SHERIFFDOM OF LOTHIAN AND BORDERS AT EDINBURGH
IN THE ALL-SCOTLAND SHERIFF COURT

[2017] SC EDIN 67

PN2657/16

JUDGMENT OF SHERIFF KATHRINE E C MACKIE

In the cause

DAVID McKENZIE

Pursuer

Against

LUKE McCORMACK

Defender

Pursuer: Crawford; Digby Brown, Glasgow
Defender: MacDougall, BLM, Edinburgh

Edinburgh, September 2017

Introduction

[1] The pursuer sought damages for personal injury sustained in a road traffic accident on about 3 May 2015. The action was defended. Following an *extra-judicial* settlement the pursuer enrolled a motion, number 7/4 of process, to interpone authority to parties' joint minute, to find the defender liable in expenses as taxed, for certification of Mr Bryn Jones and Dr Graham McMillan as skilled witnesses and for sanction for the employment of counsel. The motion was opposed only in respect of sanction for the employment of counsel. A hearing took place on 11 September 2017. I have been requested to provide this Note following my decision pronounced *ex tempore*.

[2] Section 108 of the Courts Reform (Scotland) Act 2014 (the 2014 Act) provides:-

"Sanction for counsel in the sheriff court and Sheriff Appeal Court

(1) This section applies in civil proceedings in the sheriff court or the Sheriff Appeal Court where the court is deciding, for the purposes of any relevant expenses rule, whether to sanction the employment of counsel by a party for the purposes of the proceedings.

(2) The court must sanction the employment of counsel if the court considers, in all the circumstances of the case, that it is reasonable to do so.

(3) In considering that matter, the court must have regard to –

(a) whether the proceedings are such as to merit the employment of counsel, having particular regard to –

(i) the difficulty or complexity, or likely difficulty or complexity, of the proceedings.

(ii) the importance or value of any claim in the proceedings, and

(b) the desirability of ensuring that no party gains an unfair advantage by virtue of the employment of counsel.

(4) The court may have regard to such other matters as it considers appropriate.

(5) References in this section to proceedings include references to any part or aspect of the proceedings.

(6) In this section – "counsel" means –

(a) an advocate

(b) a solicitor having a right of audience in the Court of Session under section 25A of the Solicitors (Scotland) Act 1980.

"court", in relation to proceedings in the sheriff court, means the sheriff,

"relevant expenses rule" means, in relation to any proceedings mentioned in subsection (1), any provision of an act of sederunt requiring, or having the effect of requiring, that the employment of counsel by a party for the purposes of the proceedings be sanctioned by the court before the fees of counsel are allowable as expenses that may be awarded to the party.

(7) This section is subject to an act of sederunt under section 104(1) or 106(1)."

Pursuer's Submissions

[3] Counsel for the pursuer relied upon section 108(3)(a)(i) and (ii) of the 2014 Act. He submitted firstly, that the difference in the opinions of parties' medical witnesses rendered

the issue of causation difficult, secondly, the action was important to the pursuer partly in view of the allegation that he had been intoxicated and simply fallen off his bicycle from which an inference could be drawn that he was fabricating the accident and partly because of his anxiety at the possibility of surgery and thirdly, the true value of the claim was significantly higher than the settlement figure.

Difficulty or Complexity

[4] Mr Bryn Jones, instructed on behalf of the pursuer, was of the opinion that the pursuer had sustained a considerable tear of the meniscus in the accident whereas Mr David Chesney, instructed on behalf of the defender, was of the opinion that the meniscal tear was sustained prior to the accident. Mr Chesney at page 11 of his report referred to the classic mechanism whereby such an injury was sustained being a twisting on a flexed weight bearing knee during the playing of sport such as football. While the pursuer acknowledged having played football he had no recollection of suffering a twisting injury. Counsel advised that he had been instructed to conduct the pre-trial meeting. Thereafter he had consulted with Mr Bryn Jones on 22nd June 2017. He submitted that there were a number of difficulties. Firstly, whether there was a need for the instruction of a radiologist, this being excluded at consultation; secondly, whether there was proof of the mechanism of the injury and thirdly, the evidence of pre-accident pain favouring the defender's expert's opinion.

