OUTER HOUSE, COURT OF SESSION

[2021] CSOH 120

PD329/20

OPINION OF LORD HARROWER

In the cause

FENRIR THORVALDSEN

Pursuer

against

DUNDEE CITY COUNCIL

Defenders

Pursuer: Galbraith QC; Drummond Miller LLP
Defenders: J Nicholson; Gillespie Macandrew LLP

2 December 2021

Introduction

[1] The pursuer is employed by the defenders as a teacher at Craigie High School in Dundee. On 22 August 2017, while in the classroom, he was struck on the head by a wooden partition, knocking him to the floor and rendering him briefly unconscious. In this action, in which the pursuer seeks to recover damages from his employer, liability is admitted, and the sole issue is the extent to which the pursuer's injuries were caused by the accident. The pursuer claims to have suffered a concussive head injury, followed by dizziness and confusion, debilitating headaches, and ultimately an exacerbation of his poor mental health, characterised by him in these proceedings as a recurrent depressive disorder

and a somatic symptom disorder, from which he continues to suffer. The defenders say that the pursuer's injuries were limited to a concussive head injury and associated post-concussion symptoms, all of which resolved themselves within a period of about 7 weeks following the accident.

[2] The proof had been set down for 4 days, to proceed entirely by means of the Webex platform. In the event, as a result of frequent interruptions caused by technical difficulties, the proof required to be split over 7 days, with the evidence concluding on 10 June 2021. I am grateful to both parties and all the witnesses, for their forbearance. Having regard to the extent of the overrun, parties invited me to dispense with oral argument and to require written submissions. I agreed to that on the understanding that each party would include in their assessment of damages an estimate of what, alternatively, the appropriate award should be, were I to uphold the hypothesis of fact put forward by the other. Parties' submissions were lodged on 18 June 2021.

The evidence

[3] Senior counsel for the pursuer led the following witnesses, in addition to the pursuer himself: Ewa Bieniecka, the pursuer's partner at the time of the accident; Craig Robertson, the pursuer's colleague at a charitable organisation he set up to promote the pursuit of mixed martial arts; and the pursuer's GP, Dr John Kennedy. Counsel for the defenders led evidence from members of the teaching staff at Craigie High School: Jim Gill, Depute Head Teacher; Ellen Smith, Principal Support for Learning Teacher; and Andrena Waghorn, Head Teacher. Except where I have specifically noted reservations regarding their evidence in this opinion, I am prepared to treat all the witnesses as generally credible and reliable, at least as regards those issues which were relevant to my decision.

[4] My principal difficulty related to the evidence of the pursuer, whose persistent headaches, if they had an organic basis at all, could not be traced to any neurological injury sustained as a result of the accident. As a result, there was no objective clinical basis, such as might be provided by an X-ray or a scan, to determine the basis for the existence of his pain, its origins or its extent. This is not to cast doubt on the pursuer's own experience of pain, but it does mean that it becomes all the more important to test the pursuer's evidence against the contemporary records, including the medical records, particularly where, as in this case, the question of timing is all important.

[5] With that in mind, I did not find the pursuer an altogether reliable historian. For example, the A&E notes recorded the pursuer as presenting with pain at the "point of impact", whereas the pursuer in evidence described the initial pain as throbbing pulses from the base of his neck to the front of his head, gesturing with his hand from the back of the right hand side of his head to the front. I also found the pursuer, who kept himself fit, to be rather vague about how often he went to the gym after the accident: "I don't know how frequently I was going", he said in evidence, "there were one or two occasions I went back, just to test out if I could do it". But in the GP notes for 25 September 2017, he was described as going to the gym two nights per week. Following his interview with the defenders' expert psychiatrist, Dr Cockayne, she noted that the pursuer was unable to describe when his headaches first appeared after the accident. That issue was not clarified in evidence. Moreover, when examined in relation to various points in time at which he attended his GP but made no complaint of headaches, he frequently stated that he was "still having headaches every day", almost as if he considered it should be taken as given that headaches had become a more or less constant feature of his everyday life after the accident.

[6] I accept that the pursuer would not necessarily be motivated to attend his GP, just because he had a headache, even a severe headache. Indeed, there are GP records for the pursuer going back as far as 2007 which indicate that the pursuer had simply learned to cope with his headaches as no obvious answer to them had emerged. However, where he was attending his GP's surgery in any event, in connection with other matters, I would have expected headaches to have been mentioned and noted, if those were something from which he was suffering at the time. Instead, I found that the medical records, and the evidence of the pursuer's GP, Dr Kennedy, did not reveal someone consistently presenting with intense headaches in the days and weeks, or even months following the accident. The records do however show that the pursuer began consistently to present with headaches from about March 2018, some 6 months after the accident.

