



OUTER HOUSE, COURT OF SESSION

[2019] CSOH 47

PD46/17

OPINION OF LORD BANNATYNE

In the cause

AB

Pursuer

against

INVERURIE SKIP HIRE LIMITED

Defenders

**Pursuer: Fitzpatrick; Digby Brown LLP**

**Defenders: Middleton; Brodies LLP**

21 June 2019

**Introduction**

[1] This matter came before me on the motion roll. A minute of tender had been lodged by the defenders and accepted by the pursuer. The issue before me was in respect of the expenses arising from the foregoing. It was not a matter of contention that the pursuer should be awarded the expenses up to the date of tender. However, the defenders thereafter sought to have the pursuer found liable to the defenders in the expenses of process (as may be taxed or agreed) from the date of the minute of tender. The pursuer opposed the defenders' said motion.

### **Factual background**

[2] This is a personal injury action in which the pursuer sought damages for an accident suffered by him in a fall from the trailer of an HGV lorry near workplace premises on 12 June 2015 after he uplifted a load from those premises. Primary liability was not an issue having been admitted in the defences, although contributory negligence remained an issue. In the accident the pursuer suffered a head injury and his claim was one for physical and psychological injuries, with associated claims for patrimonial losses and services. From the outset the main issues, (principally as regards past and future wage loss), have been the cause, nature and extent of the pursuer's head injuries and the existence of various claimed ongoing cognitive and mobility deficits.

### **Procedural background chronology**

[3] For the purposes of the arguments before me the salient dates were as follows:

- 12/6/15 – the pursuer's accident;
- 2/2/17 – proceedings were raised;
- 7/3/17 – defences were lodged, liability admitted, subject to contributory negligence and causation of law;
- 14/3/17, 20/3/17, 29/5/17 and 29/8/17, defences were adjusted;
- 3/10/17 - the defenders lodged their Statement of Valuation of Claim ("SVC"), along with:

A medical report by Jane McLennan, Consultant Psychiatrist, dated 22 September 2017 (no 7/15), medical report by Lorna Torrens, Consultant Neuropsychologist, dated 9 August 2017 (no 7/16), pension loss report by Mr Denis Blyth, dated

21 September 2017 (no 7/14). It was accepted in the defenders' SVC that the pursuer was unable to return to lorry driving duties due to hearing loss and the sum of £116,066 was allowed for future loss of earnings. It was noted that he was unlikely to require any future care. The total was £269,736. On the other hand the pursuer's SVC was for some £2,563,042.54;

- the pre-trial meeting ("PTM") initially was timetabled for 23 November 2017. The pursuer in advance of the PTM date made requests for co-operation from the defenders so far as expert reports affecting quantum were concerned so that the PTM might be a useful meeting (see, example, requests of 14 and 15 November relative to reports of Dr Davenport, Consultant Neurologist for the defenders who had seen the pursuer on 13 June 2017 and a Mr Andrew Nicholl, Employment Consultant, who saw the pursuer on 10 October 2017);
- the PTM fixed for 23 November 2017 was cancelled on 17 November 2017 by the defenders who explained that the cancellation was required for want of them having the reports of Dr Davenport and a care report from a Miss Carolann Lannigan;
- a replacement PTM was arranged for 1 February 2018;
- on 10 January 2018 the defenders again requested a postponement of the PTM explaining want of a report from an orthopaedic surgeon, Mr White;
- the PTM was re-fixed for 19 February 2018;
- on 13 February 2018 the defenders again cancelled the PTM explaining that they now had reports from their experts but would not be in a position to release them with sufficient time for comment by the pursuer's experts.