Importance and Value

[5] The pursuer had been faced with a denial of an accident and an allegation that he had been intoxicated. There were a number of factors and evidence to contradict the defender's assertion.

[6] The pursuer was anxious about the possibility of having to undergo surgery. A further letter was received from Mr Bryn Jones following his consideration of Mr Chesney's report and the report of an MRI scan performed after his examination of the pursuer. The dispute between the medical practitioners was focused on whether the meniscal tear was caused by the accident. Following discussion with the defender's agents they were persuaded to increase their offer in settlement to a figure of £4,500, which the pursuer had instructed he would be prepared to accept. Counsel advised that in his opinion the true value of the pursuer's claim was about £16,500. He submitted that the settlement figure was superficially low and that it was still a significant sum to someone like the pursuer who earned about £1,500 per month.

Defender's Submissions

[7] The defender's agent submitted that it was for the pursuer to meet the test set out in section 108 of the 2014 Act. Nothing in the submissions annexed to the pursuer's written motion had alerted him to any reliance being placed upon subsection 3(a)(ii). In his submission the case was not one of high value even if Counsel's true potential value was taken into account. There was nothing about the circumstances of the pursuer's injuries to suggest that the case was any more important than any other case involving personal injury. It was accepted in the Sheriff Appeal Court's decision in *Cumming* v *SSE PLC* [2017] SAC (Civ) 17 that anxiety was a relevant factor for the court to consider in looking at the question whether it was reasonable for counsel to be instructed. It was submitted that that case, involving as it did the potential development of a terminal illness, was dealing with a wholly different level of anxiety from someone who may or may not wish to undertake surgery.

[8] It was further submitted that the action was not a complex one. It involved a road traffic accident between a bicycle and a motor car. It was fair to say that liability could not be more hotly contested but that was not unusual where there was a dispute on the facts. In relation to causation much was agreed between the doctors. Their dispute came down to the question whether the meniscal tear predated the accident. At the end of the day it would have been for the court to decide which opinion was to be preferred.

[9] In all the circumstances of the case sanction for the employment of counsel should be refused.

Pursuer's Reply

[10] In reply Counsel for the pursuer emphasised the importance of the allegation of fabrication to be inferred from the defender's allegations. He also submitted that the question of the preference of one expert over another was brought into focus where a tender was lodged as it had been in this case. The bringing out of the evidence of the two expert witnesses was a task requiring care. It was accepted that it was not the most complicated of cases but it involved a sufficient degree of importance and value to merit the instruction of counsel. He relied upon the observation of the Sheriff Appeal Court in the decision of *Cumming* at paragraph 20 and their reference to the real and meaningful role of counsel in the ASSPIC.

Discussion

[11] The real and meaningful role of counsel in the ASSPIC has been acknowledged and the forensic skill of counsel will be appreciated by litigants, agents and the court in many cases. However Parliament has not authorised the unrestricted instruction of counsel in this

court although it could have done so. As set out in *Cumming* at paragraph [14] "Whether or not to sanction the employment of counsel remains quintessentially within the judgement or discretion of the sheriff…". The court approved the application of a test of objective reasonableness having regard to the factors specified in section 108(3) and (4) "to be considered at the time of the motion". Each case must be considered on its own facts and circumstances.

[12] In this case the pleadings were commendably brief. The factual averments relating to the accident required only about 5 lines of the Record with less than 4 lines in response. The date, time, place and parties were not in dispute. The issue for proof was whether there was a collision between the pursuer's bicycle and the defender's motor car or the pursuer simply fell off his bicycle while under the influence of alcohol.

[13] It cannot be said to be uncommon for there to be a dispute about the facts of any accident and where two versions are advanced by implication that involves an allegation that the other version is not accurate. It does not necessarily follow that that version has been fabricated. A party might genuinely believe that their version of the incident is accurate but the evidence as a whole, on balance of probabilities, does not support it. There were no complex or difficult circumstances about the mechanism of the accident. It would have been for the court to decide which version was accepted on the basis of the evidence led and an assessment of the credibility and reliability of the witnesses including the pursuer.

