SHERIFFDOM OF LOTHIAN AND BORDERS AT EDINBURGH

IN THE ALL-SCOTLAND SHERIFF PERSONAL INJURY COURT

[2019] SC EDIN 74

PN478/19

NOTE BY SHERIFF PETER JOHN BRAID

in the cause

LISA CLARKE

Pursuer

against

ROBERT KEENAN

Defender

Pursuer: Pitts; Digby Brown LLP
Party Minuters: Brotherhood; BLM

Edinburgh, 14 August 2019

The sheriff, having resumed consideration of the cause, refuses the pursuer's motion 5/7 of process *in hoc statu*.

NOTE

Introduction

[1] In this action, the pursuer seeks damages of £15,000 from the defender, in respect of a road accident. The defender has not entered the process. However, his insurers, Skyfire Insurance Company Ltd, have entered the process as party minuters. They have an interest, in as much as they are the defender's motor insurers but have not extended indemnity to the defender, in the circumstances set out in paragraph [5] below. However, they may be

required to satisfy any judgment against him by virtue of section 151 of the Road Traffic Act 1988 ("the Road Traffic Act"), discussed more fully below.

[2] The pursuer's motion 5/7 of process called before me on 15 July 2019. In it, the pursuer seeks decree in absence against the defender for the restricted sum of £5,017.50 together with expenses as taxed (that is, against the defender), certification of a skilled person and dismissal in favour of the party minuters with no expenses due to or by either the pursuer or the party minuters.

[3] Apart from the fact that there is no crave against the party minuters and therefore strictly speaking there is no action against them which can be dismissed, the motion is unexceptional insofar as it seeks decree in absence for the restricted sum. Clearly the restriction has come about through the efforts of the party minuters' involvement in the process. Equally, there is no suggestion that the skilled person ought not to be certified.

[4] Rather, the controversy arises in relation to that part of the motion which seeks an award of expenses against the defender as taxed, in respect of procedure which he did not cause. This is an issue which arises from time to time in this court (and elsewhere) and I invited parties to address me on it.

Background

[5] It is necessary to say something of the background, to understand fully the context in which the present issue has arisen. The pursuer avers that on the date of the accident, she was carrying out her duties in the course of her employment at B&M Store, when she observed the defender, described in the pleadings as a potential shoplifter. She followed him out of the store to the car park, where he proceeded to take stolen goods to a vehicle. She confronted him. He was verbally aggressive towards her, then got into the vehicle. He

proceeded to reverse, and struck the left side of the pursuer. He struck her several times, causing the injuries for which damages were sought. The defender was subsequently convicted of (among other things) a contravention of section 3 of the Road Traffic Act and assault. Against that background, the minuters aver in their minute of sist that they are motor insurers of the vehicle involved in the index accident, and that their policy holder is the defender, but that indemnity has not been extended to the defender under the policy of insurance.

Motion hearing

[6] At the hearing on 15 July, Mr Pitts appeared for the pursuer and Ms Brotherhood for the party minuters. Mr Pitts advised me that the motion was worded as it was at the request of the party minuters and suggested that I hear primarily from Ms Brotherhood, which I duly did.

[7] Miss Brotherhood told me that the expenses in question would amount to between £6,000 and £7,000. Overall, the defender would therefore require to pay less than if the pursuer had simply minuted for decree in absence for the entire sum sued for, and the party minuters had not entered the process at all. She further explained that the party minuters would require to satisfy any judgment against the defender, by virtue of section 151 of the Road Traffic Act. She took me to the terms of that provision. The party minuters wished to preserve the right of recovery from the defender of any sum which they required to pay the pursuer, whether by way of principal sum or by way of expenses. Section 151(5)(c) required the party minuters to pay to the pursuer any sums payable in respect of costs. Read together with subsections (3) and (7), the party minuters could recover costs from the defender only if they were included in an award against the defender in favour of the pursuer. Ms

Brotherhood was unable to advise me of the terms of the insurance policy, and, specifically, she did not know whether it entitled the party minuters to recover from the defender any award of costs made against the party minuters, in entering the process. She was also unable to refer me to any case law which was in point. She did refer to the Law Reform (Miscellaneous Provisions) (Scotland) Act 1940, section 3, although she conceded that it did not appear to be in point since that provision deals with contribution among joint wrongdoers, which the defender and party minuters are not.

[8] Mr Pitts referred to the European Communities (Rights against Insurers) Regulations 2002 and to European Directive 2009/103/EC. He also referred to what he described as the manifest absurdity of the pursuer taking decree in absence for the entire sum sued for, when a lesser sum had turned out to be due, and the unfairness to the party minuters not being able to recover, in full, the lesser amount which the pursuer would in fact receive partly by way of principal sum and partly by way of expenses.