- On 23 February 2018 the defenders also lodged:
- Medical Report by Richard Davenport, Consultant Neurologist, dated 28 December 2017 (No 7/17).  
Report by Carolann Lannigan, Care Consultant, dated December 2017 (No 7/18).  
Medical Report by Mr Tim White, Consultant Orthopaedic Surgeon, dated 19 January 2018 (No 7/19).
- 1 March 2018 – defenders’ agent E-mailed the pursuer’s agent proposing further updating appointments with Lorna Torrens, (Friday 20 April 2018), Richard Davenport (Friday 20 April 2018) and Jane McLennan (Saturday 21 April 2018).
- 1 March 2018 – email sent by pursuer’s agent to the defenders’ agent asking for more information about why further expert examinations were required, suggesting that there had been no significant change in the pursuer’s condition such as to justify a further round of reports.
- On 23 March 2018 the pursuer again sought to rearrange the PTM with a view to early settlement and identification of issues not in dispute.
- 18 April 2018 – defenders’ agent emailed the pursuer’s agent in response to a voicemail message left by the pursuer’s agent, to confirm that further medical appointments have been cancelled.
- 19 April 2018 – Answers intimated to the pursuer’s Minute of Amendment, which deleted the averments in relation to the presence of smoking and alcohol related ischaemic changes and substituted averments that “*any*

*dizziness suffered is significantly exaggerated, any cognitive deficit is mild compared to his pre-accident state and exacerbated by his failure to engage in rehab."*

- 29 June 2018 – Minute of Tender lodged.
- On 26 March 2019 – the defenders inter alia lodged:
  - Further Medical Reports by Mr White, dated 29 March 2018 and 22 March 2019 (Nos 7/49 and 7/31).
  - Further Medical Reports by Dr Davenport, dated 27 January 2018 and 25 March 2019 (Nos 7/48 and 7/32).
  - Supplementary Medical Report by Lorna Torrens, Consultant Neuropsychologist, dated 21 November 2017 (No 7/47).
  - Supplementary Report by Carolann Lanigan, Care Consultant, dated 30 January 2018 (No 7/43)."
- Three surveillance reports by Central Surveillance Co, dated December 2017, January 2018 and October 2018, plus accompanying DVD footage (Nos 7/33 to 7/39).
- On 1 April 2019 the defenders further disclosed:
  - Medical Report by Dr Angihotri, Consultant Psychiatrist, dated 31 March 2019 – required due to professional difficulties with Dr Jane MacLennan.
  - Supplementary Medical Report by Lorna Torrens, Consultant Neuropsychologist, dated 1 April 2019.
  - Further surveillance reports by Central Surveillance Co, dated February and March 2019, plus accompanying DVD footage.
- 2 April 2019 – the PTM, at which the Pursuer advised that he was going to accept the Tender.

- 4 April 2019 – the Minute of Acceptance was intimated and lodged.

### The law on expenses

[4] It was common ground between the parties that the law regarding the awarding of expenses was this:

- While expenses are a matter for the discretion of the Court, the general rule is that “expenses follow success” and fall on the party who has “caused” them:
- “...the cost of litigation should fall on him who has caused it. The general rule for applying this principle is that costs follow the event...whosoever has resisted the vindication of [a party’s] rights, whether by action or defence, is *prima facie* to blame.” – see Court of Session Practice, Para L[101].
- A party “is normally entitled to an award of expenses against any person who...forced him to defend a legitimate position...Success means success in practical terms.” – see Court of Session Practice (Para L[102]).
- “The ordinary rule in relation to the question of expenses is that if a party is put to expense in vindicating his rights he is entitled to recover it from the person who has required him to do so.” – Maclaren ‘Expenses in the Supreme and Sheriff Courts of Scotland’, p.21 – cited with approval by Lord President Cooper in *Howitt v Alexander & Sons* 1948 SC 154 at 157; and, more recently by the Sheriff Appeal Court in *Greenbelt Group Ltd v Walsh & Ors* [2019] SAC (CIV) 9, at Para 29.
- Further, “if a litigant unnecessarily or unreasonably causes litigation to take place or protracts it when it has been initiated, he may not only forfeit his claim for expenses, even if ultimately successful, but he may be found liable in expenses to the other side...” – *Bond v British Railways Board* 1972 SC 219 at 221, per Lord Wheatley.

