250) or at the bottom of the moderately severe bracket (£28,250 to £73,050), an appropriate figure being about £30,000. Recognising that the pursuer was suffering from multiple conditions which contributed to her pain and suffering, cases such as *Sadler v Filipiak* [2011] EWCA Civ 1728, CA showed that in most cases a deduction should be made so as to prevent any double counting. However, in the present case the pursuer's head injury and PTSD were distinct such that there was, at most, a minimal overlap.

[12] Turning to loss of employability, counsel sought to draw an analogy with *Smith v Manchester Corp* [1974] 6 WL UK 31 in which the facts were very similar to those here, inasmuch as the plaintiff in that case had carried on in the same work as before but found difficulty in doing it, which could also be said of the pursuer. Adopting the same approach as in that case would result in the pursuer being awarded a loss of employability figure of about 1.25 times her salary, giving a figure of about £40,000. In addition, she should be awarded a further £30,000 or so in respect of her loss of earnings caused by her reduction in hours.

[13] As regards the section 8 and 9 claims, counsel quantified those together at £30,000 to date, inclusive of interest. For the future, £5,000 per annum was an appropriate figure to which should be applied a multiplier of 31.95.

Defender

[14] Counsel for the defender accepted that the Judicial College Guidelines were a suitable starting point, provided one bore in mind that they should be adjusted downwards by just over 10% when being applied to Scotland (a proposition which did not appear to be disputed by counsel for the pursuer). His approach was to treat the pursuer as suffering

from not two, but three, separate injuries: tinnitus; an injury to her skull; and PTSD.

The appropriate starting point was Chapter 5(B). The present case fell within the lower to middle of bracket (ii) - Moderate Tinnitus and NIHL (Noise Induced Hearing Loss) or moderate to severe tinnitus or NIHL alone - with a range of £18,180 to £36,260. As regards the skull injury, counsel for the defender categorised it as a minor head injury falling within bracket (e) of Chapter 3A, with a range of £2,690 to £15,580, perhaps in the mid to upper end of that bracket. As regards the PTSD claim, the pursuer had been able to go back to work after 3 months and her symptoms should resolve if she undertakes 15-20 sessions of CBT. That was a less severe case of PTSD, at the lower end of the bracket. The values of each individual element of claim should not simply be totalled, but the aggregate figure should be discounted in terms of *Sadler*, above. In addition to the *Sadler* discount the PTSD claim should be further discounted because the pursuer had failed to mitigate her loss, by not paying for her CBT privately nor even having investigated whether she was able to afford to do that.

[15] As for loss of employability, counsel submitted that that claim was misconceived, because there was no real risk that the pursuer would find herself on the labour market in the future (unlike the pursuer in *Smith*). Finally as regards the services claims, they were also misconceived or in any event there had been no evidence of any substance about what it was that the pursuer's husband did on her behalf nor had there been any detailed evidence about the sort of services that the pursuer had previously done for her husband and children that they had lost. It might be reasonable to make an award to reflect the 3 months between the accident and the pursuer's return to work but anything more than a few thousand pounds under these heads would be excessive.

[16] Finally although case law was not a reliable guide to value, since each case necessarily turned on its own facts, counsel referred to two cases as illustrating that the sum sought by the pursuer for *solatium* was excessive: *JW v Salisbury NHS Foundation Trust* 2024 WL 05442780 in which the figure for tinnitus and general psychiatric disorders was £18,000; and *Palmer v Mantas and Anr* 2022 WL 22878922 in which £65,000 (RPI adjusted figure £80,610.64) had been awarded for a brain injury worse than the pursuer's.

Decision

[17] Parties are agreed that an appropriate starting point is the Judicial College Guidelines, rather than case law, but they disagree as to how they should be applied. Should the pursuer be regarded as having suffered from only two injuries - a head/brain injury, and PTSD as the pursuer contends: or, as the defender would have it, three injuries: a head/brain injury; tinnitus; and PTSD?

