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

[2018] SC EDIN 19

PN589/17

NOTE

by

SHERIFF KENNETH J McGOWAN

in the cause

MRS MARGARET HUNTER

Pursuer

against

EAST LOTHIAN COUNCIL

Defender

Gibson, Advocate; Thompsons
Cartney, Solicitor, Ledingham Chalmers

Edinburgh, 23 January 2018

Introduction

[1] This case came before me on the pursuer's opposed motion for (1) decree in terms of a tender and acceptance; (2) sanction for the employment of counsel; and (3) certification of two named persons as skilled witnesses. The opposition was restricted to certification of the second of these persons.

Submissions for pursuer

[2] Certification of skilled persons is regulated by Article 1 of Schedule 1 to the Act of Sederunt (Fees of Witnesses and Shorthand Writers in the Sheriff Court) 1992 ("the 1992 AS").

[3] There were four matters relevant to the use of expert evidence namely:

a. admissibility of such evidence;

b. the responsibility of a party's legal team to make sure that the expert keeps to his or her role of giving the court useful information;

c. the court's policing of the performance of the expert's duties; and

d. economy in litigation : *Kennedy* v *Cordia* [2016] UKSC 6, paragraph 38.

[4] In relation to the question of admissibility, the Supreme Court said:

"39. Skilled witnesses, unlike other witnesses, can give evidence of their opinions to assist the court. This gives rise to threshold questions of the admissibility of expert evidence. An example of opinion evidence is whether Miss Kennedy would have been less likely to fall if she had been wearing anti-slip attachments on her footwear.

40. Experts can and often do give evidence of fact as well as opinion evidence. A skilled witness, like any non-expert witness, can give evidence of what he or she has observed if it is relevant to a fact in issue. An example of such evidence in this case is Mr Greasly's evidence of the slope of the pavement on which Miss Kennedy lost her footing. There are no special rules governing the admissibility of such factual evidence from a skilled witness.

41. Unlike other witnesses, a skilled witness may also give evidence based on his or her knowledge and experience of a subject matter, drawing on the work of others, such as the findings of published research or the pooled knowledge of a team of people with whom he or she works. Such evidence also gives rise to threshold questions of admissibility, and the special rules that govern the admissibility of expert opinion evidence also cover such expert evidence of fact. There are many examples of skilled witnesses giving evidence of fact of that nature. Thus *Dickson on Evidence*, Grierson's ed (1887) at section 397 referred to *Gibson v Pollock* (1848) 11 D 343, a case in which the court admitted evidence of practice in dog coursing to determine whether the owner or nominator of a dog was entitled to a prize on its success. Similarly, when an engineer describes how a machine is configured and works or how a motorway is built, he is giving skilled evidence of factual matters, in which he or she draws on knowledge that is not derived solely from personal observation or its equivalent. An expert in the social and political conditions in a foreign country who gives evidence to an immigration judge also gives skilled evidence of fact.

42. It is common in Scottish criminal trials for the misuse of drugs for the Crown to adduce the evidence of a policeman who has the experience and knowledge to describe the quantities of drugs that people tend to keep for personal use rather than for supply to others. Recently, in *Myers, Brangman and Cox v The Queen* [2015] UKPC 40…, the Judicial Committee of the Privy Council approved of the use of police

officers, who had special training and considerable experience of the practices of criminal gangs, to give evidence on the culture of gangs, their places of association and the signs that gang members used to associate themselves with particular gangs. In giving such factual evidence a skilled witness can draw on the general body of knowledge and understanding in which he is skilled, including the work and literature of others. But Lord Hughes, in delivering the advice of the Board at para 58, warned that "care must be taken that simple, and not necessarily balanced, anecdotal evidence is not permitted to assume the robe of expertise." To avoid this, the skilled witness must set out his qualifications, by training and experience, to give expert evidence and also say from where he has obtained information, if it is not based on his own observations and experience.

