SHERIFF APPEAL COURT

[2018] SAC (Civ) 16
PIC-PN1494-17

Sheriff Principal M M Stephen QC
Appeal Sheriff W Holligan
Appeal Sheriff H K Small

OPINION OF THE COURT

delivered by APPEAL SHERIFF W HOLLIGAN

in the appeal by

CARA WEBSTER

Pursuer and Appellant

against

BIANCA MACLEOD

Defender and Respondent

Appellant: Swanney, Advocate, Digby Brown
Respondent: Sheldon QC, Plexus Law

31 May 2018

[1] The issue in this appeal is the certification of skilled persons in terms of paragraph 1 of Schedule 1 to the Act of Sederunt (Fees of Witnesses and Shorthand Writers in the Sheriff Court) 1992 (SI 1992/1878) (as amended) ("the 1992 Act").

Background

[2] The relevant facts can be stated briefly. The appellant was involved in a road traffic accident on 20 October 2015. The circumstances of the accident are not material. It is sufficient to say that the appellant was the passenger in the vehicle driven by the respondent. As a result of the accident the appellant suffered injury to her neck and chest. The respondent accepted liability for the accident.

[3] On 21 October 2015, the day after the accident, the appellant sought advice from her GP. The GP diagnosed "muscular strains due to RTA" and prescribed standard analgesia. The appellant visited her GP practice on 29 October 2015 (it appears to have been a different GP) complaining of pain in her chest. Alternative medication was prescribed with a recommendation for review should the appellant's symptoms not improve.

[4] From the material lodged before us, the next significant event was review by the appellant's solicitor of her GP records on 12 April 2016. A letter of claim dated 14 April 2016 was sent to the respondent's insurers. This was the first intimation of a claim. In that letter the appellant's injuries were described as constituting "neck pain, back pain, chest pain, arm pain and shoulder pain". On the same day a letter of instruction was sent by the appellant's agents to Dr Morrison, a consultant in accident and emergency medicine. Paragraphs one and two of that letter provide as follows:

> "We act on behalf of [the appellant] in connection with a claim for damages arising out of an accident which occurred on 20/10/2015. On that date our client was involved in a road accident and sustained chest pain and arm pain.
> We should be obliged if you would examine our client and provide a full and detailed report dealing with the injuries sustained, treatment received and present condition, dealing in particular with the capacity for work, if relevant and giving a prognosis".

[5] Dr Morrison examined the appellant on 13 May 2016 and provided to the appellant's agents a report dated 17 May 2016. In his report Dr Morrison narrated the history of the

injury, the diagnosis and treatment. Dr Morrison recorded the appellant as having stated that:

> "… The anterior chest discomfort continued to increase over a period of approximately one week. She stated that after this time there was little change in her symptoms for a subsequent period of ten days before there was gradual improvement. She estimates that this improvement continued and she was symptom free at best approximately six weeks after the accident. She states that since that time she has had an occasional niggling discomfort over the anterior chest on exercise".

[6] Dr Morrison concluded his report with an opinion and prognosis. He said:

> "In this matter [the appellant's] symptoms followed a well-recognised pattern of onset within a short space of time followed by a period of worsening before gradual improvement. All symptoms related to the neck injury had resolved within two weeks and I would confirm that this indicates a minor level of injury. No recurrence of symptoms or long term effects of this injury would be anticipated…
> [The appellant] indicated she continues to have some ongoing discomfort during exercise. Whilst such symptoms related to increased respiratory effort may persist a little beyond six weeks, I would not have expected these to continue beyond a maximum period of two months. It is my opinion that any such symptoms at this stage or at any stage beyond two months are not likely to have been caused by the injuries sustained at the time of the accident. I would not expect any recurrence of symptoms or long term effects of this injury".

[7] Negotiations as to settlement ensued; they were unsuccessful and in or about June 2017 an action was raised. The action was defended and defences lodged. In or about September 2017 the action was disposed of by means of minutes of tender and acceptance. The tender was in the sum of £3,000 (net of any liability the defender may have in terms of the Social Security (Recovery of Benefits) Act 1997), together with taxed expenses. By motion dated 22 September 2017 the appellant sought the following:

> "Decree in terms of tender and acceptance, for certification of Dr Stewart… and Dr Morrison… as skilled persons who prepared reports for the pursuer and for the expenses of process to date on the summary cause scale".