[18] As counsel for the pursuer submitted, the problem with not approaching the case in the way suggested by him is that there is no directly applicable guideline for the pursuer's skull injury if it is not to be treated as a brain injury. A more positive reason for adopting his approach is that, although the contemporaneous medical records state that the pursuer suffered a head injury rather than a brain injury, Mr Newton's evidence was that at least one theory for the cause of the pursuer's tinnitus was that there had been damage to the complex connections in the brain and in that respect the pursuer can be said to have suffered from a brain injury. Further, as noted below, the pursuer's injury, and the consequences it has had for her, are in fact accurately described within Chapter 3, suggesting that her claim can appropriately be valued under that chapter. A final, practical, reason for adopting

the two-injury approach is that it is more straightforward to apply a discount where one is considering the overall effect of two injuries rather than three.

[19] Adopting that approach, then, Chapter 3(A) of the JSC guidelines, bracket (c)(iii) describes “moderate” cases as those:

“in which concentration and memory are affected, the ability to work is reduced, fatigue may be a feature, where there is a small risk of epilepsy, and any dependence on others is very limited. There may, nonetheless, be vestibular symptoms and an effect on senses.”

The range for such cases is £52,550 to £110,720. Bracket (iv), comprises “less severe” cases where:

“the injured person will have had similar problems to (c)(iii) above but will have made a good recovery and will be able to take part in normal social life and to return to work. There may not have been a restoration of all normal functions so there may still be persisting problems such as poor concentration and memory or disinhibition of mood, which may interfere with lifestyle, leisure activities, and future work prospects. At the top of this (there may be a small risk of epilepsy) or some seizures in the past.”

The range for this bracket is £18,700 to £52,550.

[20] I agree with counsel for the pursuer that these brackets between them paint an accurate picture of the effect the accident has had on the pursuer - her concentration and memory have been affected, her ability to work is reduced, she is fatigued and there has been interference with her social life and leisure activities, all stemming from her tinnitus, which in turn stemmed from the severe blow to her skull. I would place the pursuer’s case at the top of the lower bracket/bottom of the higher one, and after making a broad brush allowance to reflect the fact that English awards are 10% higher than corresponding awards in Scotland, I value this element of the pursuer’s claim at £45,000.

[21] By way of a double check, if I were to apply the defender’s approach, and value the tinnitus separately under reference to Chapter 5(B), there is no dispute that the pursuer’s

case falls within bracket (d) (ii) - moderate tinnitus and NIHL or moderate to severe tinnitus or NIHL alone, which has a range of £18,180 to £36,260. The pursuer admittedly has severe tinnitus and I would place her case at or near the top of that bracket. On this approach, one must then attempt to value the head injury separately under Chapter 3. I agree that the injury would for that purpose be classed as in the minor bracket, the relevant section stating that the level of award will be affected by the following considerations:

- i. the severity of the initial injury;
- ii. the period taken to recover from any symptoms;
- iii. the extent of continuing symptoms; and
- iv. the presence or absence of headaches.

The guidelines further state that cases resolving within about 2 to 3 years are likely to fall within the mid to lower range of the bracket. The bottom of the bracket will reflect full recovery within a few weeks. The range is £2,690 to £15,580. I would assess the pursuer's injury (leaving the tinnitus out of account, as one must) as falling within the middle of that bracket, which when added to the figure for tinnitus alone brings out a figure in the same general area as the sum arrived at under my preferred approach.

[22] Turning to consider the pursuer's PTSD, the guidelines describe "moderately severe" cases as being those where there is a prognosis for some recovery with professional help but where the effects are likely to cause significant disability for the foreseeable future. I do not consider that the pursuer's case falls into that category, partly because she should (or at least could, were she to go undergo CBT now) make a complete recovery within the next year. Rather I place her within the moderate category being cases where the injured person will have largely recovered and any continuing effects will not be grossly disabling, albeit at

the top end of that category, the range of which is £9,980 to £28,250. Making a broad brush deduction as above, I value this part of her claim at £25,000.

[23] Those figures together suggest a total award for *solatium* of £70,000 but I must next consider whether a "*Sadler*" type reduction should be made. In that case it was said by Pitchford LG at para [34] that:

"it is in my judgment always necessary to stand back from the compilation of individual figures, whether assistance has been derived from comparable cases or from the JSB guideline advice, to consider whether the award for pain, suffering and loss of amenity should be greater than the sum of the parts in order properly to reflect the combined effect of all the injuries upon the injured person's recovering quality of life or, on the contrary, should be smaller than the sum of the parts in order to remove an element of double counting. In some cases, no doubt a minority, no adjustment will be necessary because the total will properly reflect the overall pain, suffering and loss of amenity endured. In others, and probably the majority, an adjustment and occasionally a significant adjustment may be necessary."