Discussion

[9] Stripped to its essentials, the issue before me is whether it is competent, in a court action in Scotland, to make an award of the whole expenses of process against a party who has not entered the process and who has in no way contributed to the expenses incurred (apart from the expenses of an undefended action). Neither party was able to point me to any authority which suggested that it was competent to make such an award. While this issue does arise from time to time in road traffic cases, for my part, I cannot think of any other context in which it has even been suggested, let alone ordered, that a party should be found liable for defended expenses incurred in a process in which he did not participate, and which expenses he did not cause. Indeed, such an award would appear to be contrary

to the principle that an unsuccessful party is liable in expenses only for the expenditure which he has caused the successful party to incur. In the present case, that extends to the raising of the action and the taking of decree in absence but I have not been referred to any authority or other material which suggests that it would be competent to find the pursuer entitled to recover from the defender expenses over which he had no control and which were caused by the intervention of the party minuters (such as, for example, in this case, the minuters' lodging of a specification for the recovery of documents).

[10] I acknowledge that, in this case, at first blush, that may seem unfair since overall the defender has benefitted from the intervention of the party minuters. However, the way that the arithmetic happens to fall cannot affect the competency of an award of expenses. It is equally possible that there will be other cases where the reduction in the sum sued for is less than the expenses incurred in achieving that saving.

[11] Strictly speaking that is sufficient to deal with the motion, since if what is sought is not competent, then it cannot be granted, whatever the consequences for the party minuters.

Section 151

[12] However with deference to the submissions made I will say something about section 151 of the Road Traffic Act. Insofar as material it is in the following terms:

> "**151.— Duty of insurers or persons giving security to satisfy judgment against persons insured or secured against third-party risks.**
>
> (1) This section applies where, after a policy or security is issued or given for the purposes of this Part of this Act, a judgment to which this subsection applies is obtained.
> (2) Subsection (1) above applies to judgments relating to a liability with respect to any matter where liability with respect to that matter is required to be covered by a policy of insurance under section 145 of this Act and …—

(a) it is a liability covered by the terms of the policy or security and the judgment is obtained against any person who is insured by the policy or whose liability is covered by the security, as the case may be…

…

(3) In deciding for the purposes of subsection (2) above whether a liability is or would be covered by the terms of a policy or security, so much of the policy or security as purports to restrict, as the case may be, the insurance of the persons insured by the policy or the operation of the security by reference to the holding by the driver of the vehicle of a licence authorising him to drive it shall be treated as of no effect.

…

(5) Notwithstanding that the insurer may be entitled to avoid or cancel, or may have avoided or cancelled, the policy or security, he must, subject to the provisions of this section, pay to the persons entitled to the benefit of the judgment—

(a) as regards liability in respect of death or bodily injury, any sum payable under the judgment in respect of the liability, together with any sum which…is payable in respect of interest on that sum,

(b) as regards liability in respect of damage to property, any sum required to be paid under subsection (6) below, and

(c) any amount payable in respect of costs.

…

(7) Where an insurer becomes liable under this section to pay an amount in respect of a liability of a person who is insured by a policy or whose liability is covered by a security, he is entitled to recover from that person—

(a) that amount, in a case where he became liable to pay it by virtue only of subsection (3) above, or

(b) in a case where that amount exceeds the amount for which he would, apart from the provisions of this section, be liable under the policy or security in respect of that liability, the excess.

(8) Where an insurer becomes liable under this section to pay an amount in respect of a liability of a person who is not insured by a policy or whose liability is not covered by a security, he is entitled to recover the amount from that person or from any person who—

(a) is insured by the policy, or whose liability is covered by the security, by the terms of which the liability would be covered if the policy insured all persons or, as the case may be, the security covered the liability of all persons, and

(b) caused or permitted the use of the vehicle which gave rise to the liability.

(9) In this section—

(a) *'insurer'* includes a person giving a security,

[...]

(c) *'liability covered by the terms of the policy or security'* means a liability which is covered by the policy or security or which would be so covered but for the fact that the insurer is entitled to avoid or cancel, or has avoided or cancelled, the policy or security.

…"

[13] Attempting to summarise those provisions, by virtue of subsection (1), section 151 applies where a judgment to which subsection (1) applies is obtained, and where a policy of insurance has been issued. Subsection (2) provides that subsection (1) applies to judgments (reading short) obtained against any person who is insured by the policy, in respect of liabilities covered by the policy. Subsection (3) provides that in deciding whether a liability is covered by the policy, so much of the policy as purports to restrict the insurance of the persons insured by reference to the holding by the driver of the vehicle of a licence authorising him to drive it (emphasis added) shall be treated as of no effect. Subsection (5) provides that the insurer must satisfy (a) any sum due in respect of liability for personal injury (including death); (b) any sum due in respect of property damage up to a prescribed maximum; and (c) any amount payable in respect of costs; and that he must do so even if he is entitled to avoid or cancel the policy. Subsection (7) entitles the insurer to recover certain sums from the insured including the amount paid where he became liable to pay it by virtue only of subsection (3). That subsection also entitles the insurer to recover from the insured person any difference between the amount paid and the amount covered by the policy. Subsection (8) is not relevant to the present case but applies where the insurer has had to

settle a liability by a person not insured by the policy, either from that person or from the insured if he has caused or permitted the use of the vehicle which gave rise to the liability.