43. Counsel agreed that the South Australian case of *R v Bonython* (1984) 38 SASR 45 gave relevant guidance on admissibility of expert opinion evidence. We agree. In that case King CJ at pp 46-47 stated:

> 'Before admitting the opinion of a witness into evidence as expert testimony, the judge must consider and decide two questions. The first is whether the subject matter of the opinion falls within the class of subjects upon which expert testimony is permissible. This first question may be divided into two parts: (a) whether the subject matter of the opinion is such that a person without instruction or experience in the area of knowledge or human experience would be able to form a sound judgment on the matter without the assistance of witnesses possessing special knowledge or experience in the area, and (b) whether the subject matter of the opinion forms part of a body of knowledge or experience which is sufficiently organized or recognized to be accepted as a reliable body of knowledge or experience, a special acquaintance with which by the witness would render his opinion of assistance to the court. The second question is whether the witness has acquired by study or experience sufficient knowledge of the subject to render his opinion of value in resolving the issues before the court.'

44. In *Bonython* the court was addressing opinion evidence. As we have said, a skilled person can give expert factual evidence either by itself or in combination with opinion evidence. There are in our view four considerations which govern the admissibility of skilled evidence:

(i) whether the proposed skilled evidence will assist the court in its task;

(ii) whether the witness has the necessary knowledge and experience;

(iii) whether the witness is impartial in his or her presentation and assessment of the evidence; and

(iv) whether there is a reliable body of knowledge or experience to underpin the expert's evidence.

All four considerations apply to opinion evidence, although, as we state below, when the first consideration is applied to opinion evidence the threshold is the necessity of such evidence. The four considerations also apply to skilled evidence of fact, where the skilled witness draws on the knowledge and experience of others rather than or in addition to personal observation or its equivalent. We examine each consideration in turn.

45. *Assisting the court*: It is for the court to decide whether expert evidence is needed, when the admissibility of that evidence is challenged. In *R v Turner* [1975] QB 834, a case which concerned the admissibility of opinion evidence, which Professor Davidson cites in his textbook on *Evidence* (2007) at para 11.04, Lawton LJ stated at p 841:

> 'If on the proven facts a judge or jury can form their own conclusions without help, then the opinion of an expert is unnecessary.'

In *Wilson v Her Majesty's Advocate* 2009 JC 336, which also concerned opinion evidence, the High Court of Justiciary, in an opinion delivered by Lord Wheatley, stated the test thus (at para 58):

> '[T]he subject-matter under discussion must be necessary for the proper resolution of the dispute, and be such that a judge or jury without instruction or advice in the particular area of knowledge or experience would be unable to reach a sound conclusion without the help of a witness who had such specialised knowledge or experience.'

46. Most of the Scottish case law on, and academic discussion of, expert evidence has focused on opinion evidence to the exclusion of skilled evidence of fact. In our view, the test for the admissibility of the latter form of evidence cannot be strict necessity as, otherwise, the court could be deprived of the benefit of a skilled witness who collates and presents to the court in an efficient manner the knowledge of others in his or her field of expertise. There may be circumstances in which a court could determine a fact in issue without an expert collation of relevant facts if the parties called many factual witnesses at great expense and thus a strict necessity test would not be met. In *Daubert v Merrell Dow Pharmaceuticals Inc* (1993) 509 US 579, the United States Supreme Court referred to rule 702 of the Federal Rules of Evidence, which in our view is consistent with the approach of Scots law in relation to skilled evidence of fact. The rule, which Justice Blackmun quoted at p 588, states:

> 'If scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.'

47. The advantage of the formula in this rule is that it avoids an over-rigid interpretation of necessity, where a skilled witness is put forward to present relevant factual evidence in an efficient manner rather than to give an opinion explaining the

factual evidence of others. If skilled evidence of fact would be likely to assist the efficient determination of the case, the judge should admit it.