That passage was cited with approval in the recent Supreme Court case of *Rabot v Hassam* [2025] AC 534 at paras [14] to [18].

[24] Applying that approach, I consider that there is some, but not significant, overlap between the pursuer's head injury/tinnitus on the one hand and her PTSD on the other. The tinnitus undoubtedly fuels the PTSD since it reminds the pursuer of her accident on a daily basis but the effects each has had on the pursuer are markedly different. The tinnitus is with the pursuer 24 hours a day and it is that which interferes with her sleep and leads primarily to her irritability; whereas the PTSD affects her in other ways, such as when she encounters scaffolding. Further, the tinnitus will be lifelong whereas the PTSD, hopefully, will resolve when the pursuer undergoes CBT.

[25] At this stage I should mention the other discount contended for by the defender which is to reflect the fact that pursuer has arguably failed to mitigate her loss by not paying privately for CBT. Although it is true that the pursuer did not investigate the cost of doing

that, I consider that viewing her conduct as a whole, she has acted reasonably in as much as she has continuously sought medical assistance for her problems, has attended one set of counselling sessions, has attempted to use a masking device (for her tinnitus rather than her PTSD) has also installed sleep apps on her phone, and is on an NHS waiting list. I have in any event valued the PTSD element of the claim on the assumption that she will now seek CBT, which to an extent meets the defender's argument.

[26] Recognising such overlap as there is, I value *solatium* at £60,000 (60% of which is attributable to the past, that allocation being a matter of agreement). Agreed interest will be applied to that figure at the rate of 4% from the date of the accident to the date of this opinion, which I calculate at £8,693.

[27] Finally and for completeness, since parties were agreed that the JSC guidelines are a better guide to the value of *solatium* than reported cases, no two cases being alike, I did not derive a great deal of assistance from the cases referred to by counsel for the pursuer: *JW* was in any event settled out of court; while the RPI adjusted figure in *Palmer* does not appear to me to be out of kilter with the sum I have awarded to the pursuer.

[28] Turning next to loss of employability, I agree with counsel for the defender that this element of the claim has not been established. The pursuer said in terms that her job in the National Health Service is secure. There is no real risk, as there was in *Smith*, above, that she will ever find herself on the labour market and consequently she has not been disadvantaged in that market as averred in the summons. Even if she were to leave her job, there was no evidence before me from which I could properly find that she would be at a disadvantage in finding a new job. Even had I been making an award in relation to this head of claim, I would not have taken into account the wage loss suffered by the pursuer due to her reduction in hours, which is not to do with any loss of employability but rather

was an ingenious, but ill-fated, attempt by her counsel to advance a backdoor loss of earnings claim, for which there is no basis in the pursuer's pleadings, nor in her statement of valuation of claim.

[29] I turn finally to the loss of services claims under sections 8 and 9 of the Administration of Justice Act 1982. An award under section 8 compensates a pursuer for necessary services rendered by a relative, whereas section 9 compensates a relative for the loss of personal services previously rendered by the pursuer. While I accept the submission of counsel for the pursuer that an award may be made under both sections, which compensate for different things, the evidence fell far short of justifying the levels of award sought. Although in the immediate aftermath of her accident, Mr McFadyean had to do everything for the pursuer, the overall tenor of the evidence was somewhat vague, but the gist of it is that Mr McFadyean has had to do more about the house than previously, including much of the shopping, cooking and washing, with the pursuer doing correspondingly less. It is hard to see the justification for a significant award when the pursuer is, as counsel for the defender pointed out, capable of herself performing valuable services as a nurse in the course of her employment. Further, if the pursuer, as expected, improves following CBT, her ability to resume more of the household tasks should increase. Nonetheless, I do accept that there is a services claim, mostly in the past but to a smaller extent in the future, under both section 8 and section 9. The pursuer's statement of valuation of claim, lodged only several months ago, valued this element of the claim at £10,000 which is a more realistic (although pessimistic) assessment than the figure now sought. Taking such evidence as there was at face value, I will allow £10,000 for each claim, making £20,000 in total, inclusive of interest on that element of it attributable to the past.

Disposal

[30] I have awarded the pursuer a total of £88,693, being *solatium* of £68,693 inclusive of interest to date, and £20,000 for her services claims. I have reserved all questions of expenses.