SHERIFF APPEAL COURT

[2018] SAC (Civ) 1
PIC-PN1565-16

OPINION OF THE COURT

delivered by APPEAL SHERIFF ANDREW M CUBIE

in appeal by

STUART MCCALLION

Appellant and Pursuer

against

APACHE NORTH SEA LIMITED; ARCHER (UK) LIMITED;
ARCHER SERVICES LIMITED

Respondents and Defenders

Appellant and Pursuer: Party
Respondents and Defenders: McLeod; Clyde & Co (Scotland) LLP

27 December 2017

Introduction

[1] This is an appeal by Mr McCallion, the pursuer and appellant, against the decision of the sheriff of the All-Scotland Sheriff Personal Injury Court dated 21 August 2017 to dismiss his action for damages for personal injury. The case called on that date for a peremptory diet in terms of rule 24 of the Ordinary Cause Rules because Mr McCallion's solicitors had withdrawn from acting. No issue arises about intimation. Mr McCallion accepted that he had received notification of the date and of the requirement to attend. There was no contact with the court by Mr McCallion or anyone on his behalf in advance of this hearing. He did

not attend and the action was dismissed. He appealed, asserting in his note of appeal that "Due to mental health issues" he had been unable to attend court on 21 August.

[2] The appeal was initially due to proceed on 8 November 2017. In advance of that date contact was made on Mr McCallion's behalf, indicating his unfitness to attend. By interlocutor of that date Appeal Sheriff McCulloch continued the Appeal Hearing until 6 December ordering the appellant "to provide a report from his general practitioner or consultant to specifically address his failure to appear at court on 8 November and 21 August."

[3] Mr McCallion attended on 6 December and produced three letters in relation to his medical condition; in chronological order they are as follows.

[4] Firstly a letter from Niamh Duffe, a Mental Health Link worker at Ardach Health Centre dated 21 September, which said:

> "…I received a referral for the above patient from Dr Ewan Riddick some time ago. However Mr McCallion was not well enough to engage at the time.
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> With help from his mother Christina, Mr McCallion finally agreed to come and see me on a home visit on 6th September 2017. He has since had appointments with Dr McDonald and has been referred to a pain clinic for his shoulder and neck problems. He has been referred to the Counsellor at Ardach and will continue to receive support from me for the foreseeable future.
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> If you have any queries please feel free to phone me …or email me…between 9am and 5pm, Monday – Friday."

[5] The second was from a General Practitioner, Dr J MacDonald of the Ardach Health Centre, Buckie dated 15 November 2017, and which said:

> "To whom it may concern
> Mr Stuart McCallion
> I can confirm I have been seeing this gentleman at Ardach Health Centre over the past few months. This has primarily been with regards to anxiety and his chronic pain issues.
> Should you wish any more information please do not hesitate to get in touch."

[6] Thirdly a letter from COSCA, a counselling service dated 30 November 2017, signed by an Ian Innes, described as a counsellor, although no further professional details or qualifications are given. The letter says:

> "I can confirm that Stuart McCallion has attended counselling sessions with me at Ardach Health Centre in Buckie since 16th November 2017.
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> The contents of these sessions are confidential but I can confirm that Stuart has contributed fully in each of them as he seeks to improve his psychological wellbeing."

Appellant's Submissions

[7] Mr McCallion represented himself. He explained that he had been suffering from panic attacks and anxiety attacks; that had been the main reason why he could not attend on either 21 August or 8 November. He has had such issues for some time. The problems are due to the accident and the injuries sustained. He had been attending the GP for a year or so. He has been put on anti-depressants and it has taken some time for the correct medication to be identified. His symptoms are more under control now.

[8] The lack of detail in the GP's report was put to him; he said that he had asked the GP to include more detail, but the GP had declined to do so because it was "against his practice"; Mr McCallion said he did not really understand the reason.