48. An expert must explain the basis of his or her evidence when it is not personal observation or sensation; mere assertion or "bare *ipse dixit*" carries little weight, as the Lord President (Cooper) famously stated in *Davie v Magistrates of Edinburgh* 1953 SC 34, 40. If anything, the suggestion that an unsubstantiated *ipse dixit* carries little weight is understated; in our view such evidence is worthless. Wessels JA stated the matter well in the Supreme Court of South Africa (Appellate Division) in *Coopers (South Africa) (Pty) Ltd v Deutsche Gesellschaft für Schädlingsbekämpfung mbH* 1976 (3) SA 352, 371:

> [A]n expert's opinion represents his reasoned conclusion based on certain facts or data, which are either common cause, or established by his own evidence or that of some other competent witness. Except possibly where it is not controverted, an expert's bald statement of his opinion is not of any real assistance. Proper evaluation of the opinion can only be undertaken if the process of reasoning which led to the conclusion, including the premises from which the reasoning proceeds, are disclosed by the expert.

As Lord Prosser pithily stated in *Dingley v Chief Constable, Strathclyde Police* 1998 SC 548, 604: "As with judicial or other opinions, what carries weight is the reasoning, not the conclusion.

49. In *Davie* the Lord President at p 40 observed that expert witnesses cannot usurp the functions of the jury or judge sitting as a jury. Recently, in *Pora v The Queen* [2015] UKPC 9; [2016] 1 Cr App R 3, para 24, the Judicial Committee of the Privy Council in an appeal from New Zealand, stated:

> 'It is the duty of an expert witness to provide material on which a court can form its own conclusions on relevant issues. On occasions that may involve the witness expressing an opinion about whether, for instance, an individual suffered from a particular condition or vulnerability. The expert witness should be careful to recognise, however, the need to avoid supplanting the court's role as the ultimate decision-maker on matters that are central to the outcome of the case.'

Thus, while on occasion in order to avoid elusive language the skilled witness may have to express his or her views in a way that addresses the ultimate issue before the court, expert assistance does not extend to supplanting the court as the decision-maker. The fact-finding judge cannot delegate the decision-making role to the expert.

50. *The witness's knowledge and expertise*: The skilled witness must demonstrate to the court that he or she has relevant knowledge and experience to give either factual evidence, which is not based exclusively on personal observation or sensation, or opinion evidence. Where the skilled witness establishes such knowledge and

> experience, he or she can draw on the general body of knowledge and understanding of the relevant expertise: *Myers, Brangman and Cox* (above) at para 63."

[5] The circumstances giving rise to the present claim were an accident at work. The pursuer had sued for £50,000 and had accepted a tender for £15,000 just before the pre-trial meeting.

[6] The pursuer was employed by the defenders as a nursery nurse. At the time of her accident she was supervising some 4-year-old children. The children had access to play equipment and there were 5 children playing on it. It was averred by the pursuer that the appropriate maximum ratio was 10 children to one adult. That was admitted but a breach of duty was denied. However, there was no averment by the defenders as to how they had fulfilled their duty.

[7] The pursuer's position was that by the time her accident happened, the playground was congested with 17 children present. She was then struck from behind by a child on a tricycle and fell and broke her arm.

[8] The pursuer's position was that a risk assessment should have been carried out and would have demonstrated the need for a safe system of work; that there was no system for monitoring the number of children in the playground; and that such a system was introduced after the accident.

[9] In essence, the pursuer's case was that there was a lack of appropriate monitoring of child numbers. It was a common law case informed by the Regulations.

[10] Liability had been denied. There was a factual dispute, the defenders' position being that the pursuer had stepped backwards and fallen. The defenders said that a risk assessment had been done and that control measures had been initiated, but the risk

assessment was not lodged until 14 June 2017. At that stage, the averments were also made about there being a daily checklist. The defenders also averred sole fault.

[11] Accordingly, the pursuer had to prove (1) that leaving the pursuer to supervise 17 children was a breach of their duties towards her and (2) that that breach of duty caused her accident.

[12] The reason for the 10:1 ratio was not clear. It may have been for safety reasons – but it may also have been connected with the quality of the children's experience at the nursery and/or the safety of the children themselves.

[13] Whatever the position may have been, the pursuer had to establish a breach of duty to succeed. That being so, the pursuer's agents were justified in seeking expert evidence on liability and causation.