[5] It was again common ground that as regards expenses where Tenders are concerned the law is as follows:

The general rule on Tenders is that, on acceptance, a pursuer is entitled to his/her judicial expenses up to the date of the Tender and a defender is entitled to his/her expenses from the date of the Tender onwards. A failure timeously to accept a Tender, with the resultant consequence in expenses, is simply a feature of the general rule that unnecessary expense is borne by the party that causes the litigation or, at least, that part of it that post-dates the Tender.

The period allowed for accepting a Tender without any penalty in expenses is normally a few days or, perhaps even, a couple of weeks, to allow time for

considering the sum tendered; the tendering and consideration of advice (including a consultation); and, the lodging of the requisite Minute of Acceptance of Tender. That may, however, be the actual date that the Tender was lodged/intimated, if there has been an “unreasonable interval between tender and acceptance”, – see Hastings, ‘Expenses in the Supreme and Sheriff Courts of Scotland’ (1989, p. 16).

In determining the expenses in a Tender situation, it “is always open to consider whether it is the conduct of the successful party which had caused or contributed to the prolongation of the action rather than the actions of his opponent” – Chas Stewart Plumbing & Heating Engineers v Mr David Henderson t/a The Amulree Hotel (Sheriff Principal RA Dunlop QC, 22<sup>nd</sup> May 2013; 2013 GWD 21-411) at Para 12.

Further, at paragraph 15 Sheriff Principal Dunlop observes “In the course of most contested litigation the balance of advantage and disadvantage will tilt repeatedly from one side to the other and in my view there is an inherent danger in fixing the liability of expenses by reference to how the balance happens to fall at some particular point in the process before its conclusion. Rather one should look at the procedure in the case at its conclusion and from that perspective then consider which party has been responsible for that procedure (or part of it) being required.”

Accordingly, the Court should not determine the expenses in a Tender situation by reference to the state of the evidence or how a pursuer’s prospects of success may appear to him/her at any given time. Rather, the Court should apply its hindsight at the end of a case, to determine who has caused the prolongation of the case and its associated procedure and expense.

### **Submissions for the pursuer**

[6] It was Mr Fitzpatrick’s position that the pursuer had succeeded in the action as was evidenced by his having accepted a tender in the sum of £225,000. This was a not inconsiderable sum and could not be described as a merely notional sum. His damages, in the event, were in a lower sum than sought and anticipated. However the context of this acceptance was a case with complex features of employability, care and psychological injury.

[7] The pursuer’s opposition to the defenders’ motion in short was based on the following argument: the pursuer seeks to apply the ordinary rule on his expenses and invokes the general discretion of the court relative to any expenses due to the defenders and

complains that the defenders have disregarded the terms of a long promulgated practice note and the terms and spirit of the Rules of Court.

[8] Mr Fitzpatrick directed me to the terms of two practice notes: first, paragraph 2 of Practice Note no 1 of 2007 which provides:

“2. Practitioners are reminded of the principles of early disclosure of evidence underlying the procedure set out in chapter 43 with a view to facilitating early settlement. The practice whereby parties delay disclosure of expert reports until the last minute is to be discouraged. Parties will be expected to lodge in process, within a reasonable time after receipt, all expert reports on which they intend to rely, whether in relation to liability or quantum. Failure to do so without reasonable cause may have a consequence in expenses.”

[9] Secondly, I was referred to Practice Note no 2 of 2014 and in particular to paragraph 5 thereof which provides:

“5. Rule 43.10 (pre-trial meetings) provides that there will be a pre-trial meeting between the parties to discuss settlement and to agree matters not in dispute. As explained in Practice Note no 2 of 2003, the meeting must be a real meeting and it is the obligation of each party to take all such steps as are necessary to comply with the letter and the spirit of the rule. Where it is apparent to one of the parties that this has not been done, then that party should not sign the joint minute in form 43.10, thus triggering the case being put out by order. Practitioners are also reminded of the importance of section 2 of form 43.10 and are encouraged to make use of the procedure provided for in chapter 28A (notices to admit and notices of non-admission).”

