A1375/05 MRS THERESE ELLIOTT v MR MARK KERR

KILMARNOCK : 16th January, 2006 Sheriff C G McKay

The Sheriff, having resumed consideration of the cause, Finds in Fact : -

1. The Pursuer is Mrs Therese Elliott, who resides at 58 Belvedere View, Galston, Ayrshire. At Proof she was 58 years of age and worked as a secretary. She is a married lady with 2 adult children.

2. On 9 June 2002, at or about 5.45 pm, she was the front seat passenger in a motor vehicle, registration number M943 FUS, which was then being driven by her husband on the A719 Galston Road towards its junction with the A77. She was wearing a seat belt. Her motor car was involved in a head on collision with another motor car, then being driven by the Defender in the opposite direction on the wrong side of the road.

3. For the purposes of the present action only, liability to make reparation to the Pursuer is admitted by the Defender.

4. As a result of the accident the Pursuer sustained injuries. The motor car in which the Pursuer was a passenger had reached a speed between 30 and 40 miles per hour and the oncoming vehicle involved in the collision was travelling at an equal or greater speed. The Pursuer was aware of the oncoming vehicle immediately prior to the accident and of the fact that there was about to be a collision.

5. After the accident the Pursuer was taken by ambulance to Crosshouse Hospital. She was in great pain and had great difficulty breathing. She was administered oxygen whilst in the ambulance. She sustained a fractured sternum and a soft tissue injury to her back in the accident.

6. On arrival at Crosshouse Hospital she was told that her heart was missing beats and she was admitted to the coronary care ward. She was terrified and thought she was going to die. She received a blood transfusion. She was attached to monitors for her heart. Her husband was called to the hospital in the early hours of the morning immediately following the accident because the hospital staff had grave concerns about the Pursuer's medical condition. She was given strong pain killers and morphine to control the pain. She was discharged from hospital after 4 days.

7. On return home, the Pursuer required assistance from her husband to carry out ordinary house work. She was unable to bend down or lift heavy objects. Any attempts to do so resulted in excruciating pain. She required to take strong pain killers up to 4 times in each day. These severe symptoms persisted for about 2 months. Notwithstanding the persistence of these severe symptoms the Pursuer returned to work 2 weeks after the accident. She continued to have severe chest pain and back pain over this same period. At her employment she was unable to carry files or any other heavy material.

8. Prior to the accident the Pursuer had not suffered any heart rhythm problems. She did not suffer chest or back pain prior to the accident. She was physically very active and attended gym and swimming about 3 times a week. She participated in aerobics and circuit training. She was unable to return to any form of swimming or training for a period of about 4 months, but chest pains continued to prevent her from swimming. She was only able to return to full circuit training about 8 months after the accident. Overall, pain from the injuries sustained in the accident persisted for about 2 years after the accident.

9. The medical report prepared by the consultant psychiatrist, Dr Helen Livingstone, dated 5 June 2003 and forming item 5/1 of process, is a true and accurate account of the nature and extent of the Pursuer's injuries at the time of examination, namely 2 June 2003.

10. The medical report by Mr A Muirhead, Consultant Orthopaedic Surgeon, dated 27 November 2003, forming item 5/2 of process, is a true and accurate of the nature and extent of the Pursuer's injuries at the time of her examination on 27 November 2003.

11. As a result of the accident the Pursuer suffered an adjustment disorder. As a result of the accident she developed a brief period of instability of heart rhythm and although, prior to the accident she had not worried about her physical health, she now tends to worry about developing cardiac problems following the accident. Since the accident, the Pursuer has exhibited symptoms of anxiety and depression. These symptoms improved over a period of some 6 to 9 months after the accident and continued to improve over the next year or 2 following the examination by Dr Livingstone. Palpitations relating to her anxiety act to maintain her fear that she has significant cardiac problems. There was no evidence to suggest she has such problems.

12. The Pursuer had no psychological or psychiatric condition prior to the accident nor did she suffer any form of panic attacks prior to the accident. As a result of the accident, she became very anxious and tearful. She suffered panic attacks which featured a feeling of her heart pounding in her chest, shortness of breath, anxiety and tears. These symptoms arise randomly. Initially, immediately following the accident, they arose several times in each week. This lead to the diagnosis of an adjustment disorder.