[14] It might be said that Mr Bradley was guilty of usurping the function of the court. But the use of infelicitous language in his report should not influence the court in the present case: *Kennedy*, paragraph 49.

[15] In terms of Article 1 of the 1992 AS, the first matter to be determined was whether Mr Bradley was a skilled person.

[16] It was accepted that he had no experience of nursery nursing, but he did have general experience of risk assessments and experience of safe systems of work in another context.

[17] It was not fatal to the argument that he was a skilled person that he had no direct nursery nursing experience when he had experience - including curriculum planning – of risk assessment and risk reduction. The curriculum planning included planning courses. No further detail was available.

[18] Mr Bradley had experience of risk assessments. He had been involved in such for teachers and social- and health-care workers working in settings where aggression and violence were foreseeable.

[19] He had advised on the need for employers to provide safe systems of work for staff.

[20] He had knowledge of children and education policies in the context of developing modules for undergraduate nurses and had co-developed a health module for undergraduate primary teachers at the University of Stirling.

[21] He had initially gained his knowledge in these various areas in the late 1990's/early 2000's. He had maintained his knowledge by sitting on a nursing group which advise the Chief Nurse who in turn advised the Scottish Government on health and social care.

[22] He had also maintained his knowledge of the application of risk assessment and control principles by delivering training seminars and workshops to undergraduate professional groups, in particular those dealing with challenging behaviour; adolescent mental health; ADHD; and learning disability environments.

[23] He had previously given opinions for court actions and had given evidence about the risk reduction in the context of learning disability; child care; elderly care; and mental health care.

[24] He had gained learning and experience in risk assessment and was in a position to apply knowledge of that to the circumstances of this case, even although gained in other contexts.

[25] He had knowledge of how a risk assessment was completed and how risks could be identified and reduced. This was generic knowledge which could be applied to various work settings.

[26] Generic risk assessment witnesses rarely had experience of particular workplaces. They tended to have generic skills about how to identify, eliminate and control risks and apply these to the facts of the case. That is what had happened in *Kennedy*. The expert witness in that case was not an expert in care work.

[27] In all the circumstances, the court should conclude that he was a skilled person.

[28] Turning to the issue of reasonableness, there were three versions of Mr Bradley's report. Versions 2 and 3 had been provided after a copy of the risk assessment had been made available and a sketch had been prepared of the locus. The risk assessment was not discussed in the September report as that discussion had (in error, it appears) been included as an amendment to the original, March version, rather than the second version.

[29] Turning to the report, it was clear that it contained information as to how risk assessments were done which would have been of assistance to the court and would have been admissible: production 5/12/6.

[30] It was accepted that the pursuer's agents did know that there was a risk assessment. It had been mentioned in pre-litigation correspondence.

[31] The report contained an error in the date: Mr Bradley had said 2005 but the correct date was 2009: production 5/12/8.

[32] He had expressed his own view about certain matters: 5/12/9. He had expressed views which would have been of assistance to the court: 5/12/10. That version of the report had not been lodged in process.

[33] Mr Bradley's CV showed extensive experience of situations involving children and risk assessment: production 5/13/3 and 9.

[34] Any question of a mix-up in the reports was not relevant to the issue before the court.

[35] There had been difficulty in identifying an appropriate expert. It was not clear who else would have been available to give advice if Mr Bradley had not been used. But even if somebody more suitable was available, that was not fatal to the pursuer's motion.

[36] The reason for the rule about the number of children to staff permitted being in place was not clear. It was not directed at the safety of workers.

[37] Mr Bradley would have been in a position to express relevant views about the inadequacy of the risk assessment.

[38] The pursuer's motion was for decree in terms of the tender and acceptance; expenses; sanction of the cause as suitable for the employment of junior counsel; certification of both skilled witnesses; and the expenses occasioned by this motion.

Submissions for defenders

[39] The defenders' position was that (i) Mr Bradley was not skilled; (ii) if he was skilled, it had not been demonstrated that he had exercised that skill; and (iii) it had not been reasonable to instruct him.