[8] The respondent opposed the motion. The grounds of opposition related to expenses and the pursuer's motion for certification of Dr Morrison as a skilled witness. (Certification

of Dr Stewart was not an issue). In her opposition to the motion, the respondent said as follows:

> "The pursuer's medical report was provided by [Dr Morrison] Consultant in Emergency Medicine. The date of the incident was 20 October 2015. The pursuer was examined on 13 May 2016, 8 months post incident. Long before the date of this examination, the pursuer was fully recovered (sic).
> The pursuer's physical injuries were of a minor nature. She sustained a musculoskeletal injury to her chest wall which substantially resolved after six weeks. The pursuer was able to return to exercising at the gym after this initial short recovery period. The musculoskeletal injury to her neck resolved within a period of two weeks. In the circumstances, instruction of a specialised Emergency Medicine consultant was unreasonable. A GP report would have been appropriate. There was no relevant past medical history which would justify instruction of a more senior specialist. The pursuer attended her GP on two occasions post-incident in connection with her injuries.
> Certification of [Dr Morrison] should be refused".

[9] The motion was heard before the sheriff on 23 October 2017. Having heard parties, the sheriff pronounced an interlocutor which, read short, granted decree in terms of the minute of tender and acceptance; found the respondent liable to the appellant in expenses to the date of the tender on the summary cause scale, as taxed; certified Dr Stewart as a "skilled witness" but refused to certify Dr Morrison as a "skilled witness"; found the respondent liable to the pursuer in the expenses of the opposed motion modified to 75%. The sheriff gave *ex tempore* reasons for his decision (later committed to a Note). The appellant appealed against the decision of the sheriff not to certify Dr Morrison as a skilled person. The respondent lodged a cross appeal against that part of the sheriff's interlocutor in which he awarded to the appellant the expenses of process to the date of the tender on the summary cause scale. The respondent maintained that the respondent's liability to expenses ought to have been further modified. The respondent's cross appeal was abandoned.

Arguments for the appellant

[10] Leaving aside the analysis of the rule to which we will return, the appellant submitted that the sheriff was wrong to find the appellant was not complaining of ongoing symptoms at the time of her examination by Dr Morrison and that there was no need for the appellant to obtain a prognosis based upon what the appellant's position was at the time the report was instructed. The appellant was complaining of continuing symptoms.
Mr Swanney was not present at the hearing of the motion. It was his understanding that the sheriff was informed that the appellant was suffering from continuing symptoms (although this was not noted as having been said by the sheriff). Mr Swanney accepted that the letter of instruction to Dr Morrison did not make express reference to continuing symptoms.
Dr Morrison recorded in his report that the appellant had made reference to continuing symptoms. It was necessary to ascertain whether the continuing symptoms were related to the accident and, if so, when, if at all they were likely to resolve. The appellant's agents must proceed on the basis that certain matters require to be proved (*Allison* v *The Chief Constable of Strathclyde Police* 2004 SC 453). It was reasonable to instruct Dr Morrison, an independent consultant in accident and emergency medicine, and to seek a report from him. Reasonableness is determined at the date of instruction of the skilled person *(Allison).* The letter of instruction to Dr Morrison followed the style of letter (Style C) contained in the Voluntary Pre Action Protocol (paragraph 3.12). There was no specific file note recording why that particular practitioner was chosen. Mr Swanney submitted that this appeal raises a general issue of principle as to the selection of expert witnesses. He referred to the large number of road traffic accidents recorded nationally, many of which involve minor injuries such as the present. If a GP was instructed, insurers may, as they have done in the past, reject such evidence as being inadequate. It was necessary to have opinion evidence as to

causation. The evidence of an independent medical witness is preferable in that it attracts greater weight than that of a treating practitioner. For the instructing solicitor, there were three potential areas of expertise relevant to the appellant's injuries: an accident and emergency consultant/practitioner; a general practitioner; and an orthopaedic surgeon.

[11] Accident and emergency practitioners and general practitioners regularly see patients suffering from injuries such as those suffered by the appellant. It was reasonable to instruct Dr Morrison. There is a crossover between the work of a general practitioner and the work of a consultant such as Dr Morrison who can be considered a primary care specialist. Secondly, the sheriff erred in finding that Dr Morrison was a skilled person who spoke only to fact. Reading his report he spoke both to fact and opinion. Thirdly, the sheriff's view was that the report from Dr Morrison contained no expression of fact or opinion which would not have been within the competence of a GP. The sheriff had erred in placing too much weight on this finding when weighing the relevant considerations. The question is whether it was reasonable to employ the person. Whether a general practitioner could have been instructed is not a decisive factor. Reference was made to *McAllister* v *Scottish Legal Aid Board* 2011 SLT 163 at paragraph [39].