13. She attended her general practitioner for advice regarding these symptoms and was advised to be patient and they would subside. She was informed that they were due to the trauma of the accident. No medication or other counselling was recommended and she was unwilling to embark upon any form of prescribed drugs for her anxiety. She took and still takes an "over the counter" medicine, known as "Kalms" to control her anxiety and this makes her less nervous. The symptoms of anxiety persisted significantly for about 2 years following the accident and persist but to a much lesser degree to the present day.

14. As a result of the accident she continues to worry about her family travelling in motor vehicles.

15. She did not drive a motor vehicle until about 2 months after the accident.

16. There is no claim in respect of loss of wages.

17. Solatium is reasonably assessed in the sum of £7500.00, being (a) a sum of £4200.00 in respect of pain and suffering from the physical injuries, (b) a sum of £3000.00 in respect of the psychological consequences, and (c) the sum of £300.00 in respect of services.

Finds in law that the Pursuer, having sustained injuries through the fault of the Defender, is entitled to reparation from the Defender therefor; Accordingly Sustains the Pursuer's pleas-in-law and Repels the Defender's pleas-in-law; Grants Decree against the Defender for payment to the Pursuer of the sum of SEVEN THOUSAND FIVE HUNDRED POUNDS (£7500.00) together with interest thereon at one half of the Judicial Rate from 9 June 2002 to date and at the Judicial Rate from today's date until payment; Appoints the cause to the Ordinary Court of 15 February 2006 at 10.00 am as a hearing on the issue of expenses including the certification of the Pursuer's medical experts.

Sheriff

NOTE :

(1) In this action the Pursuer seeks damages for injuries sustained in a road traffic accident on 9 June 2002 when she was the front seat passenger in a motor vehicle being driven by her husband which was involved in a head on collision with another vehicle. Liability to make reparation is admitted by the Defender for the purposes of this action only. After sundry procedure, I heard proof on 9 January 2006 and made avizandum on that date.

(2) At the proof the Pursuer was represented by Miss Brown, Solicitor, Glasgow and the Defender by Mr Singer, Solicitor, Glasgow. The Pursuer's solicitor referred to the Notice to Admit, item 10 of process, which had not been challenged and accordingly the matters there specified were to be held as admitted, including the 2 medical reports, being productions 5/1 and 5/2 of process. The only witness was the Pursuer. The notes of evidence have not been extended.

(3) In the course of submissions, I was referred to the Judicial Studies Board (England & Wales) Guidelines for the assessment of general damages in personal injuries cases, 7th Edition (published September, 2004) and to McEwan & Paton's Inflation Table (October 2005) I was also referred to the following cases,

John Lock v W H Malcolm Limited and David Dick, 1996 SCLR 1125

Sawyer (William) v Habgood (2001) 4Q.R. (1)14

Brown V Somerfield (2002) 2Q.R. (1)13

Smith v Fife Health Board, 1996 Rep. L.R. (Quantum) 15

W (a patient) v Evans Current Law Cases, March 2004

Kay v Whittle Current Law Cases, October 2004.

Copies were provided by parties.

(4) **For the Pursuer**, Miss Brown submitted that I should accept the Pursuer as a credible and reliable witness; that her evidence, along with that of the 2 medical reports demonstrated that the Pursuer had suffered a significant injury, involving considerable pain, and that she had suffered anxiety and depression for a significant period of time following the accident, and which continued in a much lesser form to the present day. She submitted that I should be satisfied that there were no pre-accident anxiety disorders or physical ailments of the type which had arisen from the accident. She invited me to be satisfied in fact that the Pursuer had suffered a fractured sternum and that symptoms of pain and anxiety had, in the case of the physical injuries, persisted for some 2 years following the accident and were ongoing in psychological terms to the present day. Under reference to the authorities, and in particular, the Judicial Studies Board for England and Wales Guidelines, she submitted that a reasonable award in full would be £8000.00. In addition, she sought expenses and certification of Drs Muirhead and Livingstone as expert witnesses.

(5) **In response, Mr Singer for the Defender**, accepted that this was a serious accident and was prepared to allow the Pursuer considerable credit for getting up and getting on with it after the accident. He accepted that she had fractured her sternum and had been in hospital for 4 days and had been off work for some 2 weeks. He suggested that she was able to go back to her normal hobbies after some 2 months, initially on a very limited basis, but able to resume full circuit training after some 8 months, but not swimming. He suggested that physical symptoms had accordingly resolved after some 8 months, with some minor symptoms persisting in the physical sense for up to 2 years.