Skill

[40] Mr Bradley's background was nursing in the NHS. He had made references to workplaces – nursing – including restraint techniques.

[41] He had no experience of teaching - whether nursing, primary, secondary - or of involvement in the delivery of education at these levels.

[42] He had made a specific reference to the Health and Safety Act and suggested that this was a "violent" incident. The accident giving rise to the pursuer's injuries could not properly be categorised as a violent incident.

[43] Mr Bradley had referenced a secure unit for children who had offended and were in the Criminal Justice system. Mr Bradley may have had expertise in restraint and de-escalation, but that was not relevant to the present case.

[44] It was clear that Mr Bradley had no knowledge of the competing interests which had to be balanced in delivering education to very young children.

[45] That was fundamental to the assessment of risk. The short point was that from an educational point of view, children must be exposed to some risk.

[46] This was covered in the National Care Standards at item 8. In the context of education for children, some risk must be accepted. Mr Bradley did not mention that.

[47] Neither did Mr Bradley deal with the Care Inspectorate Report which was publicly available. The absence of analysis of the issue of risk to children meant that his report was of limited value.

[48] As noted, the Care Inspectorate Report was publicly available: productions 5/18/5 and 5/9/10. The Care Inspectorate had had access to the premises and had found that a risk assessment was in place. The nursery had been given the top grading – pp 6 and 7.

[49] Against this, Mr Bradley had suggested that the children should not be allowed out to play: production 5/18/12.

[50] The reference to "violent incidents" strongly suggested that Mr Bradley's report had been informed by his background.

[51] He had also involved in advocacy: production 5/18/8.

[52] A copy of the risk assessment could have been obtained earlier by the pursuer's agents on request or by formal methods such as a specification of documents.

[53] Mr Bradley had not carried out a comparison with control measures or risk assessments operated in other nurseries.

[54] He referred to the wrong version of the relevant standards: production 5/8/9 (although it was accepted that the terms thereof had not changed between versions).

[55] At the same point in his report, Mr Bradley had expressed a view, but where was the explanation for the basis for that view? By whom was that view held?

[56] It was clear from Annex A that supervising adults might be absent. The opinion expressed was no more than Mr Bradley's *ipse dixit*: *Kennedy,* at paragraph 48.

[57] Another example of advocacy appeared at production 5/8/10. Mr Bradley had shown a willingness to usurp the function of the court: production 5/8/16. This was not permissible: *Kennedy*, paragraph 42.

[58] The question which should be considered was: could Mr Bradley's report assist the court in its task? It was submitted that it could not since the matters in dispute were matters of fact.

[59] There was a strong flavour that Mr Bradley was not impartial and there was an absence of references to his own knowledge or experience.

Exercise of skill

[60] It was surprising that Mr Bradley felt able to offer an opinion at all: production 5/8/2.

[61] The problems may have stemmed in part from the way in which Mr Bradley's instructions were framed. He was more or less invited to usurp the function of the court.

[62] The questions had this case proceeded to proof – and hence the live issues in the case - were:

a. had the impact occurred at all?

b. was the area congested? and

c. was the relevant ratio of staff to children to be taken as applying to the whole nursery or only to the playground?

[63] It was notable that Mr Bradley had not sought any information about the playground layout: production 5/18/5.

[64] In summary, his final report was incomplete; he had mentioned the wrong care standards; he had indulged in advocacy; and his opinion was merely *ipse dixit.*

[65] Accordingly, it could not be said that he had properly exercised whatever skills he had.

Reasonableness

[66] In order to satisfy the test of reasonableness, it must be shown that Mr Bradley's evidence would have been of assistance to the court. But prior to the defences being lodged, it was implicitly accepted that the relevant staff to children ratio was not challenged: production 6/13.

[67] The questions as to whether there was an impact and whether the playground was congested were plainly issues of fact.

[68] The question as to whether there should have been a restriction on movement of children into the playground might be relevant.