[12] Fourthly, the sheriff erred in finding that the nature of the pursuer's injuries was such that only a report from a general practitioner ought to have been obtained. Fifthly, the sheriff also erred in finding that a report from the general practitioner would have been less expensive than the report prepared by Dr Morrison. Mr Swanney accepted that, in the course of the hearing before the sheriff, the agent for the appellant said that the cost of obtaining the report from the GP would have been less than that of Dr Morrison but the agent also said that she herself had never instructed a general practitioner and had always instructed a consultant. In any event, the cost of a report is not the only consideration.

There are other factors such as the cost of a general practitioner attending as a witness as opposed to the attendance at court of a consultant. There are occasions when reports from a general practitioner are no less expensive than those from a consultant.

[13] Lastly, in any event the sheriff had erred in placing too much weight on the lower cost of instructing a general practitioner. The question to be addressed is simply whether the instruction of the skilled person was reasonable. If the fee charged by a skilled witness is unreasonable the auditor can be invited to abate the fee.

Submissions for the respondent

[14] Again leaving aside the analysis of the rule, Mr Sheldon QC submitted that there was no indication in the printed material or the hearing before the sheriff to suggest that the instruction of a consultant was reasonable at the time of his instruction. It is relevant to note that the instruction of Dr Morrison was made at exactly the same time as the letter of claim was sent to the insurers. There were no issues of causation or prognosis because the insurers had no notice of the claim. There was no reason why the appellant's agents could not have relied on the notes from the general practitioner. If the insurers were not satisfied with this material it would have been open to them to ask for a more detailed report. Had they done so they would have accepted responsibility for payment of a fee therefor. Instruction of a specialist appears to have been undertaken as a matter of course. That is not reasonable and it is not the proper way to approach individual cases. What information the appellant's agents had before instructing Dr Morrison was not clear. Dr Morrison's report suggested that any continuing symptoms had long since resolved. Each case turns upon its own facts and circumstances. It is the responsibility of the appellant to satisfy the court that, in this particular case, certification was appropriate.

[15] The sheriff had reached the correct conclusion. The sheriff was not plainly wrong. He applied his mind to the nature of the injury. He also took into account the cost of the report. The agents of the appellant had accepted that the cost of a report from a GP would have been less than that of a consultant. Further, and in any event, it was open to the sheriff to rely upon his own knowledge of similar matters to reach a view. There should have been a "staged" approach in this matter. The appellant could have relied upon information from a general practitioner; only if the insurers had rejected this information and asked for a more detailed report should it have been instructed.

[16] Mr Sheldon was not in a position to contradict the proposition that the sheriff was told that the symptoms were continuing. However, he had no knowledge as to what had been said before the sheriff on this particular point. Not only did the sheriff not record this but his Note would tend to suggest otherwise.

Decision

[17] Paragraph 1 of Schedule 1 of the 1992 Act provides as follows:

> **Skilled persons**
> "(1) If, at any time before the diet of taxation, the sheriff has granted a motion for the certification of a person as skilled, charges shall be allowed for any work done or expenses reasonably incurred by that person which were reasonably required for a purpose in connection with the cause or in contemplation of the cause.
> (2) A motion under paragraph (1) may be granted only if the sheriff is satisfied that –
> (a) the person was a skilled person, and
> (b) it was reasonable to employ the person.
> (3) Where a motion under paragraph (1) is enrolled after the sheriff has awarded expenses, the expenses of the motion shall be borne by the party enrolling it.
> (4) The charges which shall be allowed under paragraph (1) shall be such as the Auditor of Court determines are fair and reasonable.
> (5) Where a sheriff grants a motion under paragraph (1), the name of the person shall be recorded in the interlocutor".

[18] The foregoing text was inserted into Schedule 1 by the Act of Sederunt (Fees of Solicitors and Witnesses in the Sheriff Court) (Amendment) 2011, SSI 2011 / 403. (At or about the same time, a similar amendment was made to the equivalent rule in the Court of Session – see rule 42.13A, inserted by the Act of Sederunt (Rules of the Court of Session) Amendment No.4 (Miscellaneous) 2011 SSI 2011 / 288.)