[10] I observe that Practice Note no 2 of 2014 was replaced by no 4 of 2015. Rule 6 of no 4 of 2015 is in the same terms as Rule 5 of no 2 of 2014. Against the background of the said provisions of the above Practice Notes, Mr Fitzpatrick in particular founded on the following matters: he complained that the defenders’ only exhibited surveillance footage as evidence and the expert reports commenting thereon, on 26 March 2019 despite the first batch of surveillance footage having been available since December 2017. [Further surveillance was made in late January 2018 and he submitted was likely instructed before or at about the time the defenders sought cancellation of the PTMs fixed for 23 November 2017 and 1 February 2018]. The periods of surveillance can be seen in the 15<sup>th</sup> inventory of



productions for the defender. Expert reports commenting on surveillance footage are dated as early as January 2018, 7/43 and 7/48 of process, and March 2018, 7/42 and 7/49 of process.

[11] What underlay and founded these complaints was that the advice which was given to the pursuer might have been given much earlier, considerable further procedure and expense all round would have been reduced or avoided and doing so would have allowed an early settlement of the action.

[12] Mr Fitzpatrick further developed his argument in this way: had the Working Group or Rules Council determined that a special exception to the Rules of Court or Practice Notes applied to the necessity of lodging productions in cases where surveillance evidence was involved they might have done so. However, they did not. There was an opportunity for the issue to be revisited as the Courts Reform Bill proceeded and in the administrative aftermath including the establishment of the Personal Injury Court. Neither Parliament nor the Rules Council did so. He submitted that this perhaps was for the good reason that proofs at large are to be avoided and the course proposed by the defenders leaves to defenders the decision on when to introduce significant evidence. In addition he submitted that the basis for the pursuer's complaint was the failures of the defenders to comply with the spirit of the rules in cases under Chapter 43. He went on to say that this court and more recently the All-Scotland Personal Injury Court in its practice note no 3, 2016, have stressed the necessity of early disclosure as a factor in avoiding late disclosure, wasted procedure, additional procedure and increased expense. Particularly, he emphasised non-compliance with the spirit of early disclosure may have consequences in expenses. The defenders here have no additional expenses or inconvenience, liability having been admitted. The conduct here is that of their employment liability insurers, who can be assumed to be the *dominus litus*.

[13] Lastly, Mr Fitzpatrick emphasised that the court should not reach any concluded view about the content of the surveillance evidence. He submitted that it would not be appropriate to do so at a motion roll hearing where the court had heard no evidence on the matter. This submission was made under reference to the opinion of Lady Clark of Calton in *M v Lothian NHS Board* 2015 CSOH 89 at paragraphs 18-21. It was accepted by Mr Middleton that the court was not in a position to form any such concluded views.

### **The reply on behalf of the defender**

[14] Mr Middleton began by submitting that expenses should be dealt with in accordance with the long established general rules.

[15] The first detailed point made by Mr Middleton was: there were very good reasons for not disclosing the surveillance evidence and the medical evidence commenting thereon until just prior to the pre-trial meeting. These reasons were:

- Surveillance cannot by its nature be disclosed to the pursuer.
- It has to be carried out on a number of occasions and over a material period of time.
- Accordingly if the defenders had been required to disclose their surveillance evidence and their experts commentary thereon on a piecemeal basis, they would not have been able to mount a proper defence to this action.

[16] Secondly, the pursuer knew how he had acted at the time of the surveillance material. The pursuer's agents are deemed to have the pursuer's knowledge of what he was able to do. Against that background the pursuer was not entitled to say that what was contained in the surveillance material came as a surprise to him.