[69] Certain questions had been posed to Mr Bradley in the letter of instruction: production 5/10/1. Question 1 was not a reasonable question for Mr Bradley as it was a matter for the court. The first part of question 2 was not relevant; the second part might have been. The first part of question 3 was the wrong question: it should have been "could" not "should". The second part of question 3 was not a matter for an expert witness.

[70] Mr Bradley's answer to the second part of question 2 could be found in production 5/10/9. This showed that it had not been reasonable to instruct him.

[71] The defenders' motion was the pursuer's motion should be granted to the extent to which it was not opposed; that certification should not be granted; and the expenses of the opposed motion should be awarded in favour of the defenders.

Reply for pursuer

[72] A critical question in the case was how the ratio of 1 staff member to pupils should be applied. That was not apparent: production 6/2. Nor was it focused in the pleadings: answer 4. Accordingly, that was a relevant area for expert advice.

Discussion

[73] The matter to be determined by me is whether Mr Bradley should be certified as a skilled person as provided for by the 1992 AS. In terms thereof, a motion for the certification of a person as skilled can only be granted if I am satisfied that (a) the person was a skilled person; and (b) it was reasonable to employ him.

Was Mr Bradley a skilled person?

[74] How is this to be interpreted? Does it mean that Mr Bradley's putative skill should be looked at in isolation; or is it appropriate to proceed on the basis that the question of skill must be determined by reference to the matters in issue in the case i.e. is it necessary to demonstrate that Mr Bradley had *relevant* skill?

[75] In my opinion, the correct interpretation is the former rather than the latter. The only question (at this stage) is whether it can be said that at the time of his instruction, Mr

Bradley was possessed of skill based on knowledge, experience, training or education or a combination thereof.

[76] In my opinion, that can be determined relatively easily by reference to his *curriculum vitae.* It is clear that Mr Bradley has a number of academic and professional qualifications. He has experience of both nursing and teaching. He holds a senior academic post. He has teaching and research responsibilities. He is a reviewer of academic papers and an academic author: production 5/13.

[77] In these circumstances, I have no difficulty in holding that he was skilled.

Was it reasonable to employ Mr Bradley?

[78] Before turning to consider this issue in more detail, it is important to note two related preliminary points.

[79] The first is that this question is to be answered by reference to the position as it stood at the time of instruction: *Allan* v *Chief Constable, Strathclyde Police* 2004 SC 453, paragraph [38]. That means that what must be considered is the circumstances at the point when the decision was taken to employ the person selected as a skilled witness. It is not an exercise in hindsight and thus care must be taken in attaching too much weight to circumstances as they developed after that date.

[80] The second is that although *Kennedy* is undoubtedly an important case, it is primarily concerned with the admissibility of expert evidence: paragraph 38 thereof. That is not to say that a prospective view of or ultimate decision on admissibility of expert evidence (or the other factors mentioned in *Kennedy*) may not be relevant to, and may inform the determination of, the question of reasonableness. But on the other hand, these factors do not

determine, by themselves, the question as to whether, at the time the decision was made to employ a particular person as a skilled witness, it was reasonable to do so.

[81] Turning then to the question of reasonableness, the point in time at which that must be considered in this case is around 3 March 2017, that being the date on which Mr Bradley was instructed: production 5/10.

WHAT STEPS WERE TAKEN TO ESTABLISH MR BRADLEY'S CREDENTIALS?

[82] I was given no specific information about this. I was told that there were difficulties in finding a suitable expert. The letter of instruction to Mr Bradley indicates that there had been an earlier telephone conversation with him on 24 February. I was given no information about what was discussed. In particular, I was not provided with any information about what steps had been taken to establish whether Mr Bradley was a (potentially) suitable person to employ as a skilled witness in this case, in the sense of having relevant qualifications, knowledge, experience *et cetera*.

TIMING OF INSTRUCTION

[83] If it was left until the last minute and the decision to instruct Mr Bradley was taken in haste, that is a factor which bears on the question of reasonableness. In this case, by the time Mr Bradley was instructed, the last day of the triennium was 16 days away.

