**OUTER HOUSE, COURT OF SESSION**

**[2025] CSOH 96**

**A285/22**

OPINION OF LORD BRAID

In the cause

PETER GASPER

Pursuer

against

(FIRST) THE PARTNERS OF TAIN & FEARN MEDICAL PRACTICE AND
(SECOND) NATIONAL HEALTH SERVICE EDUCATION FOR SCOTLAND

Defenders

**Pursuer: Lennon; Slater & Gordon Scotland LLP**
**Defenders: Bowie, KC; Medical and Dental Defence Union of Scotland; National Services of Scotland – NHS Scotland Central Legal Office**

14 October 2025

**Introduction**

[1] This action arises out of the first defenders' alleged negligence in repeatedly failing properly to examine and investigate the pursuer's symptoms of prostate cancer, and to refer him for further investigation, until such time as the cancer was incurable. The pursuer sued the defenders for damages of £2 million, claiming that had his cancer been properly investigated and diagnosed earlier, his life expectancy would have been greater. The critical issues in the action were, first, whether the defenders' various failures to have the pursuer's symptoms investigated was negligent; and, second, if so, whether the delay in diagnosis in

fact had any impact on the pursuer's life expectancy. The defenders denied liability, but from an early stage in the action, their position, founded on expert medical opinion, was that even if the cancer had been diagnosed when the pursuer first consulted the first defenders about his symptoms, by that stage it had already metastasised, and that the delay did not worsen his life expectancy; consequently, any damages awarded to the pursuer should reflect only that his suffering would have been alleviated sooner had his cancer been diagnosed earlier. Following that approach the defenders lodged a joint tender in the sum of £30,000 (net of any liability that the defenders may have in terms of section 6 of the Social Security (Recovery of Benefits) Act 1997, together with the expenses of process to the date of the tender, on 11 December 2024. That tender was accepted by the pursuer on 22 August 2025. The pursuer now seeks decree in terms of the tender and acceptance, together with expenses to the date of the tender (which parties accepted will be for the auditor to determine in due course) and certification of certain skilled persons. The defenders, for their part move for the expenses of process from the date of tender to date, and they, too, seek certification of skilled persons. The only contentious part of these motions is the defender's motion for expenses.

**QOCS**

[2] Section 8 of the Civil Litigation (Expenses and Group Proceedings) (Scotland) Act 2018 introduced a restriction on a pursuer's liability for expenses in personal injury claims, commonly known as qualified one-way costs shifting (QOCS). In general, a pursuer in such a claim is not to be found liable in expenses, but by virtue of section 8(2) of the Act that is subject to any exceptions which may be specified in the Rules of Court. As set out more fully below, one such exception is where the pursuer has unreasonably delayed in

accepting a tender. The principal issue arising for determination in this action is whether that exception applies in this case, standing the pursuer's delay of more than eight months in accepting the defenders' tender. If it does, a question also arises as to whether the court has any residual discretion to limit the amount of expenses for which the pursuer may be found liable (in addition to the court's inherent power to modify any award of expenses).

[3] Chapter 41B of the Court of Session Rules, insofar as material, provides:

> "41B.1.—(1) This Chapter applies in civil proceedings, where either or both—
>
> (a) an application for an award of expenses is made to the court;
> (b) such an award is made by the court.
>
> ...
>
> (3) In this Chapter—
> 'the Act' means the Civil Litigation (Expenses and Group Proceedings) (Scotland) Act 2018;
> 'the applicant' has the meaning given in rule 41B.2(1), and 'applicants' is construed accordingly;
> 'civil proceedings' means civil proceedings to which section 8 of the Act (restriction on pursuer's liability for expenses in personal injury claims) applies.
>
> **Application for an award of expenses**
>
> 41B.2.—(1) Where civil proceedings have been brought by a pursuer, another party to the action ('the applicant') may make an application to the court for an award of expenses to be made against the pursuer, on one or more of the grounds specified in either or both—
> (a) section 8(4)(a) to (c) of the Act;
> (b) paragraph (2) of this rule.
>
> (2) The grounds specified in this paragraph, which are exceptions to section 8(2) of the Act, are as follows—
> ...
> (b) unreasonable delay on the part of the pursuer in accepting a sum offered by way of a tender lodged in process;
>
> **Award of expenses**
>
> 41B.3.—(1) Subject to paragraph (2), the determination of an application made under rule 41B.2(1) is at the discretion of the court.