[14] The averments of loss injury and damage averred to have been sustained by the pursuer were inevitably more lengthy. They were met by a general denial and an assertion that the sum sued for was excessive. There were no positive averments of any contrary position on behalf of the defender. From parties' submissions and a consideration of the

reports by Mr Bryn Jones and Mr David Chesney it was clear that there was much common ground in relation to the injuries sustained by the pursuer. Indeed the opinion of Mr Chesney, that the records from A&E Wishaw General Hospital, confirming a haematoma of the right calf, would be consistent with a direct blow, may have been of assistance to the pursuer in supporting his version of the accident. Where the witnesses were at odds was in relation to whether the medial meniscal tear diagnosed following an MRI scan was sustained in the accident or at some earlier date. While this issue was clearly important to the value of the pursuer's claim it cannot be said to be a complex medical issue of causation. Each expression of opinion would require to be considered in light of the respective experience of the witnesses, an examination of the pursuer's medical history and an assessment of the pursuer's account of his injury. At the end of that process the court would be expected to prefer one of the competing opinions.

[15] On an objective analysis of the issues in dispute, both in relation to liability and quantum, it cannot, in my opinion, be said that they were complex or difficult either in terms of evidence or presentation.

[16] It is trite to say that all litigation is important to the parties. Each party seeks to vindicate their rights or claims and the outcome will determine whether the action was justified particularly having regard to the expense incurred. To that extent all litigants may be said to be anxious about the outcome of the action. In this case the pursuer was said to be anxious about the prospect of surgery. I note from Mr Chesney's report that following the MRI scan the pursuer was offered but declined arthroscopy as he was reluctant to take time off work. There are no averments about the pursuer's anxiety in contrast to the case of *Cumming* where there were averments of the pursuer's distress and anxiety relating to his diagnosis and the associated risk of his condition progressing, and arising from his

knowledge of former colleagues suffering from asbestos related conditions and two named individuals having died as a result of asbestos related disease. At first instance the sheriff accepted that these were relevant factors in assessing the importance of the proceedings particularly to the pursuer and no criticism was made by the Appeal Court. I agreed with the defender's agent that any anxiety which may be suffered by the pursuer in this case may be distinguished from the anxiety of Mr Cumming. In this case I do not consider that any anxiety is such as to add materially to the importance of the proceedings to the pursuer.

[17] The action was settled in the sum of £4,500 being a sum which the pursuer was willing to accept. Counsel for the pursuer submitted that the true potential value on his calculations was of the order of £16,500. When providing that value is a factor to be considered by the court in assessing the reasonableness of the employment of counsel section 108 (3)(a)(ii) does not indicate whether the value to be considered is the value at which the case was concluded, either by settlement or following proof, or the potential value of the party instructing counsel. It is well recognised that a pursuer may accept in settlement a sum below, sometimes well below, the potential value of his case for a myriad of reasons. It may be that in certain cases it would be reasonable to consider the potential value when having regard to this factor. In terms of section 108(2) the court requires to have regard to "all the circumstances" of the case and the reasons for accepting a lower sum may form part of the circumstances. While in this case it might be that either the sum accepted or the potential value may be a significant one to some people in certain circumstances, including the pursuer, it cannot be said on an objective basis to be a significant one in terms of orders made in this court.

Decision

[18] There were two issues in this case, one of fact, was the pursuer knocked off his bicycle or did he fall, and the other of opinion, was the meniscal tear sustained in the accident or on an earlier date. I was not satisfied, in all the circumstances of this case, having regard to the factors set out in section 108(3)(a)(i) and (ii), that it was reasonable to employ counsel. No other factors were relied upon on behalf of the pursuer and no other factors appeared to be relevant in assessing the reasonableness of employing counsel. Accordingly I refused that part of the pursuer's motion relating to sanction for the employment of counsel and on the unopposed motion of the defender found the pursuer liable in the expenses of the hearing.