[84] In addition, Mr Bradley was instructed before the action was raised; and before defences were lodged. Thus, at that stage, the pursuer's agents could not be sure what the defenders' position about the case generally or any aspect of it would be in the light of whatever preliminary legal advice they received once the writ was passed on to the nominated agents.

WHAT WERE THE RELEVANT ISSUES AT THE TIME OF INSTRUCTION?

[85] In order to evaluate this, it is necessary to look in some detail at the content of the contemporaneous documents and the evidence available to the pursuer's agents.

[86] There had been correspondence between the pursuer's agents and the defenders' claims handlers in the latter part of 2014: production 6/13. (It appears that there had been some correspondence prior to that, but it was not produced.)

[87] The material sent to Mr Bradley with the letter of instruction comprised a precognition of the pursuer; the pursuer's accident and injury questionnaire; the correspondence with the claims handlers; an accident report (which I take to be 5/5 of process); photographs (it was not clear whether these were productions 5/6 or 6/9); and a letter from the pursuer. The precognition, questionnaire and letter were not disclosed to me.

[88] According to the pre-litigation correspondence, the position being adopted on behalf of the defenders was that (i) the mechanism of the accident was disputed; (ii) a risk assessment had been carried out; and (iii) the playground was not congested: production 6/13/1.

[89] The pursuer's agents' position was that their client's version of the accident mechanism (she being struck by a child on a trike) was supported by other evidence; the system was that … "there should be one adult for every 10 children present…"; and that a failure to monitor the number of children had led to a situation whereby there was one adult (the pursuer) and 17 children outside: production 6/13/2.

[90] In the letter of instruction to Mr Bradley, the pursuer's agents summarise what appears to be the pursuer's position on the number of children present outside at the relevant time; the issue of congestion; and the mechanism of the accident.

[91] The claims adjusters, while not expressly disputing the estimate of the number of children present, disputed that the playground was congested: production 6/13/4.

[92] The letter of instruction continues:

> "We require a report detailing whether (the defenders) were negligent in causing this incident to occur. Specifically please comment on what levels of staffing you would expect to see in supervising such numbers of children. Please confirm whether the correct staff to pupil ration *(sic)* was followed; whether more staff could have meant that the incident could have been avoided; and whether the outdoor play area was too congested to allow children to safely ride bikes or scooters or trikes. Please confirm whether such an incident would have been foreseeable in these circumstances… thereafter provide us with your expert opinion as to the general circumstances of the incident."

[93] Thus, at that stage the issues which were live between the parties were:

a. the mechanism of the accident;

b. whether the playground was "congested";

c. the appropriate staff/pupil ratio;

d. whether the appropriate ratio had been achieved/maintained at the time;

e. whether more staff would have meant that the incident could have been avoided (causation); and

f. "foreseeability"

[94] Taking these in turn, Mr Bradley was not asked to comment on the mechanism of the accident.

[95] He was asked about congestion. It seems doubtful Mr Bradley if has the appropriate skill to be able to comment on that. In any event, information which might allow an evaluation of that issue of congestion was either inadequate or lacking. (The information provided was inspecific: "… numerous species of large play equipment and… in addition, approximately 5 children… playing on scooter *(sic)*, bikes and trikes". No information was provided about the dimensions of the playground other than the photographs.)

[96] I accept that the appropriate staff/pupil ratio was a matter on which skilled evidence would be admissible.

[97] Whether that ratio was achieved at the time is a question of fact.

[98] In my view, questions of causation and foreseeability are primarily matters for the court.

[99] Thus, overall, the letter of instruction demonstrates a lack of clear thinking about the issues in the case on which expert testimony might have been led; and a lack of awareness of the principles enunciated by the Supreme Court in *Kennedy*.

[100] The lack of proper focus is further highlighted by the issue of the risk assessment. The pursuer's agents knew that the defenders' position was that one had been done: production 6/13/1. No effort seems to have been made to obtain it; no copy of it was provided to Mr Bradley when he was first instructed; and he was not even told that one might exist. (The averments in article 5 of the initial writ seem to proceed on the basis that there was no risk assessment and there should have been.) The result was that Mr Bradley appears to have assumed that none had been done and much of his report was taken up commenting on this. Before me, Counsel for the pursuer suggested that the question of risk assessments was a valid area for comment by a skilled witness.