(2) Where, having determined an application made under rule 41B.2(1), the court makes an award of expenses against the pursuer on the ground specified in rule 41B.2(2)...(b)—

(a) the pursuer's liability is not to exceed the amount of expenses the applicant has incurred after the date of the tender;

(b) the liability of the pursuer to the applicant, or applicants, who lodged the tender is to be limited to an aggregate sum, payable to all applicants (if more than one) of 75% of the amount of damages awarded to the pursuer, and that sum is to be calculated without offsetting against those expenses any expenses due to the pursuer by the applicant, or applicants, before the date of the tender;

(c) the court must order that the pursuer's liability is not to exceed the sum referred to in subparagraph (b), notwithstanding that any sum assessed by the Auditor of Court as payable under the tender procedure may be greater or, if modifying the expenses in terms of rule 42.5 (modification or disallowance of expenses) or 42.6(1) (modification of expenses awarded against assisted persons), that such modification does not exceed that referred to in sub-paragraph (b);

(d) where the award of expenses is in favour of more than one applicant the court, failing agreement between the applicants, is to apportion the award of expenses recoverable under the tender procedure between them."

**Agreed chronology**

[4] The following narrative is taken primarily from a chronology lodged in process by the defenders, with which the pursuer did not take issue, supplemented where necessary by my perusal of the process. The action was raised in November 2022. It was governed by chapter 42A of the rules of court. Following adjustment of the pleadings, the closed record was lodged in December 2024. The defences articulated the defenders' position that any delay in diagnosis had not affected the pursuer's life expectancy. Thereafter, in accordance with a timetable issued by the court on 5 December 2024, draft medical reports were exchanged on or about 17 January 2025 and statements of valuation of claim were exchanged shortly thereafter. The pursuer's draft causation report was prepared by consultant urological surgeon Professor N W Clarke, and was dated August 2024. At that stage, the pursuer valued his claim at £189,750, the first defenders at £16,500. On 22 May

2025, the defenders chased the pursuer's agents for a response to the tender of 11 December 2024, receiving a reply that day that the tender was rejected. On 4 June 2025 a case management hearing took place, at which a proof before answer was fixed for 21 October 2025. On 27 June 2025 the pursuer lodged his valuation of claim, now at a reduced figure of £101,520. On 1 July 2025, the pursuer lodged Professor Clarke's final causation report, dated 24 June 2025, and also intimated a pursuer's offer in the sum of £75,000. That was not accepted, but the defenders intimated that their tender remained open for acceptance. However, the pursuer's agents again rejected the tender, also on 1 July. On 2 July 2025, the defenders lodged their final expert reports from Professor Sethia, consultant urologist, and Dr Lester, consultant oncologist, whose conclusions were no different from those expressed in their draft reports intimated in January 2025 and were to the effect that the delay in diagnosis had no impact on the pursuer's life expectancy. On 4 July 2025, a joint meeting took place between Professor Clarke and Dr Lester. On 7 August 2025, the defenders lodged their valuation of claim, now in the sum of £17,973. On 13 August 2025, the joint report of the experts' meeting became available. On that date too, senior counsel for the pursuer contacted senior counsel for the first defenders to discuss the case, counsel for the first defenders making it clear that there was to be no increased offer, nor a refreshing of the tender. On 22 August 2025, the first defenders' agents emailed the pursuer's agents confirming that the defenders were not willing to increase the tender and at around 4pm on that date, the pursuer's agents confirmed that the tender was accepted, albeit the minute of acceptance was not lodged until 23 September 2025.