[9] He said that he wanted to continue with the case. The accident which occasioned the court action had rendered him unfit for work; he said he had back, neck, shoulder problems and mental health issues. He sees Niamh Duffe every few weeks. He sees Ian Innes weekly although he conceded that had only been since November.

[10] He explained that his anxiety and panic had been made worse by the withdrawal by his solicitor; they had disagreed about the way forward in the action. He wanted to instruct

new solicitors although he had not been successful in identifying a new firm, primarily due to lack of time.

[11] He accepted having been in contact with the defenders' agents in the days leading up to 21 August; he denied saying that he would prefer not to go to court on 21 August (a suggestion made in the defenders' written note of argument). He had simply been unable to attend.

Defenders' Submissions

[12] Miss McLeod appeared for all defenders and respondents. She opposed the appeal. The written note of argument gave the background and a helpful chronology. I note in particular that the defenders took the step of discharging a diet of proof because they wished to know whether the appellant wished to proceed with the action. Miss McLeod made reference to the note of argument in relation to the history of the case. She referred to Macphail 14.14 – 14.15 and the test to be applied. She made reference to *General All Purpose Plastics Limited* v *Young* [2017] SAC (Civ) 30.

[13] She submitted that there was no material to support the one focus of the appeal, the appellant's mental health condition. All of the letters post-dated the peremptory diet; none say he was unfit to attend court, there was no diagnosis.

[14] She submitted that, seen in the context of the GP's awareness of the ongoing action (he would have received specifications of documents, for example), and the nature of the specific request in AS McCulloch's interlocutor, the letter produced by the GP was inadequate. It was not on soul and conscience so no reliance could be placed upon it. In any event it had to be put in context; the appellant had been in communication with the defenders' solicitors from 16 – 18 August. He had been fit to attend a meeting at the agents'

Aberdeen office on 18 August; there had been no reference to the health issues at that meeting. There had been no contact with the court before the hearing on 21 August.

[15] She referred to the case of *Scottish Ministers* v *Smith* [2010] CSIH 44. Essentially he produced no material which explained or justified the non-attendance. She submitted that the appeal should be refused

[16] If, however, the court was considering reponing the appellant by allowing him back into the action, then there was a need to restore the defenders to the position that they would have been in but for the additional procedure. But his position in relation to expenses was clear; he could not pay them.

Appellant's Response

[17] Mr McCallion explained that he had had no income from employment for years now; he received Employment Support Allowance on an intermittent basis. He denied saying that he did not want to attend court on 21 August; he did accept that he said he had nothing to lose. His position was that in August he was not coping well and only a family intervention had prompted his engagement with the medical and counselling services. He had struggled with dates, although he accepted that he had known about the requirement to attend court on 21 August. He had planned to go but felt himself unfit. He wanted to continue with the action. He said that he would struggle to pay expenses because of what he had lost. He had lost everything because of the accident. He recognised that the medical information was not full; if allowed back into the case, he would provide more information.

Basis for Decision

Legal Test

[18] The Sheriff granted decree of dismissal in terms of OCR 24.3 because the appellant failed to appear. The appellant is looking to be reponed and for relief from failure to comply with rules. OCR 2 provides:

> "2.1. (1) The sheriff may relieve a party from the consequences of failure to comply with a provision in these Rules which is shown to be due to mistake, oversight or other excusable cause, on such conditions as he thinks fit.
> (2) Where the sheriff relieves a party from the consequences of a failure to comply with a provision in these Rules under paragraph (1), he may make such order as he thinks fit to enable the cause to proceed as if the failure to comply with the provision had not occurred."

[19] This is not a matter of assessing the sheriff's approach at first instance; the sheriff had little option in the circumstances. The appellant has to demonstrate that the failure to attend was excusable. He seeks to excuse the failure to attend by pointing to his medical condition.