[7] The pursuer also struck me as having a tendency, perhaps understandably, to attribute all his present difficulties to the accident, and to minimise the difficulties he was having, including his experience of headaches, prior to the accident. So, for example, in the GP records for 4 September 2017 he was described as stating that his last episode of migraine had been 10 years previously. In his evidence, however, while initially confirming that this entry was correct, he later conceded in cross-examination that it was incorrect, and that he would have had two or three migraines a year. The pursuer also said in evidence that the first Botox injection he had received for his headaches was in 2020, whereas the evidence of Ellen Smith, which I accept, was that he had informed her, before the accident, that he was already at that time receiving Botox for his headaches. Again, the pursuer stated on record that he had run a charity gym in Dundee, but had had to give that up because of the accident (p8A-B of the record). However, elsewhere he has stated that he had "handed over the reigns [*sic*]" of the charity to a committee, as he had "got very little from it

[him]self" (7/1/49 of process). He was happy to concede that, in the period after the accident, he "wasn't very good" at his job and lacked the patience necessary to deal with difficult pupils, attributing that to his headaches. However, he was more reluctant to accept that this might also have been true prior to the accident when he had experienced difficulties at work. Already in January 2017, he was considering a change in career (GP records for 16 January 2017).

[8] In my understanding of the medical records, I was greatly assisted by the evidence of Dr Kennedy, the pursuer's GP. Senior counsel for the pursuer submitted that his evidence was only of limited assistance, since it was "restricted to considering documentation provided by others". Given that Dr Kennedy was most acquainted with the pursuer's medical history, based on many face-to-face consultations dating back to 2011, I found this a rather startling submission. The pursuer himself acknowledged that Dr Kennedy knew him well, and he trusted Dr Kennedy's opinion. Senior counsel went so far as to describe Dr Kennedy as "relatively evasive and unwilling to accept basic propositions". She criticised his lack of specialist qualifications in the diagnosis of headaches "as an organic condition", and, in her examination in chief, she directed a whole line of questioning at his lack of specialist qualifications in psychiatry which, she contended, would be necessary for the diagnosis and treatment of "functional" headaches. However, as Dr Kennedy pointed out, patients frequently attended at his surgery complaining of headaches; headaches do not present themselves already classified as "organic" or "functional"; and it is the job of the GP in the first instance to provide a diagnosis and treatment: 25-50% of Dr Kennedy's training had a psychiatric component. In summary, I was not persuaded by any of these criticisms, and I accepted Dr Kennedy's evidence in its entirety.

[9] I acknowledge that the pursuer's account was supported to some extent by his former partner, Ewa Bieniecka. But while I had no reservations about her credibility, I found that she too was vague on matters of timing, perhaps understandably so, since during much of the relevant period, she was working intensively on completing a doctoral dissertation in mathematics, sometimes up to 12 hours a day, until it was finally submitted in November 2017. Perhaps as a result, and by way of illustration, she was unable to recollect the pursuer's prolonged absence from work between September 2016 and February 2017, despite the fact that their relationship had started, she said, in August 2016, and she was living with him for at least part of that period. She herself conceded in her evidence that she couldn't be relied on as regards the timeline. And she also conceded that the pursuer had a tendency not to be frank with her about the pain he was experiencing. She thought he underestimated it, which in one sense might be regarded as in his favour, but it did cause me to have doubts about the extent to which I could rely on her evidence, particularly in relation to his pre-accident headaches and the extent to which they could be said to have been made worse by the accident.

[10] In addition to these witnesses to fact, I heard expert psychiatric evidence from Dr Deepa Tilak, consultant psychiatrist and psychotherapist at Perth Royal Infirmary, and Dr Lucinda Cockayne, consultant psychiatrist at St John's Hospital, Livingston. Dr Cockayne had expertise as a "liaison" psychiatrist, that is, a psychiatrist specialising at the interface between physical and mental health, and as an addiction psychiatrist. In addition, she had been a GP for 5 years at an earlier stage in her career. For the reasons I have given below, I preferred the evidence of Dr Cockayne, and accepted her evidence rather than that of Dr Tilak, where their opinions diverged.

Objections

[11] A number of objections were taken during the course of the proof. In each case I allowed evidence to be elicited subject to relevancy and competency. In the event, the only objection insisted upon in submissions was one taken by senior counsel for the pursuer. That was to the relevance of evidence led by the defenders of pre-accident incidents at work involving the pursuer. These occurred after his return to work in February 2017 following a bout of depression. Senior counsel for the pursuer conceded that there were averments on record at p13A-B relating to these matters. Indeed, she had explored them herself with the pursuer in his examination in chief. However, she was concerned that the defenders might be attempting to attribute the pursuer's post-accident absence from work to his pre-accident "performance or behaviour", implying that the pursuer had fabricated or exaggerated the symptoms from which he suffers. This, she said, had never been put directly to the pursuer in cross-examination.

