OUTER HOUSE, COURT OF SESSION

[2016] CSOH 114

PD1617/15

NOTE BY LORD TYRE

In the cause

CAROLINE BRIDGES

Pursuer;

against

ALPHA INSURANCE A/S

Defenders:

Pursuer: Allardice, Price-Marmion; Thompsons
Defenders: Murray; DAC Beachcroft Scotland LLP

28 July 2016

Introduction

[1] The pursuer in this action sustained injury at approximately 1am on 23 November 2014 when she was struck by a car driven by the defenders' insured. At the time of the accident the pursuer was crossing Leith Walk, Edinburgh and attempting to flag down a taxi to take a friend home after a night out. On 25 November 2015, an interlocutor was pronounced on the pursuer's motion allowing issues. An issue and a counter-issue were subsequently lodged and approved.

[2] The action proceeded to jury trial on 17 May 2016. The trial lasted four days, in the course of which evidence was led on the merits on behalf of both parties, and on quantum on behalf of the pursuer. At the close of the evidence, in accordance with the procedure described by Lord President Hamilton in *Hamilton* v *Ferguson Transport (Spean Bridge) Ltd* 2012 SC 486 at paras 76 – 79, I invited counsel for the parties to address me on the appropriate level of damages for solatium (the quantification of other heads of claim having by then been agreed by joint minute). Counsel for the pursuer submitted that I should provide the jury with the widest possible range, with an upper end around double the top of the highest JSC Guidelines category into which the pursuer's case might be regarded as falling. That, it was submitted, would produce an upper end figure of 2 x £58,000, ie around £120,000. Counsel also requested that I provide parties, prior to their addresses to the jury, with an indication of the spectrum that I intended to suggest in my charge. I

declined to do so, taking the view that the procedure recommended in *Hamilton* v *Ferguson Transport* was intended to provide an opportunity for parties to assist the judge in his guidance to the jury rather than the other way round. I was not, moreover, attracted by the suggested approach to jury guidance. In my view it could hardly be said to be of assistance to the jury to mention a figure that was twice as high as the top of a range of awards derived from judicial guidance and previous cases. Counsel for the defender provided a helpful written submission accompanied by copies of material (previous judge and jury awards, JSC Guidelines etc) said to support a range of £15,000 to £20,000, although it was recognised that an award of up to £28,000 could be justified by the examples cited.

[3] In the course of my charge to the jury I made the following remarks:

"I cannot tell you what to award as the question is for you, not me. What I can do is give you as guidance, which is not binding on you, a range of figures that you may care to consider. I emphasise again though that it is for you to decide. You are perfectly entitled, if you think it right to do so, to choose a figure outside the range that I will mention. What I am about to say is just non-binding guidance. It is not a direction in law that you must accept; you can reject it if you want.

I can only go by my knowledge and experience of trends of awards that have been given in the courts here in cases that might be regarded as being in some ways similar to the present one, having regard both to awards by judges and awards by juries, and also to published judicial guidelines. Of course, it goes without saying that no two cases are exactly the same, and that in every case there will be factors which increase the appropriate award and factors that reduce it. I have not included in the range every single case; rather I have looked to see if patterns emerge from cases to show the sort of amounts that have been awarded in cases dealt with by courts here. I have discarded some awards which seem to me to fall outside the identified patterns and the relevant judicial guidance. From that I can say to you that in today's money, the figures that I can discern in the guidelines and in the sorts of awards that have been reported in cases which have circumstances in common with the circumstances of this one range from about £25,000 to about £40,000 in total. I repeat, however, that this is only guidance that you may accept or reject as you wish, and that if you choose to award a figure outside this range you are free to do so."

[4] Rule of Court 37.7 provides as follows:

"(1) Where a party seeks to take exception to a direction on a point of law given by the Lord Ordinary in his charge to the jury or to request the Lord Ordinary to give a direction differing from or supplementary to the directions in the charge, he shall, immediately on the conclusion of the charge, so intimate to the Lord Ordinary, who shall hear counsel for the parties in the absence of the jury.

(2) The party dissatisfied with the charge to the jury shall formulate in writing the exception taken by him or the direction sought by him; and the exception or direction, as the case may be, and the judge's decision on it, shall be recorded in a note of exception under the direction of the Lord Ordinary and shall be certified by him.

(3) After the note of exception has been certified by the Lord Ordinary, he may give such further or other directions to the jury in open court as he thinks fit before the jury considers its verdict."

[5] At the close of my charge, I invited the jury to retire and consider their verdict on the issue and counter-issue. Neither party at that stage sought to take exception to the charge.

[6] After the jury had been deliberating for over an hour, counsel for the pursuer intimated that he wished to take exception to the charge. I heard parties in the absence of the jury. Counsel for the pursuer submitted that the range I had suggested to the jury was too low, and amounted to a misdirection. Such a misdirection could be cured by a supplementary direction to the jury: reference was made to Lord President Hamilton's observation in *Hamilton* v *Ferguson Transport* at paragraph 77 that "if a party conceived that the guidance given by the trial judge on damages was unsound in law, it might except to his charge", with the note of exception being available for consideration in any motion for a new trial. Counsel invited me to record the exception and to give further directions to the jury that they should consider a range with a higher upper end.

[7] I refused to record and certify a note of exception or to give any further directions to the jury, for two reasons. In the first place, I considered that the intimation of a desire to take exception came too late. Rule of Court 37.7(1) explicitly requires intimation to be made *immediately* on the conclusion of the charge. Similarly, Rule 37.7(3) envisages that any further directions be given *before* the jury considers its verdict. I rejected the proposition advanced by counsel for the pursuer that there was "scope for latitude" in interpretation of the word "immediately" in post-*Hamilton* practice. The rule is quite clear. In any event, there are in my view sound practical reasons for requiring intimation to be made at the conclusion of the charge and before the jury have begun their deliberations. Interruption of the jury in the course of their discussions could result in their attaching undue weight to the supplementary direction at a late stage in their assessment of the evidence. The practice is well settled: intimation must be made immediately and the exception has to be "formulated hurriedly while a doubtless impatient and puzzled jury waits" (*Robertson* v *Federation of Iceland Co-operative Societies* 1948 SC 565, Lord Justice-Clerk Thomson at 572). I find nothing in the guidance provided in *Hamilton* v *Ferguson Transport* to indicate that the rule should now be differently interpreted.

[8] In the second place, I was not persuaded that the pursuer's proposed exception related to a direction on a point of law, as required by Rule 37.7. As a generality, non-binding guidance to the jury on quantification of damages is not a direction in law. Clearly it was envisaged by Lord President Hamilton that circumstances could arise where guidance given by a trial judge was unsound in law: for example, the judge might convey to the jury an impression that they were bound to make an award within the suggested spectrum. *Hamilton* requires the trial judge expressly to inform the jury that the spectrum suggested is for their assistance only and is not binding on them; that requirement was met in my charge. I accordingly took the view that no issue of law arose in the circumstances of this case, and that no relevant basis had been advanced for the recording and certification of a note of exception.

[9] I have produced this Note in response to a request by counsel, in case it may be of assistance in the development of post-*Hamilton* practice in civil jury trials.