[20] As the defenders submitted, the matter of reponing has been the subject of observations from the President of the Sheriff Appeal Court in *General All Purpose Plastics Limited* v *Young*, where Sheriff Principal Stephen said:

> "[9] The first issue of law to be decided is the proper approach of an appellate court when reviewing a sheriff's decision to grant decree by default. The terms of OCR 16.2 clearly point to the sheriff having a discretion whether to grant decree where a party is in default. In their written submissions, parties differed as to whether the appellate court required to restrict its review of the sheriff's decision to the usual principles for review of the exercise of judicial discretion as set out in *Thomson v Glasgow Corporation* (supra) at page 66 and as applied in *Moran v Freyssinet* (supra) an Inner House decision on "*default*". These principles, put shortly, involve a narrow approach by examining the sheriff's decision making and assessing whether some irrelevant factor had been taken into account or an important relevant factor left out of the equation or that a decision was reached which could be described as unreasonable or unjudicial. The respondents concede that an appeal against decree by default involves the question whether the appellant should be reponed, which in other words means that the appellate court should exercise its own discretion having regard to all the circumstances.

> [10] Accordingly, I approach this appeal on the basis that I may exercise my discretion whether to open up or to recall the decree by default. That means, as a matter of principle, that my decision whether to recall the decree by default should not be restricted to the question of whether, on the information available to the sheriff, she exercised her discretion reasonably by granting decree. A party who appeals decree by default is, in effect, seeking to be reponed or to have the case put back on track with further procedure allowed. Whether or not the appellant should be reponed involves a broad consideration of the circumstances surrounding the default and whether there is a proper or meritorious defence to the action. The correct question is whether the interests of justice require that the appellant be reponed. In Macphail Sheriff Court Practice Chapter 14 the learned author emphasises that "The court must do justice not only to the defaulter but to the innocent victim of the default; and where the defaulter's failures in duty transcend what is acceptable to the court and fair to the other party, and matters cannot be mended by an award of expenses,..the appeal will be refused." (at 14.15). Further, at paragraph 14.14:- "It is always a matter in the discretion of the appeal court whether the appellant is to be reponed, and if so, upon what conditions as to expenses or otherwise. If the appeal court allows the appeal it recalls the sheriff's interlocutor, imposes any such conditions, and remits the case to the sheriff to proceed as accords." Accordingly, reponing involves the exercise of a broad discretion. The appellate court may entertain an explanation for the default; why there was no appearance and give consideration to the question of whether there is a *prima facie* defence and the strength and substance of that defence (*McKelvie v Scottish Steel Scaffolding Company 1938 SC 278*.). The *dicta* of the Lord President (Rodger) in *Munro and Miller (Pakistan) Limited v Wyvern Structures Limited* 1997 SLT 1356 serves to emphasise the broad nature of the appeal court's discretion in such appeals."
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> > 'Of course, as counsel for the reclaimers argued, there is a risk that the party's absence from the diet of proof may have been due to some very exceptional circumstance of which the Lord Ordinary was unaware. But even if something of this kind comes to light after the judge has granted decree, no injustice need result since the party in default can reclaim and the court would be able to repone him. This was not disputed by counsel for the respondents.'"

[21] I accept and adopt these observations about the nature of the test for this court; this court exercises its own discretion on the material available, examining the explanation for the default, the stage of the proceedings reached, looking to the interests of justice, and what conditions as to expenses or otherwise might be applied.

The Approach to be Taken to Medical Evidence in this Context

[22] Some analysis of the approach which the court should take to the provision of medical information in these circumstances is justified. *Scottish Ministers* v *Smith* involved a consideration by the Inner House of a purported medical report provided when an appellant failed to appear. The report said:-"This 36 year old lady attended the surgery today for assessment of a health condition. In my professional opinion I consider her medically unfit to attend Court on Tuesday the 18th May and I would be grateful if you could take this into consideration." Lord Gill, then Lord Justice Clerk, gave the opinion of the court and said the following.