[12] It is true that, in her submissions, counsel for the defenders asked me to find that the pursuer was already in 2017 not committed to teaching and not enjoying his job. However, as I understood her, she did not seek to imply that this was directly the reason for the pursuer's absence from work after the accident, or even that he was not now genuinely suffering from depression. Rather, her argument was that, by April 2018, the pursuer had relapsed into depression, as a result of a combination primarily of renewed stress at work and in his relationship. In my view, it would be a mistake to ignore the pursuer's pre-accident difficulties at work when considering the stresses to which he appears to have succumbed in April 2018. Indeed, the pursuer's evidence was that these earlier concerns had all been discussed at a meeting he attended with Andrena Waghorn on 28 June 2017. After that, he believed it was all over: "for me", he said, "it was done". But just because he

considered these pre-accident concerns to have been fully resolved, it would be understandable if he found it all the more frustrating that he was not being adequately supported at work following his return – or at least that he perceived that to be the case ("Gone from 9 to 2 members of staff in a failing school", Dr Kennedy noted him as saying on 5 April 2018): it is unnecessary for me to make any findings as to whether or not that perception was well founded. Seen in this way, what happened in 2017, before the accident, remains highly relevant to the pursuer's state of mind in 2018, and to the issue between the parties of whether the pursuer's depression can be said to have been caused by the accident. On that basis, I repel the pursuer's objection.

The relevant facts

[13] The parties agreed certain facts by joint minute and a chronology extending to some 24 pages (numbers 23 and 24 of process). Without repeating the content of these documents here, I have taken them into account, along with the rest of the evidence, in arriving at the following findings in fact.

The pursuer

[14] The pursuer was born in Rochdale on 27 April 1974. In 2000, after graduating in marine biology from Liverpool University, and obtaining a teaching qualification from Aberystwyth University, he moved to Scotland. He has been employed by the defenders as a teacher since 18 October 2000 and, since 4 June 2010, as a Teacher of Learning Support at Craigie High School, Dundee. He is a keen exponent of mixed martial arts, which he helped to make more accessible to young people in Dundee through a charitable organisation set up for that purpose. The pursuer has suffered from depression from time to time throughout

his adult life and probably earlier. In February 2017, he changed his name to Fenrir Thorvaldsen. This coincided with his recovery from, and return to work following, a bout of depression in which he had been struggling to cope with a number of stressful events. These included breaking up with his partner of about 19 years, and the death of his mother. This is described in more detail below. By January 2017, however, he had entered into a new relationship, with Ewa Bieniecka. They moved in together, initially taking up rented accommodation, before settling into his late mother's house. In June 2018, they were married, though stresses had already appeared in their relationship by April of that year. In January 2021, they separated. The pursuer has had no children with either Ewa Bieniecka, or with his previous long-term partner.

2003-2006: Depression and headaches

[15] Between 2003 and 2006, the pursuer was seen by his GP in connection with depression and persistent headaches and was referred to a number of specialists, including a consultant psychiatrist, a neurologist and consultant occupational health physician. The pursuer's description of his headaches at that time was noted by his GP as being "sharp pains behind both eyes", preceded by an aura and a feeling of stuffy head followed by bilateral frontal headache. This is broadly consistent with the pursuer's description in evidence of his current headaches. Medical opinion seemed to confirm that his headaches had no organic basis, and an MRI report in February 2005 disclosed no injury to the brain. In 2005, Dr Baldacchino, a consultant psychiatrist and specialist in addiction, expressed concerns that the level of codeine the pursuer was taking may have been exacerbating his headaches.

[16] The pursuer was off work for 6 months but in April 2005, he returned to work part time, and struggled to cope with controlling a group of students. The pursuer expressed the view to his consultant psychiatrist that in the long run he would have to look at an alternative career. In June 2006, his GP noted that that the pursuer's complaint of "migraine" headaches was "[the pursuer's] diagnosis, not mine", and that he was going to have headaches "regardless of job or hours worked". By 2007, the pursuer's mood was reported as being "less problematic these days" and he is said to be learning to cope with his headaches "as no obvious answer to these [had] emerged".