[19] In their respective notes of argument, the appellant and respondent had different views as to the correct approach to the interpretation of the rule. The appellant submitted that the rule conferred upon the sheriff a discretion as to whether to certify a person as a skilled person. The rules as to the review of a discretionary decision were clear: an appellate court could only do so on certain well known grounds including the sheriff misunderstanding a material fact; taking into account irrelevant considerations; the decision was plainly wrong (see *Ahmed v QBE Insurance (Europe) Limited* [2017] SAC (Civ) 22). The respondent took the view that a decision made pursuant to the rule was an order in relation to expenses. Appeals on questions of expenses may only be entertained if there has been an obvious miscarriage of justice or a question of principle is involved (*Robertson v Muir* [2016] SAC (Civ) 10). The correct categorisation of the decision under review is important because it has consequences as to the basis upon which an appellate court may approach review of the interlocutor complained of. At the end of the day, both parties accepted that a decision as to whether to certify a person as a skilled person is a matter of judgement and not a matter of discretion. So far as appeals to this court concerning the certification or non-certification of skilled persons, we consider such matters ought to be categorised as falling within the rules relating to expenses. As such, appeals may only be pursued if there has been an obvious miscarriage of justice or a question of principle is concerned. In the present

case the issue of principle is the correct construction of the rule and the practice in relation thereto.

[20] Given the way in which the rule is constructed the starting point is paragraph 1(2). It is only if the sheriff grants the motion that paragraph 1(1) applies ("…the sheriff has granted the motion…"). There are two matters upon which the sheriff requires to be satisfied: the person was a skilled person; and it was reasonable to employ that person. Although the rule is located in an Act of Sederunt which deals with the fees of witnesses and shorthand writers it is clear that the skilled person need not be a witness and may have been employed at a point at which there was no cause at all ("…in contemplation of the cause…"). The words used are "skilled person" and not "skilled witness" although the interlocutor against which the appeal proceeds uses that terminology. The terms of paragraph 1(2)(a) are straightforward and concern the qualifications and expertise of the person concerned. No issue is taken in relation thereto in the present case. It is neither possible nor appropriate to provide an exhaustive list of factors which may be relevant to a determination as to whether the employment of the skilled person is reasonable. The purpose of the rule is to provide some judicial superintendence of one aspect of the cost of litigation. It is the responsibility of the person seeking certification to provide adequate material to enable the sheriff to be satisfied as to the matters specified in paragraphs 1(2)(a) and (b). It is then for the sheriff to reach a view on such material. Reasonableness falls to be determined objectively; it falls to be assessed at the time of instruction. That requires consideration of the state of affairs at the point of instruction. Implicit in the concept of reasonableness is proportionality: proportionality between the decision to instruct that skilled person at that particular time and the matters in issue or likely to be in issue. If certification is granted, pursuant to

paragraph 1(1), it is for the auditor to decide the reasonableness of the charges (it is hard to see that paragraph 1(4) adds anything to paragraph 1(1)).

[21] Returning to the merits of the appeal itself, the key issue between the parties is the decision to employ Dr Morrison rather than a GP. Given our analysis and interpretation of the rule it was for the appellant to satisfy the sheriff as to the reasonableness of the decision taken to instruct Dr Morrison at the time. It would appear from the sheriff's Note that he was given little, if any, information as to why it was decided by the pursuer's agent to instruct Dr Morrison at the time at which it was done; rather it would appear the sheriff was given information to justify a decision which had been taken. There is nothing to show that it was about the matters likely to be in issue (especially given that the respondent's insurers were only notified of the claim at or about the same time as the instruction of Dr Morrison) which made the instruction of Dr Morrison a reasonable step to take at that point. We hasten to add there is no criticism by anyone of Dr Morrison: he did what he was asked to do by those instructing him. Nor should it be thought that we are laying down a rule as to the instruction of consultants as opposed to GPs. Each case will turn upon its own facts and circumstances. However, we must emphasize that it is up to the party seeking certification to justify the employment of the skilled person at the relevant time. We have considered the sheriff's Note carefully. Although we differ in part from the sheriff in the interpretation of the rule, we do not disagree with the conclusion which he reached on the basis of the information before him. We shall therefore refuse the appeal. The expenses of the appeal are reserved.