> "[6] The certificate is not given on soul and conscience. Although certification on soul and conscience is no longer an indispensable requirement (cf practice note, 6 June 1968), the absence of it is a factor that we are entitled to take into account. More importantly, Dr McCartney fails to specify the health condition for which he assessed the second respondent. He fails to specify for how long she has suffered from this health condition, whatever it may be, or for how long he expects it to continue. He also fails to specify why, in his opinion, the second respondent's health condition makes her unfit to attend court today.
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> [7] A medical certificate to the effect that a person is unfit to attend court is not conclusive evidence of that fact. In every case it is for the court to decide, from the certificate and any other relevant circumstances, whether it is persuaded that the person concerned is unfit to attend and, if so, what the consequences of that should be."

[23] The Inner House has also considered the matter as part of a wider appeal in *Yazdanparast* v *Yazdanparast* [2013] CSIH 27, where the court commended the approach of the sheriff at first instance who was faced with an absent party asserting ill health as the reason for absence. Lady Smith delivered the opinion of the court, saying (emphasis added)

> "[14] The proof and the contempt matter both called before the sheriff at 10 am. The defender was not present. The pursuer was present, as was her solicitor, Mr Dickie, who invited the sheriff to pronounce an interlocutor requiring the defender to provide a medical certificate, on soul and conscience, vouching his ill health, by 2 pm. The sheriff did so. The interlocutor was in terms which are replicated in the appeal print. **They, in essence, required the defender to produce a medical**

> **certificate to the court detailing the nature and extent of any medical condition from which he was suffering, whether it prevented him from attending at court and participating in the proceedings and if so, when he would be fit to attend court to do so.**" (Emphasis added)

[24] In addition there are a number of cases from England and Wales which provide useful guidance. In *Levi* v *Ellis-Carr* [2012] EWHC 63 Mr Justice Norris observed that

> "[33] …[J]udges are daily faced with cases coming on for hearing in which one party either writes to the court asking for an adjournment and then (without waiting for a reply) does not attend the hearing, or writes to the court simply to state that they will not be attending. Not infrequently "medical" grounds are advanced, often connected with the stress of litigation. Parties who think that they thereby compel the Court not to proceed with the hearing or that their non-attendance somehow strengthens the application for an adjournment are deeply mistaken. The decision whether or not to adjourn remains one for the judge."

He continued, in connection with the terms of medical evidence required, to say.

> "[36] Such evidence should identify the medical attendant and give details of his familiarity with the party's medical condition (detailing all recent consultations), should identify with particularity what the patient's medical condition is and the features of that condition which (in the medical attendant's opinion) prevent participation in the trial process, should provide a reasoned prognosis and should give the court some confidence that what is being expressed is an independent opinion after a proper examination. It is being tendered as expert evidence. The court can then consider what weight to attach to that opinion, and what arrangements might be made (short of an adjournment) to accommodate a party's difficulties. No judge is bound to accept expert evidence: even a proper medical report falls to be considered simply as part of the material as a whole (including the previous conduct of the case)."

[25] That approach was expressly approved by the Court of Appeal in *Forrester Ketley* v *Brent* [2012] EWCA Civ 324 where Lewison LJ said

> "25. …Whether to adjourn a hearing is a matter of discretion for the first-instance judge. … An adjournment is not simply there for the asking. While the court must recognise that litigants in person are not as used to the stresses of appearing in court as professional advocates, nevertheless something more than stress occasioned by the litigation will be needed to support an application for an adjournment. In cases where the applicant complains of stress-related illness, an adjournment is unlikely to serve any useful purpose because the stress will simply recur on an adjourned hearing.

> 26. In *Levi v Ellis-Carr [2012] EWHC 63 (Ch)*, Norris J set out his approach to medical evidence, in terms with which I agree."