2016: Adjustment reaction and anxious mood

[17] Between the beginning of September 2016 and the end of January 2017, the pursuer attended his GP complaining of low mood. A number of stressful events had occurred: his mother had been diagnosed with terminal cancer and died in December 2016; a sibling was diagnosed with a serious illness; he had also split up with his partner of 19 years. Noting that he was bearing a "heavy mental health work load", Dr Kennedy diagnosed the pursuer as having an "adjustment reaction with anxious mood", and signed him off from work. By January 2017, Dr Kennedy reported that he "[seemed] to be adjusting", with the pursuer himself stating he was "more in control"; he had a "new girlfriend" (probably Ewa Bieniecka, though neither she nor the pursuer were very clear in their evidence as to when precisely that relationship started). Dr Kennedy's notes for 16 January 2017 described the pursuer as worried about his level of patience when working with children with behavioural issues. However, the pursuer was well enough to begin a phased return to work from February 2017, albeit that Dr Kennedy had noted that a "change of job" was

something to be considered by the pursuer "over coming months". By March 2017, Dr Kennedy recorded that the pursuer was "back in school" and his "mood OK".

2017: Return to work and the months immediately preceding the accident

[18] Following his return to work in February 2017, the pursuer experienced a number of difficulties: he was confronted with complaints about his arriving late for class, being disengaged and interacting little with pupils, writing in a notebook or using his phone in class, refusing to take a class when another teacher was absent, and speaking inappropriately about fighting in front of pupils. It is not necessary for me to make any findings as to the rights and wrongs of these matters, but I do find that they were a source of stress for the pursuer between February and June 2017, and themselves contributed to, even if they were not themselves symptomatic of, a decline in the pursuer's commitment and morale. During this period, the pursuer was taking painkillers, which he kept in his car. He told Ellen Smith he was having Botox injections to deal with his headaches.

[19] Between 10 March 2017 and the accident, the pursuer did not attend Dr Kennedy's surgery again with any complaints of low or anxious mood. His anti-depressant medication was reviewed on 2 June 2017, with Dr Kennedy noting, "hopes to wean in due course". A doctor would not be planning to wean a patient off anti-depressant drugs if the patient were still actively depressed, but a prescription will usually be continued to minimise the risk of a relapse. Typically, the first episode of low mood would be treated with anti-depressants for 6-9 months; a second episode, for 2 years; and a third, for 5 years. In the pursuer's case, since he had already suffered a significant period of depression between 2003 and 2006, it was reasonable for him to be prescribed anti-depressants for

between 2 and 5 years. The pursuer himself considered he was not depressed prior to the accident.

[20] In the summer of 2017, the pursuer visited the GP surgery on several occasions regarding hypertension. During a review of his hypertension on 2 June 2017, the pursuer took the opportunity of mentioning his headaches.

22 August 2017: The accident

[21] On 22 August 2017, while in a classroom, the pursuer was struck on the head by a wooden partition. The pursuer fell off his chair on to the floor. He was rendered unconscious for 5-10 seconds. He experienced nausea, vomiting and dizziness. Paramedics attended and assessed the pursuer. His Glasgow Coma Score ("GCS") was 15/15 indicating no head injury. The pursuer was advised not to drive that day, to rest over the weekend and to go to hospital if he felt worse. The pursuer was collected from school and taken home. Later that day, the pursuer attended A&E at Ninewells Hospital, Dundee. He was assessed (his GCS again being 15/15) and discharged home with advice to rest. The A&E consultant advised the pursuer he was likely suffering from concussion, and advised him to take Paracetamol and Ibuprofen instead of Co-codamol.

Post-concussion syndrome and recovery

[22] In the days and weeks immediately following the accident, the pursuer was off work and attending regularly at his GP's surgery. Between the date of the accident and 6 October 2017, eight visits were recorded, in which the pursuer presented with a variety of complaints, including dizziness, particularly in the morning, nausea, vomiting, and tiredness. On 29 August 2017, he reported "no chronic daily headache". But by 4 September

2017, he was having migrainous headaches "on and off", "up to 3 times per day". The pursuer had previously suffered from migraine but stated that he had not had an episode for 10 years, although this was untrue. He now felt "as though he [was] having these again". On 15 September 2017, he was still reporting a "morning headache", and had continuing problems with his balance. But by 25 September 2017, 6 weeks after the accident, though he was still complaining of feeling "sea sick" and being tired, he was not reporting any headache. He was well enough to be going to the gym "2 nights per week", and had even coached a martial arts session on 12 September 2017. By 6 October 2017, 7 weeks after the accident, the pursuer was "at last feeling normal". His balance had returned. "Difference in a day was remarkable", recorded Dr Kennedy. The pursuer was allowed to return to work and exercise. Dr Kennedy's "clear memory" of this consultation was of a feeling of "relief and progress". He said the pursuer had "no hesitation about going back to work". Ewa Bieniecka had been supporting the pursuer's recovery during this 7 week period.