[17] Further, the content of such medical evidence did not materially alter the defenders' position on the true nature and extent of the pursuer's claimed disability and fitness for work as was already averred on record before the tender was lodged. Thus it was his position that the content of the surveillance and accompanying medical evidence did not materially innovate upon what had already been produced and averred for months, if not years, and gave rise for no cause for complaint.

[18] Mr Middleton in addition argued that there was no obligation on the defenders to lodge these documents at all. Given the nature of these documents they could have been made use of in cross-examination of the pursuer in the course of any proof without them having ever been lodged in process.

[19] Finally, Mr Middleton contended that it was the pursuer in every sense who had caused the prolongation of the litigation and resisted the defenders' attempts to vindicate their rights to resolve his claim by a substantial payment of damages, in the sum of £225,000. It was his position that the pursuer had unreasonably and unnecessarily prolonged the litigation. In essence practical success post-tender was with the defenders. All the pursuer had succeeded in doing was delaying resolution of the claim by over nine months generating considerable additional judicial expense between the two parties, and costing the defenders' insurers more in repayable benefits.

[20] Mr Middleton finished his submissions by saying this: to refuse the defenders' motion would drive what he described as the proverbial "coach and horses" through the system of tendering. As is said in "Expenses in the Supreme and Sheriff Courts of Scotland at page 16:

"The tender has always been an important weapon in a defender's armoury in order to minimise expenses ..."

Tendering is really the only step that a defender can take to protect himself in relation to a pursuer's expenses.

[21] In conclusion looking to all of the above factors, Mr Middleton submitted that the defenders should be awarded the expenses post-tender.

### **Discussion**

[22] In my view, the defenders were justified notwithstanding the terms of the Practice Notes to which I was referred by Mr Fitzpatrick in delaying the disclosure of the surveillance material and their expert's commentary thereon until the point it was communicated to the pursuer.

[23] This was a case in which the pursuer's claimed deficits were generally reliant on his truthful self-reporting of symptoms. Such a position can only be challenged by the production of objective evidence to the contrary. The principal means whereby such objective evidence is normally produced is by the obtaining of surveillance evidence.

[24] For surveillance to be effective it has to be carried out in circumstances where it is not disclosed to the pursuer. Disclosure would fundamentally undermine its effectiveness. Thus, if surveillance is being carried out, the results of such surveillance cannot be disclosed to the pursuer and his advisers until the surveillance has been completed and until the relevant experts have commented on the surveillance.

[25] Beyond the above, in order to produce a body of evidence which is both credible and convincing, the surveillance must be carried out: (1) on a number of occasions; (2) over a reasonably substantial period of time; and (3) up to a point as close as possible to the diet of proof. If the surveillance is not carried out on a number of occasions and over a reasonably substantial period of time then it is possible for it to be answered by an argument that: "the

pursuer has some good days and some bad days". If not carried out until relatively close to the date of proof then it is possible for it to be argued that it does not reflect the current medical position of the pursuer (namely: his position at the date of proof). Lastly, a single period of surveillance would not allow medical experts and other experts commenting on the pursuer's disability to properly form a view on whether it supports a particular diagnosis.

[26] Accordingly to have made the defenders lodge the surveillance evidence and their experts commentary thereon on a piecemeal basis at or about the time of it becoming available would have prevented the defenders putting forward an effective defence based on such surveillance evidence.

[27] Mr Fitzpatrick argues that he is not seeking to stop the defenders making a defence based on surveillance evidence but merely arguing that if they do not lodge the surveillance material and the related expert reports until long after it first became available and long after a tender has been lodged they cannot have an award of expenses for the period post-tender. However, if the court were to follow that course it would considerably undermine the system of tendering in cases such as the present one as it would mean the defenders could tender but it would not be fully protected in relation to expenses post-tender. The principal purpose of tendering is in order to protect the defenders' position regarding expenses post-tender. Thus the fundamental reason for tendering would be undermined by following the course suggested to the court by Mr Fitzpatrick. I am satisfied that such a result would not be appropriate. It would, as argued by Mr Middleton, drive a "coach and horses" through the system of tendering.