[101] That may well be so, but the point is that in this case there *was* a risk assessment. The letter of instruction, by omission, led Mr Bradley to write much of his initial report from the wrong premise i.e. that there was no risk assessment.

DID MR BRADLEY HAVE RELEVANT SKILL?

[102] In my view, Mr Bradley's skill was not very well suited to the circumstances of this case. He had no experience of this type of educational setting. (It is clear that he was more

versed in situations where violence or the need for restraint might arise. His apparent characterisation of a small child on a wheeled toy colliding with an adult staff member as a 'violent incident' is odd.)

CONCLUSION

[103] Drawing these points together, at the stage when Mr Bradley was instructed,

a. I have no information as to the timing and/or scope of research carried in identifying him as a suitable expert;
b. the factual and legal issues between the parties had not been focussed in the pleadings;
c. the instructions to Mr Bradley were confusing and unclear;
d. he was asked to opine on matters which were matters for the court;
e. the information provided to him was incomplete (no information about dimensions/layout of playground; no copy of risk assessment); and
f. the relevance of his skills was doubtful.

[104] The cumulative effect of these points is that I am not satisfied that it was reasonable to employ Mr Bradley at the stage at which he was instructed.

Ancillary procedural matters

[105] There are two other matters which I wish to comment on.

Duration of hearings

[106] The time estimate provided by parties for the hearing of this motion was 40 minutes. In the event, the hearing took well over two hours. In terms of paragraph 8 of Form G9A, the

information to be provided to the court is the estimated duration of the hearing. Naturally, it is accepted that such estimates cannot be wholly precise. Nevertheless, it is incumbent on parties to provide an estimate which is as accurate as possible. In the present case, the estimate was hopelessly inaccurate. In order to provide an accurate estimate, it is essential that parties have a dialogue in advance to discuss (i) what matters are at issue and (ii) each party's estimate of the likely duration of their respective submissions. Account must be taken of matters such as the number of authorities or documents to be referred to, as that inevitably slows matters down if they are numerous. What should emerge from that is a joint estimate of the duration of the hearing, which is what should be communicated to the court.

Intimation and lodging of authorities etc.

[107] In this case, the pursuer's counsel commenced his submissions by tendering a third inventory of productions at the bar of the court. This contained about 40 – 50 pages of text. I was told that it had been intimated to the defenders' agents the previous afternoon.

[108] I was given no satisfactory explanation as to why it was being presented to the court so late. The material in that inventory had plainly been available for some time to those instructed by the pursuer. The need to rely on or refer to it should have been identified well in advance. The motion before me was lodged with the court on 9 November and did not come before me until 11 days later. In these circumstances, there is simply no excuse for the late tendering of such material, which among other things means that the court must try to absorb and digest the material at short notice or as the motion is being dealt with. There will be cases where the late lodging of material cannot be avoided. This was not one of them.

Expenses of hearing

[109] It was accepted that expenses should follow success. The defenders have been successful in their opposition to certification of Mr Bradley and accordingly I find the pursuer liable to the defenders in the expenses occasioned by the opposed motion, as taxed. Ms Cartney moved that that encompass the first calling of the motion on 18 December. I did not understand that to be opposed.

Disposal

[110] I shall grant decree in terms of the minutes of tender and acceptance for payment to the pursuers of the sum of £15,000 net of any liability which the defenders may have in terms of Section 6 of the Social Security (Recovery of Benefits) Act 1997; find the defenders liable to the pursuer in the expenses of process to the date of tender as taxed; certify Prof Margaret McQueen, consultant surgeon, as a skilled witness for the pursuer; sanction the cause as suitable for the employment of junior counsel; find the pursuer liable to the defenders in the expenses occasioned by this motion (including both callings thereof on 18 and 20 December, both 2017, respectively); allow accounts thereof to be given in and remit same, when lodged, to the auditor of court to tax and report.