[23] Between 6 October and 4 December 2017, the pursuer made no visits to his GP. He returned to work. He got back into mixed martial arts. On 4 December 2017 he was seen by Dr Kennedy. The headings in the GP records indicate that the "head injury" was being reviewed at this time, but Dr Kennedy explained that this consultation was about the pursuer's overuse of Co-codamol. "Headache" would have been a more accurate description for this entry, as the pursuer had more than one reason for his headaches.

[24] In the beginning of January 2018, the pursuer visited Dr Kennedy after his partner had noted he was slurring his speech. The pursuer had been "pretty exhausted", having driven back to the UK from Poland. Dr Kennedy referred the pursuer to Ninewells Hospital for a TIA scan, which revealed no abnormality.

[25] On 12 March 2018, the pursuer complained to Dr Kennedy that he couldn't "shake these headaches". They affected the right side of his head and his speech. He had "visual flashes". They could be incapacitating and could occur once or twice a week.

Recurrence of depression

[26] On 5 April 2018, Dr Kennedy noted the following: "Lack of enjoyment. Relationship pressured. Less active. Gone from 9 to 2 members of staff in a failing school. Given up on fighting. Has done counselling. Not sleeping. Relapse of mood." This was the first time the pursuer had complained to his GP of low mood or depression since 10 March 2017. Dr Kennedy noted no increase in frequency of the pursuer's headaches.

[27] On 23 April 2018, Dr Kennedy signed the pursuer off work, noting that he was "[s]truggling with his work" and complaining of a "[l]oss of patience". The pursuer's headaches were now occurring "most days".

[28] On 10 May 2018, Dr Kennedy noted the pursuer was now "focused on his headaches" and that he recognised that there may be a "functional component" to them. Dr Kennedy referred the pursuer to a specialist in mental health to "help him develop strategies to optimise his mood for the longer term, particularly given his recurrent disposition [to low] mood and anxiety". In the letter of referral, Dr Kennedy summarised his understanding of the pursuer's relevant medical history as at that date. He noted that the pursuer suffered a head injury in September 2017 "which took a number of months to fully recover [from] though ultimately he did".

[29] At the end of May 2018, the pursuer went on a yoga retreat with his partner, but reported a feeling of "guilt", since this was during the exam season, when his colleagues would likely be very busy. On 14 June 2018 the pursuer attended his GP "feeling a bit

better", and asked for a phased return to work to take him up to the end of term. He was once again "[t]hinking about his long term career in teaching". The pursuer returned to work on 16 June 2018. He married Ewa Bieniecka on 21 June 2018 but, even on what should have been a happy day, his mood was low. Over the summer the pursuer continued to present with migrainous headaches, noted to be causing him "pain from back of neck to face/loss of vision/sometimes [affecting] speech/altered taste". On 16 August 2018, he reported to Dr Kennedy that he was "not able to focus on the [a]utistic children with his migraine", and that he was "speaking to Union re possible alternative role". On that date he was signed off from work by Dr Kennedy. He has not returned.

[30] The pursuer has continued to suffer from migrainous headaches, low mood and depression.

Expert evidence

[31] Dr Tilak used the 5th edition of the Diagnostic and Statistical Manual of Mental Disorders, published by the American Psychiatric Association (DSM-5). In her opinion, the pursuer suffered from both a recurrent depressive disorder and a somatic symptom disorder with predominant pain. Somatic symptom disorder is diagnosed when a person has one or more somatic symptoms that are distressing or result in significant obstruction of daily life, and has excessive or disproportionate thoughts about the seriousness of one's symptoms, persistently high levels of anxiety about health or symptoms, or devotes excessive time and energy to health concerns.

[32] Dr Tilak maintained that the pursuer was in a state of depression prior to the accident. Although she acknowledged that his mood had improved earlier that year, by the summer of 2017, it had deteriorated again and there were "associated" concerns about his

blood pressure, persistent visual difficulties and migraines. In her oral evidence, she explained that she did not consider the pursuer was ever in remission, remission being defined as a sustained period of at least 2 months of being symptom-free. Cross-examined specifically about the GP records from June 2017, she asked rhetorically why, if the pursuer was in remission, he was still at that stage on anti-depressants.