(6) He submitted that the issue with the cardiac problem, post-accident, was problematic on the basis that the evidence before me was such as to make it difficult to be satisfied that the arrhythmia was attributable to the accident. I should make it plain at this stage that I do not accept that proposition. I accept the Pursuer's evidence that none of the symptoms, indicative of any kind of cardiac problem, existed prior to the accident and they arose immediately following the accident. Notwithstanding what is said in the medical report of Dr Muirhead, it seems to me quite clearly, on the balance of probabilities, that the problems arose immediately following the accident and are readily attributable to it. I am so satisfied.

(7) He suggested that relationships within her family were not significantly affected and, indeed, the Pursuer still enjoyed a good relationship with her family. Dr Livingstone had not determined an existence of clinical

depression and expected that there would be further improvement in her condition after some 2 years following his examination. Accordingly, he submitted, the Pursuer had recovered from the vast majority of her psychological symptoms some 2 years after the accident and there was no medical support that they continued thereafter. As to quantum, he submitted that an appropriate award be £4000.00, within a range of £3750.00-£4500.00. He accepted that interest at one half of the Judicial Rate should apply to the award from the date of the accident until the date of decree, a submission accepted by the Pursuer's solicitor. For services, he suggested an award of some £300.00, and accordingly a total award of £4300.00. He sought a hearing on expenses.

Decision

(8) I found the Pursuer a credible and reliable witness in her own cause. Her evidence was not really seriously challenged in cross examination and, indeed, the Pursuer's solicitor recognised - quite rightly my view - that this lady had demonstrated considerable determination not to have her life too adversely affected by this accident. In particular, because she had just changed employers, having lost her previous employment of some 14 years due to redundancy, she was anxious to make a start on her new job and did so only some 2 weeks after the accident, notwithstanding that she was then unable to drive and still in considerable pain and discomfort.

(9) I accept that this was a very frightening experience for Mrs. Elliot, as well as being one which caused her a considerable amount of pain. The development of the arrhythmia in her heart at the time she was admitted to hospital and her physical condition was such that hospital staff felt it necessary to summon her husband to her bedside in the early hours of the morning immediately following the accident. There is little doubt that that must have been an extremely traumatic experience for the Pursuer. I have made reasonably detailed findings in fact, which reflect my acceptance of the Pursuer's account of her injuries and the consequences for her. In addition to that, by reason of the Notice to Admit, the medical reports are accepted as a true and accurate record. Accordingly, Dr Livingstone's conclusion that she sustained an adjustment disorder was not challenged. The solicitor for the Pursuer appeared to distinguish between an adjustment disorder and post-traumatic stress disorder - as in the case of *Lock*.

(10) I have to say that there was no evidence of exactly what an adjustment disorder is, in that the consultant psychiatrist was not called to give evidence. Dr Livingstone, in paragraph 4 of her conclusions, states that since the accident, the Pursuer

"has had symptoms of anxiety and depression which meet DSM IV for Adjustment Disorder with Anxiety and Depression".

The exact meaning of that expression is not something within judicial knowledge, but I can readily understand the symptoms of anxiety and the feeling of depression from time to time the Pursuer describes. I accept that this subsided to a large extent after some 2 years, but I also accept the Pursuer's evidence that from time to time she occasionally feels anxious, even today. Considering that this was a severe head on collision, almost certainly at a combined speed in the region of 60 miles per hour or greater, I have little difficulty in accepting that the Pursuer will regard travelling and thinking of her family travelling as an anxious experience.

(11) The real issue in this case is the assessment of the level of damages. Both solicitors referred me to a number of cases, the Pursuer relying upon *Lock v Malcolm, Sawyer v Habgood and Brown v Somerfield*, the Defender upon *Smith v Fife Health Board, Lock v Malcolm, W v Evans and Kay v Whittle*. In her reference to the Judicial Studies Board's Guidelines, the Pursuer's solicitor suggested that so far as the physical injury was concerned this might fall within chapter 5, paragraph (A)(g) where the figure of £2150.00 is suggested as a maximum. So far as psychiatric damage was concerned, she suggested that it fell within the class of moderate as set out in chapter 3(A)(c), where a range of some £3250.00 to £10500.00 was indicated.