[14] Thus, section 151 has two distinct purposes. The main one is that set out in subsection (5), namely the obligation on the insurer to satisfy any judgment, including costs, which a victim has obtained against the insured. The secondary purpose is to entitle the insurer to recover the sum paid from its insured (or, the person whose use of the vehicle gave rise to the liability, if someone other than the insured). There is nothing about the section which provides a necessary correlation between the two. There will inevitably be cases where the insurer requires to satisfy a judgment but is not entitled to recover from the insured: indeed, that will be so in the vast majority of cases which fall within section 151.

[15] If we now read section 151 in the context of the present case, the first point to make is that I was not told, explicitly, why the minuters were not extending indemnity to the defender; but it appears likely that the policy did not cover damage or injury caused deliberately. That being so, I have to say that it is not immediately obvious to me that section 151 applies at all, since subs (2) applies only to liabilities covered by the terms of the policy. On this point, see *Bristol Alliance Partnership* v *Williams and Another* [2013] QB 806. I was not addressed in detail on this point, however, and if the parties are agreed that the minuters are liable under section 151 then so be it. However, on any view, it appears that subsection (3), upon which the minuters founded in argument, has no application, certainly on the basis of the submissions before me. I have emphasised the circumstances in which that provision applies, in paragraph [13] above, namely where the policy restricts the insurance by reference to the holding of a licence. In other words, the insurers cannot avoid the obligation to satisfy a judgment under section 151 simply because the person driving the vehicle in question did not hold a licence authorising him to drive it. However, there is

nothing about the circumstances here which suggests that the defender did not hold a licence authorising him to drive the vehicle, or that that is the reason why indemnity is extended. If that is correct, then equally subsection (7) has no application. Since the minuters will not be able to rely on it, they therefore cannot pray it in aid in support of an argument that the defender should be found liable in expenses.

[16] However, lest I am wrong in the foregoing paragraph, and subsection (3) does apply (for example, because the insured was not driving in accordance with a licence and that is the reason he is not entitled to indemnity), it is necessary to say a little more about the minuters' argument, on the assumption that subsection (7) does apply. The question then becomes what is meant by the words "an amount in respect of a liability of a person who is insured by a policy". It is that amount which the insurer is entitled to recover from the insured. It seems to me that those words are capable of meaning either that the only amount which can be recovered is the amount due in respect of one of the liabilities mentioned in subsection 5(a) or (b); or that, where there is such a liability, the total amount payable, including costs, can be recovered. I do not venture an opinion as to which is correct, but if the latter construction is correct, then the minuters would be entitled to recover their expenses from the defender irrespective of whether or not an award had been made against the defender; and if it is the former construction which is correct, then the minuters will not be entitled to recover the expenses from the defender even if an award is made against him. Put another way, an award of expenses against a defender may be neither a necessary, nor a sufficient, ground for recovery by the insurer from the insured.

[17] In other words, it seems to me that the minuters' concerns which led to the wording of the motion are misconceived. Either they will be able to recover *their* costs from the defender whether or not an award is made against him; or they will not be able to recover

those costs even if an award is made against him. Either way, that is not a reason for finding him liable in expenses for which he would not and could not otherwise have been found liable.

[18] This leads to a further comment: the correct approach in such cases in my view is not to contrive a judgment against a party in order to create a right of recovery for insurers; rather, the court should make such order as is appropriate, in accordance with law and practice, and for insurers to work through such rights and remedies as they may or may not have. As I have already pointed out, there will be other situations where an insurer is liable to meet a judgment where it will have no statutory right of recovery. It is also possible for insurers to confer some degree of protection on themselves in the contract of insurance. It should be borne in mind that in order to effect recovery, a court action would be required against the insured in any event, and it is immaterial whether such an action is founded upon a statutory right, or a contractual one. If a *lacuna* exists which results in insurers being required to bear liability for costs incurred by them, and being unable to recover those costs from their insured, and if that is perceived to be unfair, then it is for Parliament to remove that *lacuna*, not for the courts to collaborate in a mechanism to circumvent the problem. Those acting for pursuers, when framing motions for decree or joint minutes, should give proper consideration to what motions for expenses can be justified, rather than simply acceding to the requests of insurers.

Decision

[19] For the reasons given above, I have reached the view that the pursuer is not entitled to expenses as taxed from the defender (save on an undefended basis). As discussed at the hearing, I propose in these circumstances to refuse the motion *in hoc statu* to allow the

pursuer to consider her position in relation to expenses, and to intimate a fresh motion in due course. Mr Pitts suggested that his fallback position would be expenses against the defender and party minuters jointly and severally but if I am correct in concluding that an award against the defender for the whole expenses of process is incompetent, then it must remain incompetent even were an award also to be made against the party minuters. Any fresh motion should be marked for my attention.