[33] Dr Tilak was of the view that, "since [the accident], [the pursuer] had been even more troubled with migraines", adding that "[t]here is a note of poor concentration, low mood, low motivation and a general loss of interest in things that had previously energised and motivated him such as keeping fit, his charity and teaching at school" (paragraph 7.7 of Dr Tilak's report). When she interviewed the pursuer, for approximately two hours in November 2019, 18 months after the accident, he was anxious and depressed. This marked a change from his previous pattern of "bouncing back" from adversities. Instead, "the trauma of the accident at work has led to a deterioration in his mental and physical health, now preventing him from returning to work over a much more prolonged period of time" (paragraph 7.12 of Dr Tilak's report). In addition, the lack of any adequate medical explanation for his migraines, together with his preoccupation with his symptoms and the degree of distress experienced by him suggested the likelihood that he was suffering from somatic symptom disorder. In Dr Tilak's opinion, looking back at the pursuer's medical history, he should properly be regarded as already suffering from both a recurrent depressive disorder and somatic symptom disorder prior to the accident, but the accident exacerbated both of these conditions.

[34] Dr Cockayne preferred to use Chapter V of the tenth revision of the International Classification of Diseases (ICD-10), dealing with mental and behavioural disorders, as her diagnostic tool, but she and Dr Tilak were agreed that nothing turned on this for the

purposes of the proof, since for each of the diagnostic categories referred to by Dr Tilak there were directly analogous categories within the ICD classification system: recurrent depressive disorder and somatoform disorder. (I note in passing that there are several versions of ICD-10, Chapter V, published for different purposes, and that Dr Cockayne was working from the so-called "Blue Book", titled "Clinical Descriptions and Diagnostic Guidelines", intended specifically for "general clinical, educational and service use".)

[35] Dr Cockayne examined the pursuer on 23 September 2020, and made a diagnosis of relapse of recurrent depressive disorder with current (ie at the time of examination) moderate depressive episode with somatic syndrome. In her opinion, the pursuer had "by April 2018" suffered a relapse of his depressive mood disorder. The pursuer himself had described a return to full function, following the bout of depression in 2016/2017, with no significant symptoms immediately prior to the accident. It was not a case of the accident having exacerbated pre-existing symptoms. Further, given the significant period of time elapsing between the accident and the onset of his depression in April 2018, during which period his GP had supported a phased return to work, the pursuer's relapse into depression could not be attributed to the accident with any degree of certainty.

[36] There was no basis for a diagnosis of somatoform disorder, the ICD equivalent of somatic symptom disorder. ICD-10 defined this as "repeated presentation of physical symptoms, together with persistent requests for medical investigations, in spite of repeated negative findings and reassurances by doctors that the symptoms have no physical basis". In Dr Cockayne's opinion, the pursuer had not pressured for unnecessary investigations and was very open to psychological treatment if recommended.

Submissions

[37] I was favoured with detailed written submissions from counsel for both parties. These are numbered 26 and 27 of process. I will only provide brief summaries here.

[38] Senior counsel for the pursuer submitted that the clear and unchallenged evidence from the pursuer was that he had developed and continued to suffer from headaches since the accident. They deteriorated over time, and he has become preoccupied with them to the extent that they dominate his life. She asked me to accept the opinion of Dr Tilak, and certainly to prefer it over the opinion of Dr Cockayne. Senior counsel offered many criticisms of Dr Cockayne. She lacked expertise in medico-legal work. She made little if any reference to the pursuer's documented medical history. Her report lacked precision and clarity in relation to the all-important timeline of his depression. She had misread the GP records, failing to pick up an increase in the pursuer's prescribed dose of anti-depressants in March 2017. Although Dr Cockayne accepted in her evidence that the pursuer had persistent thoughts and high levels of anxiety about his headaches, she insisted on the need for the pursuer to have been pressing for "unnecessary" investigations, even though this was not a diagnostic criterion for somatoform disorders.

[39] Counsel for the defenders submitted that the pursuer had made a full recovery from his head injury by 6 October 2017 at the latest. He had not been depressed for some months prior to the accident. He suffered a relapse of his depression in April 2018 as a result of relationship pressures and stress at work. He had already had difficulties at work in 2017, and these resurfaced in April 2018, following his return to full time work after the accident. Counsel criticised Dr Tilak's evidence for relying too heavily on the pursuer's own account and not testing it against the pursuer's documented medical history. Her analysis of the GP records, such as it was, made no reference whatsoever to the entry for 6 October 2017, when

Dr Kennedy considered the pursuer had recovered from the head injury. She had been selective in her use of the occupational health records. She referred to the pursuer having had an absence from work in September 2016, apparently unaware of his prolonged absence from September 2016 until February 2017. Dr Tilak's opinions tended to be overly speculative, for example, her suggestion that it was "entirely possible" that the pursuer carried a "sense of vulnerability" which had been exacerbated by the head injury. Dr Tilak maintained that the lack of an adequate medical explanation for the pursuer's migraines was an important factor in diagnosing somatic symptom disorder, but also appeared to indicate that she would stand by that diagnosis even if it turned out that there was an adequate medical explanation for his migraines. Counsel urged me to accept Dr Cockayne's evidence and to reject the diagnosis of somatic symptom disorder, as not being supported by the medical records. Even if the pursuer had such a disorder prior to the accident, it was not exacerbated by the accident.