(12) Both parties referred to the case of *Lock v Malcolm and another* which is an Outer House decision reported in Scottish Civil Law Reports. Coincidentally, the description of the Pursuer's physical injuries and their treatment in that case, as recorded by the Lord Ordinary, at page 1125E to 1126B, might equally have applied to the Pursuer in the present case. However, the aspect of the psychiatric injury, described in *Lock* as "post-traumatic stress disorder" is different from the case under consideration as the Pursuer's solicitor herself accepted. It is clear in *Lock* that there were pre-existing problems and the consequences for the Pursuer in *Lock* were much more significant in that he was seeking to justify - and did justify - a decision to seek early retirement, leading to a more significant award in terms of loss of employment earnings. Unfortunately, the Lord Ordinary, in *Lock*, makes no apportionment of the sum of £7000.00 awarded as solatium between physical injury and psychiatric injury. *Lock* is now some 10 years old.

(13) The Pursuer also referred to the case of *Sawyer*. The copy was simply an excerpt from Current Law. Whilst the apportionment of the award so far as orthopaedic injuries were concerned, might mirror the situation for the Pursuer in the present case, she accepted that the psychiatric consequences might be seen as more serious, the award for that element being given as £5000.00. She also referred to *Brown v Somerfield* - again providing only a copy of the current Law Report - which she suggested was at the lower end of the scale in comparison with the consequences for the Pursuer in the present case particularly in relation to the psychiatric injury. There the award was £6100.00.

(14) In his submission the Defender referred to a report of a case *W v Evans* - again relying upon a current Law excerpt - which he suggested was very similar to the present case, particularly in relation to the physical symptoms. However, he suggested that the psychiatric consequences described in the report were of a more serious nature than those described by the Pursuer. The award there was £5500. Again, under reference to a like Current Law Report of *Kay v Whittle*, he suggested the physical injuries were very similar, although he conceded that Mrs Elliot's recovery was somewhat more protracted. The award there had been £3250.

(15) Reliance upon reported decisions, as a basis for determining a level of solatium in any particular case is, it seems to me, is difficult in view of the variety of circumstances and range of awards to be found. Much must depend upon the assessment by the Court, particularly in a case such as the present, of the claimant. The Pursuer made a favourable impression upon me and could not in any way be regarded as some kind of malingerer seeking to exaggerate the consequences of the accident for herself. She was quite clearly in a great deal of pain for a significant period of time following the accident and this did not really disappear for several months. Her ability to maintain her physical fitness was significantly affected with her only being able to return to the full circuit training some 8 months after the accident and she still finds it difficult to swim. I accept she had a very frightening experience, both in the accident and in the first few days in hospital. In terms of her ability to carry out ordinary household duties, this was plainly very restricted for a period of some 2 months at the very least and it seems to me that an award in the region of £300.00 for services is readily justified.

(16) So far as the physical element, what are described as the orthopaedic consequences in one of the cases relied upon, is concerned, it seems to me that an ward of £4200.00 is readily justifiable on the basis of all the cases. In my view the current law cases relied upon by the Defender are at the lower end of the scale so far as the Pursuer's injuries and recovery time are concerned.

(17) As to the psychiatric consequences of the accident, these plainly persisted for a significant period of time, certainly 2 years, at a significant level, leading to a great deal of anxiety for the Pursuer. Looking at the various reports to which I was referred, it seems to me that an award of £3000.00 is readily justifiable for this element.

(18) Thus I have concluded that an overall award of £7500.00 is appropriate. In *Sawyer* the consequences in terms of the physical injury recurred some 3 months after the plaintiff returned to work and he was off work for 3 months again. The award was £5000 and that was in 2000. The award for psychiatric injuries was £5000 but they do appear to be somewhat more serious than in the present case. *Brown* seems to me to be a

little less serious in terms of the physical injuries and has no psychiatric element. In looking at the case of *Lock* - the case to which both parties referred - when one applies the factor for inflation to the £7000.00 award, this brings it somewhere in the region of £9000.00 in current day values. Considering the great similarity of physical injuries there described, and taking account of the somewhat more severe consequences of post-traumatic stress disorder, it seems to me that the overall award of £7500.00 is reasonable in all the circumstances.

(19) Parties require a hearing on expenses and I have appointed the cause to my next ordinary court for that purposes. I have continued consideration of the Pursuer's motion for certification of the 2 experts since the Defender's solicitor did not deal with this matter, having asked for a hearing on expenses.