[26] In *Decker* v *Hopcraft* [2015] EWHC 1170 (QB), Mr Justice Warby reviewed the cases referred to above; he took as his starting point an observation by Neuberger J (as he then was) in *Fox* v *Graham Group Ltd (The Times 3rd August 2001)*, that a court faced with an application to adjourn on medical grounds for the first time by a litigant in person should be hesitant to refuse the application. He identified some qualifications:

> "23. First, the decision is always one for the court to make, and not one that can be forced upon it.
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> 24. Secondly, the court must scrutinise carefully the evidence relied on in support of the application.
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> 25. Norris J's approach in *Levi* ...was followed by Vos J (as he then was) in refusing an application to adjourn the trial in *Governor and Company of the Bank of Ireland v Jaffery* [2012] EWHC 734 (Ch) [49].
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> 26. In the context of what amounts to proper medical evidence it is pertinent to note two points made by Vos J in [that] case. At [19], referring to a GP's letter running to some 11 lines which confirmed that the defendant had been signed off work for three weeks, he said this:
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> > 'It is important to note that a person's inability to work at a particular job is not necessarily an indication of his inability to attend court to deal with legal proceedings. It may be but it may also not be.'
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> At [58] Vos J indicated that he took into account the contents of the defendant's litigation correspondence, observing that he
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> > 'has been communicating with the court and with the claimants over a lengthy period in the most coherent fashion. He is plainly perfectly capable of expressing his point of view, taking decisions and advancing his case'.
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> 27. The third main qualification … is one that is implicit, if not explicit in what Norris J said in *Levi*: the question of whether the litigant can or cannot participate in the hearing effectively does not always have a straightforward yes or no answer. There may be reasonable accommodations that can be made to enable effective participation. The court is familiar with the need to take this approach, in particular with vulnerable witnesses in criminal cases. A similar approach may enable a litigant in poor health to participate adequately in civil litigation. But the court needs evidence in order to assess whether this can be done or not and, if it can, how.

> 28. Fourthly, the question of whether effective participation is possible depends not only on the medical condition of the applicant for an adjournment but also, and perhaps critically, on the nature of the hearing: the nature of the issues before the court, and what role the party concerned is called on to undertake. If the issues are straightforward and their merits have already been debated in correspondence, or on previous occasions, or both there may be little more that can usefully be said. If the issues are more complex but the party concerned is capable, financially and otherwise, of instructing legal representatives in his or her place and of giving them adequate instructions their own ill-health may be of little or no consequence. All depends on the circumstances, as assessed by the court on the evidence put before it.
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> 29.The fifth point that may be of significance here is that, sometimes, it may appear to the court at the outset or after hearing some at least of the rival arguments that in truth the matter before it is one on which one or other side is bound to succeed. The closer the case appears to one or other of these extremes the less likely it is that proceeding will represent an injustice to the litigant. ..
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> 30. … [W]hen considering an adjournment application the court's approach should to an extent be affected by whether the matter involves applications of a case management nature, or final determinations on the merits such as an order striking out a statement of case or part of it, where Article 6 of the Convention is engaged. The court will need to be more cautious in cases failing within the second category. Nonetheless, the factors I have identified above are relevant in both contexts."

[27] Certain considerations can be drawn from these decisions.

[28] The question of whether to adjourn or to continue in the absence of a purportedly unfit party is an exercise of discretion, as is the decision to accept the medical evidence proffered to excuse a failure to appear.

[29] Courts should be hesitant to refuse such an application made by a party litigant on the first occasion but the decision is for the court and cannot be forced upon it.

[30] A medical certificate provided in such circumstances need not be on soul and conscience, but the court is entitled to regard the absence of such certification as a factor in assessing the weight to be attached. As it is effectively tendered as expert evidence, the court should have some confidence that what is being expressed is an independent opinion after proper examination.

[31] A medical certificate should be scrutinised carefully. A certificate to the effect that a person is unfit to attend court is not conclusive evidence of that; in every case it is for the court to decide whether it is persuaded that a person is unfit to attend and if so what the consequences are, based upon the certificate and other relevant circumstances as a whole (including the conduct of the case, and the nature of the party's engagement otherwise with the case). Unfitness for work is not unfitness for court to attend to legal matters.