Decision

Loss, injury and damage

[40] I accept that the pursuer suffered, for some weeks following the accident, from symptoms such as concussion, dizziness, nausea and vomiting, sometimes referred to as "post-concussion syndrome". Dr Kennedy distinguished helpfully between primary and secondary brain injury. The symptoms experienced by the pursuer were consistent with the shaking and displacement of neurons that were typical of primary brain injury. It was not unusual for the consequences of a primary brain injury not to resolve themselves for several weeks. There was no evidence of any secondary injuries, such as bleeding to the brain.

[41] While it is difficult to be precise about when this period of post-concussion syndrome came to an end, Dr Kennedy had been carrying out careful reviews of the pursuer's condition in the weeks immediately following the initial head injury. It is inherently unlikely that he would have allowed the pursuer, on 6 October 2017, to return to work and exercise, had there been any significant residual symptoms of post-concussion syndrome.

[42] None of the pursuer's other complaints, including his headaches, have been proved on a balance of probabilities to have been caused or exacerbated by the accident. The pursuer was already suffering from headaches prior to the accident, and was taking painkillers in relation to these. He would have been aware from concerns that had been expressed in 2005, that codeine could have exacerbated his headaches. These concerns were repeated to him when he attended A&E shortly after the accident, and again, in December 2017 by his pharmacist (see the GP notes for 4 December 2017).

[43] Nor do I find it proved on a balance of probabilities that the pursuer was consistently suffering from debilitating headaches during the period when he was suffering post-concussion syndrome, or in the months immediately following his recovery from that syndrome. By 6 October 2017 he was "at last feeling normal", and whatever his experience of headaches at this point, they were not so debilitating as to prevent his return to work or his return to training. In the pursuer's own words, he was at this time "very busy, running his charity, doing related things, working, and discussing future plans with his partner".

[44] In summary, the pursuer suffered from headaches before and after the accident; he has not established that his headaches were worse after the accident; and, to the extent that they were worse, he has not established that they were made worse by the accident, as distinct from some other cause, such as his use of codeine contrary to medical advice.

[45] So far as the pursuer's depression is concerned, it is highly likely that he suffers from bouts of depression on a recurrent basis. He had experienced a sustained period of low mood and anxiety in 2016-2017, from which he had recovered a considerable time prior to the accident. It was not until April 2018 that he suffered a relapse, as a result of a combination of stresses, primarily the resurfacing of pressures at work, and pressures in his relationship with his partner. He had already succumbed to similar pressures in 2017, and indeed in 2005. Even applying Dr Tilak's own test for remission, which required a period of at least two months of being symptom-free, I consider that the pursuer was "in remission" both prior to the accident and for a sustained period after the accident. It cannot be said that the accident exacerbated a condition from which the pursuer was not even suffering at the time the accident occurred. Nor has the accident, from which Dr Kennedy noted he had made a full recovery, been proved to have caused or made any material contribution to his eventual relapse in April 2018. However, I do accept that his relapse into depression at that time may have become connected with his headaches, in what Dr Cockayne referred to as a "vicious circle" (at paragraph 3.50 of her report).

[46] With regard to the diagnosis of somatic symptom disorder (DSM-5) or somatoform disorder (ICD-10), I preferred the evidence of Dr Cockayne to that of Dr Tilak. I found Dr Cockayne's evidence more compelling in matters of detail. Dr Tilak's comment - "we see that the trauma of the accident at work has led to a deterioration in his mental and physical health" – does not appear to be based on any detailed analysis of the medical records (she seems inexplicably to have ignored the GP record of 6 October 2017), and does not acknowledge the several other potential causes of that deterioration. Further, the contrast she portrayed between the pursuer's situation post-accident and the "previous pattern of bouncing back from adversities" appeared not to have been made with full awareness of the

prolonged period during which the pursuer was off work with depression between 2016 and 2017 ("his GP records note time off only in September 2016, following which he was able to make a return to work", paragraph 7.11 of her report). I am prepared to accept the submission made by senior counsel for the pursuer that a single interview would be far from unusual in medico-legal practice, at least in the field of personal injuries. However, my strong impression was that Dr Tilak would have been able to carry out a more forensic assessment, relying less heavily on the pursuer's own account, had she spent more time with him.