[28] I recognise that the ethos in the Practice Notes to which my attention was directed by Mr Fitzpatrick is clearly to encourage early disclosure of expert reports. The benefits of such

early disclosure are so clear they do not require to be repeated by me here. However, there must be circumstances in which early disclosure cannot be required and I consider the circumstances of the present case fall into that category for the reasons I have above outlined.

[29] Moreover, I observe that in paragraph 2 of Practice Note no 1 of 2007 where the issue of expenses in circumstances of no early disclosure is dealt with it is explicitly provided as follows: "Failure to do so (make early disclosure of expert reports) without reasonable excuse may have a consequence in expenses."

[30] The circumstances in the present case for the reasons I have already detailed I am satisfied clearly amount to such a "reasonable excuse".

[31] I would also note in passing that the paragraphs to which I was referred in Practice Note no 1 of 2007 relate to lodging of expert reports. The surveillance evidence is of course not an expert report although the comments by the various medical witnesses thereon clearly form parts of expert reports.

[32] In considering the pursuer's position it seems to me that what underlies the argument advanced by Mr Fitzpatrick is this: there is an obligation on a defender to disclose all expert and other evidence which is before it at the time when it makes a tender in order that the pursuer can then decide whether to accept or not the tender in full knowledge of that evidential position. There is no rule to that effect and the Practice Notes properly understood do not innovate on that position.

[33] I also note the comments of Sheriff Principal Dunlop at paragraph 15 in the Chas Stewart Plumbing case to which I was directed by Mr Middleton. I am persuaded that the pursuer's contended for position runs counter to the analysis of Sheriff Principal Dunlop. I am persuaded that Sheriff Principal Dunlop's analysis is correct. Looked at in the

context of a tender and its acceptance it flows from these observations that the court should not determine the expenses by reference to the state of evidence or how a pursuer's prospect of success appears at any given time which is the core of the pursuer's argument in the present case by founding on the date of production of the surveillance evidence and accompanying expert reports. Rather what the court must do is this: it should apply its mind to the procedure in the case at the end of the case and determine what has prolonged the case and the associated procedure. Approached in that way it can be seen that the cause of the prolongation is the pursuer's failure timeously to accept the tender.

[34] In addition, I think it is important to understand that there was no obligation on the defenders to lodge either the surveillance material or the medical comment thereon at any point before the proof. This material challenged the pursuer's credibility and reliability. Scottish litigation remains fundamentally an "adversarial" process. There is no obligation to lodge material of the above type which seeks to show any inconsistencies between the claimed and actual level of disability. It could have been used for that purpose at the proof without it ever having been lodged. (See: *Robertson v Anderson* 2014 SLT 709 at 710H-L).

[35] Further, I observe that the pursuer's position in opposing the defenders seeking the expenses post-tender in essence comes to this: my agents did not know what I was doing in the surveillance. This argument is developed as follows: the pursuer puts in issue the timing of the disclosure of the surveillance evidence in seeking to avoid the awarding of the expenses to the defenders. Thus he contends: the defenders should have told him and his agents of the existence of the content of the surveillance material at an earlier stage.

[36] When the above argument is analysed, I think it clearly shows that it is misconceived. The pursuer is not entitled to put forward such an argument. I accept that the pursuer's agents did not know and may not even have suspected that such evidence

existed. However, the pursuer himself did. He knew how he had behaved when the surveillance was carried out. The pursuer's agents are deemed to have that knowledge. The argument put forward by the pursuer therefore lacks any proper legal basis.