[32] A medical certificate which purports to explain a failure to attend court should

- Identify the medical attendant and give details of familiarity with the party's medical condition detailing all recent consultations,
- Specify the health condition assessed, detailing the nature and extent of any medical condition from which he was suffering,
- Specify how long the condition has been suffered and for how long it might continue,
- Provide a reasoned prognosis,
- Identify with particularity the features of that condition which in the opinion of the doctor prevent attendance at, or participation in, the court process; put short, it should specify why the health condition renders the party unfit to attend court.

[33] The question of whether effective participation is possible depends not only on the medical condition but also on the nature of the issues before the court and the role the party will have to undertake.

[34] It may be of significance if it appears to the court that one or other party is bound to succeed. It is relevant to take account of whether the issues in question are of a case management nature or are a final decision on the merits, where the court should be more cautious.

The Material Provided by the Appellant

[35] Against that background I consider the material provided by the appellant. There is one letter from a medical practitioner, his GP. The letter is not certified on soul and conscience, there is no information about familiarity with the condition, recent consultations, the nature and extent of condition, length suffered or prognosis, and there is a complete failure to identify with particularity what, in the opinion of the medical practitioner, prevented attendance at either of the diets missed.

[36] The two other letters provide background information only, and can be interpreted as confirming that full engagement with the mental health and counselling services took place after 21 August. Neither court date is mentioned. The letters produced amount to general assertions about health, over an unspecified period and not fixed to either court dates.

[37] While there is clearly an undercurrent of health difficulties, this appeal is concerned with the particular failure to attend court on 21 August; there is an absence of information about the nature, extent, and duration of the condition and the extent to which it is or was an impediment to attending court.

[38] Mr McCallion's self-proclaimed unfitness for work only takes him so far. The appellant was able to enter into discussion both by email and telephone with the defenders' agents on 16 and 17 August, culminating in a meeting in Aberdeen to which he travelled on 18 August. During none of these communications was the issue of his mental health raised.

[39] There is no material to support the assertion that his mental condition inhibited his ability to attend court for the hearing on 21 August.

[40] Accordingly having scrutinised the material I consider that it falls far short of giving an explanation for the particular failures to appear. To put it another way, if this material had been presented to the first instance judge to explain the failure to appear on 21 August, the judge would have been justified in considering that no explanation, far less excusable cause, had been shown.

[41] In reaching this conclusion I take into account firstly that he does appear to be suffering from some condition or conditions which justify medical intervention and secondly that the consequence of refusing the appeal would be to bring the matter to an end, being a determination of the merits rather than a procedural or case management step missed.

[42] But against these factors, there were two failures to appear; he was effectively given two chances to provide medical information including a very clear order from AS McCulloch about what was required. Despite that, as I have addressed, the letter from the doctor, even if characterised as a medical report, is not on soul and conscience, does not address the failures to attend on 21 August and 8 November, and refers to inspecific mental and physical conditions. In addition, he was able to communicate effectively with the defenders' agents from 16 to 18 August and to travel to and attend a meeting to discuss the case. The diet which he failed to attend on 21 August, whilst very important, was not onerous in terms of the appellant's involvement. Finally he was by his own admission not in a position to pay any award of expenses which would restore the defenders into the position that they would be in but for the withdrawal and subsequent procedure.

[43] Accordingly, although sympathetic to Mr McCallion's apparent condition, in assessing whether he has established that he should be allowed to continue with the action, I have not been persuaded that the failure to attend on 21 August was excusable.

[44] If I had been inclined to allow the pursuer back into the action that would have been on the basis that he met the expenses occasioned from 31 July 2017 to include the expenses of the discharged proof, a sensible and pragmatic decision by the defenders' agents given the uncertainly of the appellants' position.

[45] Accordingly the appeal is refused. The defenders are entitled to their expenses.

Postscript

[46] After completion of the final draft of this judgement, I received an email from the Sheriff Clerk at Edinburgh attaching correspondence received. On enquiry I was told that it had come "through the post directly from the medical practice". I have not read this report, so it has formed no part of the decision making process.