[47] By contrast, Dr Cockayne was closely examined in relation to the pursuer's medical history, but could find nothing indicating the presence at any stage of a somatoform disorder. For example, it was suggested to Dr Cockayne that the pursuer's presentation at his GP in January 2013, complaining of urinary symptoms in circumstances where his urine had never grown any bacteria, might be indicative of someone pressing for "unnecessary investigations". But, as Dr Cockayne pointed out, he had a slight temperature on examination, and his presentation was therefore appropriate. Whether such presentations were taken in isolation or together, she was able to explain, to my mind entirely convincingly, that the pursuer was appropriately concerned, rather than someone having excessive or disproportionate thoughts about the seriousness of his symptoms, or pressing for unnecessary investigations. The pursuer had "healthy responses" to his symptoms, with no psychological overlay. Insofar as any criticism was levelled at Dr Cockayne in respect of her use of ICD-10, I reject it: as I have indicated, neither expert considered anything turned on the choice of diagnostic tool. In principle, therefore, if Dr Tilak were right, the pursuer's case ought to have been capable of being made out on the basis that he had a somatoform disorder (ICD-10).

Quantification

[48] In the result, therefore, and in broad agreement with the defenders, I have approached quantum on the basis that the pursuer suffered a minor head injury followed by post-concussion syndrome lasting at most 7 weeks. There having been no wage loss during this period, damages are restricted to solatium and necessary services provided by Ewa Bieniecka. Inevitably, senior counsel for the pursuer's submissions on solatium were made on a quite different basis. In particular, she submitted that the pursuer's pain and suffering did not end seven weeks after the accident, but were a continuing loss. Moreover, the appropriate Judicial College Guidelines were those governing "moderately severe psychiatric damage", not minor head injuries. On that basis, she submitted that £45,000 would be a reasonable award for solatium, with two thirds of that amount being attributable to the past.

[49] Unfortunately, senior counsel for the pursuer's submissions did not include an alternative assessment of what she considered would be an appropriate award of solatium in the event that I agreed with the defenders. However, on the basis that two thirds of what the pursuer seeks was said to be attributable to the past, then, on the pursuer's own approach, pain and suffering from the date of the accident to the date submissions were lodged can be quantified at £30,000. Further, since submissions were lodged roughly 200 weeks after the accident, this equates to £150 per week, or £1,050 for the first 7 weeks following the accident. Of course, this would be to assume the same straight line basis of assessment used by the pursuer for his interest calculation, but even allowing for a higher than average amount of pain and suffering in the weeks immediately following impact, the defenders' assessment of solatium at £5,000 does not seem ungenerous. It is roughly in the

middle of the bracket of the Judicial College Guidelines for "minor brain or head injuries", the bottom of which is said to reflect "full recovery within a few weeks". I would therefore make an award of solatium, upon which interest falls to be calculated, of £5,000.

[50] Before leaving this aspect of the pursuer's calculations, it may be worth briefly exploring what is entailed in attributing £15,000, or one third of the £45,000 he seeks, to the future. As already noted, the pursuer has calculated interest on pain and suffering incurred in the past by using a straight line method of assessment. Extending that line into the future, it is implicit in the pursuer's calculations that he will suffer pain and suffering for a further 100 weeks (£15,000 ÷ £150/week). However, this sits rather awkwardly with the pursuer's claim, elsewhere in his schedule of damages, for 5 years of future loss of earnings, where this choice of multiplier will already have been discounted to reflect "uncertainties" and the impossibility of "accurate calculation".

[51] Turning to necessary services, the pursuer claims only for services provided by Ewa Bieniecka from 16 August 2018 when the pursuer became absent from work, until 15 January 2021, when she and the pursuer separated. This is to ignore altogether whatever services Ewa Bieniecka provided in the weeks immediately after the accident, when the pursuer was also absent from work. The defenders' counsel has assessed the pursuer's services claim at £250, based on Ewa Bieniecka taking him to hospital and supporting his recovery during the 7 week post-accident period. This is a more generous amount than would result from applying the pursuer's own basis of assessment (£8.50/hour × 3.5 hours/week ≅ £30/week) to the 7 week period. In any event, I am prepared to allow, prior to any calculation of interest, £250 in respect of necessary services.

Disposal

[52] I shall invite parties to recalculate the appropriate amount of interest due on the above figures of £5,000 for solatium and £250 for necessary services. I shall also reserve all questions of expenses. I shall put the case out by order to determine what further orders may be necessary in the event that agreement on these matters cannot be reached.