[37] Finally, it is difficult to see how the defenders' position as evidenced in the surveillance material and the comments thereon by their experts came as any great surprise to the pursuer and his representatives given the position taken on record by the defenders in the period prior to the lodging of the tender. When this material is examined there does not appear to me to be any material change in the position of the defenders resulting from the disclosure of this material.

[38] In their defences the following was averred:

*"The pursuer is currently capable of dressing his top half, showering, attending to his grooming needs, mobilising short distances indoors and can feed himself. With encouragement and further input it is possible that he could dress his lower half, mobilise outdoors, prepare meals, access the community, cross the road and participate in leisure activities. The pursuer has been able to go to his club on more than one occasion with a friend. The pursuer was able to have a drink there before coming home. The pursuer has also attempted to return to fishing but he has been precluded from that activity by shoulder pain. The pursuer's past medical history includes admission in January 1989 to a psychiatric ward in relation to alcohol misuse. It has also been noted that there had been many years of intermittent concerns about the pursuer's appetite and weight prior to the accident on 12 June 2015."*

[39] Further, the adjustments of 29 August 2017 averred that:

*While the pursuer's initial CT scan (taken in hospital at around the time of the accident) disclosed that he had suffered a traumatic brain injury, he did not suffer a stroke. Further, a more recent MRI brain scan (taken in September 2016) is not suggestive of any ongoing accident related brain injury. He is cognitively functional and, apart from his loss of hearing (for which he refuses to wear a hearing aid), taste and facial palsy, the pursuer does not suffer from any significant ongoing accident related frontal lobe, neurological or cognitive deficits or personality change, over and above those of his pre-morbid state. Said MRI scan shows the existence of smoking and alcohol related ischaemic small vessel changes, which are the cause of any dizziness, the extent of which is, in any event, significantly exaggerated by the pursuer. He can sit comfortably for long periods, with normal head and neck movements, and can walk without any walking aids... he has continued to drink alcohol following the accident... he also walks with a significantly invariably exaggerated gait... the pursuer is neither truly depressed nor anxious. The pursuer is currently capable of dressing his top half, showering, attending to his grooming needs, preparing basic meals, climbing stairs*



*(including spiral stairs), mobilising indoors and outdoors and he can feed himself and manage his own medication... the pursuer has been able to attend the Lossiemouth Sports and Social Club, Queens Lane Lossiemouth, on more than one occasion with a friend. The pursuer was able to have a drink there before coming home."*

[40] Further, the defenders' answers to the pursuer's minute of amendment intimated on 19 April 2018, deleted the averments in relation to the presence of smoking and alcohol related ischaemic changes and substituted averments that:

*"Any dizziness suffered is significantly exaggerated. Any cognitive deficit is mild compared to his pre-accident state and exacerbated by his failure to engage in rehabilitation... The pursuer's soft tissue back injury ought to have given rise to 2 to 3-month period of moderate discomfort, followed by mild, age-related back pain... In terms of his soft tissue back injury, the pursuer was capable of a return to light, administrative duties within 2 weeks of the accident and a return to driving within 4 or 5 months of the accident. The pursuer was nearly 59 years old when the accident happened. Had the accident not occurred, the pursuer may have worked on until the age of 65 years. He may not have been able to work full-time until said age. Full-time earnings are likely to have been about £25,321 net per annum. Part-time earnings would have been about £17,886 net per annum. He was paid £6,421.81 after the accident. The pursuer is currently fit for light to medium manual occupations or driving an LGV which does not involve heavy lifting, earning between £14,183 and £15,883 net per annum."*

## **Decision**

[41] I consider that having regard to all of the above considerations the cause of the litigation from the date of the minute of tender lies at the pursuer's door. He has forced the defenders to continue to seek to vindicate their position beyond the lodging of the minute of tender. As argued by Mr Middleton in all real senses the defenders have been the party successful post tender. In these circumstances the normal rule should apply and the pursuer should be found liable for the defenders' expenses from the date of the minute of tender.

[42] For all of the above reasons I find in favour of the defenders in respect to this matter.