**Submissions**

***Pursuer***

[5] While counsel for the pursuer accepted that the delay of more than 8 months called for explanation, he submitted that having regard to the complexities of the action and the low value of the tender in comparison with the sum sued for, the delay was not unreasonable. The pursuer's assessment of the medical evidence evolved and as it did so it became evident that his prognosis would not have been very different had his cancer been diagnosed earlier. It was only after the joint meeting between Professor Clarke and Dr Lester in July 2025, when Professor Clarke departed from his previous advice, that the pursuer was able to appreciate the weakness of his case as regards causation. Only then was it reasonable for him to accept that the sum tendered was a reasonable assessment of his loss. Over the period from the lodging of the tender to August 2025, the pursuer's prospects of recovering a sum substantially in excess of that sum gradually waned. In any event, counsel submitted that even if there was unreasonable delay, I should not make any award against the pursuer, failing which that any delay was not so unreasonable as to justify the maximum award of 75% of the costs incurred in that period, this apparently being a reference to RCS 41B.3(2)(b); in other words, that I should not visit the full consequences of unreasonable delay upon the pursuer.

***Defenders***

[6] Senior counsel representing both defenders advised me that the defenders were in agreement as to the allocation of any award, hence there was no need for the court to make any apportionment in terms of RCS 41B.3(2)(d). Authorities on the common law's approach to reasonableness in the context of a delay in accepting a tender were helpful, but this was a

new regime. Although Sheriff Campbell, sitting in the All-Scotland Personal Injury Court, had held in *Anderson* v *Emtelle UK Ltd* [2023] SC Edin 40 that a delay of 5 months was not unreasonable, the facts of that case – where there had been difficulties in fixing an appointment with the expert and subsequently obtaining his report – were different. Here, the pursuer's expert opinion, properly read, had never supported his case on causation, and, if anything, Professor Clarke's opinion as expressed in the note of the joint meeting was more favourable to the pursuer than the view in his report. The defenders had made their position on causation plain from the outset, and their statements of valuation of claim clearly set out that any solatium award must reflect only that the pursuer's symptoms would have been ameliorated sooner had they been treated earlier. The pursuer had simply not made out his argument that the medical evidence had evolved unfavourably to him in the manner suggested. Finally, the court had no discretion to vary the figure of 75% referred to in RCS 41B.3(2)(b). Even if it did, no reason had been advanced as to why any award of expenses in the defenders' favour should be modified.

**Professor Clarke's reports**

[7] As can be seen, Professor Clarke's reports are central to the pursuer's argument that the medical evidence evolved after the tender was lodged. As both parties accepted, for the pursuer's case on causation to succeed, he required to prove, on a balance of probabilities, either that his cancer was clinically localised, or that it was low volume metastatic, at the date when (according to him) it ought to have been diagnosed. In his report of 24 June 2025, Professor Clarke said the following (at page 8):

> "Looking at the characteristics of [the pursuer's] case when he first presented to his GP with urinary symptoms, it is *possible* that his prostate cancer, which was highly likely to have been present at that time in July 2018 and again when he was seen by

> his GP in September 2018, may have been clinically localised within the pelvis. It is also *possible* that his disease would be low volume metastatic....Had his disease been clinically localised at that stage, which is a *possibility*, then he would have been a candidate for *potentially* life-saving treatment aimed at curing his problem...
>
> *It is impossible to say whether [the pursuer's' disease was metastatic in the earlier stages of his presentation* ... (emphasis added)"

That was no different from what he had said in his draft report of August 2024. It follows that the pursuer was aware of what Professor Clarke's evidence was likely to be from that earlier date; significantly, there was no changing of Professor Clarke's position as between August 2024 and June 2025.

**The note of the joint experts' meeting**

[8] The note of the meeting of Professor Clarke and Dr Lester contained answers to a series of different questions put to them. Professor Clarke's view was recorded as being that treatment would have extended survival but would not have been curative, Dr Lester's contrary position being that life expectancy would have been no different.

**Decision**

[9] The starting point is to observe that while RCS 41B.3(1) restates the common law position that the determination of an application for expenses against a pursuer in a personal injuries action is at the discretion of the court, that is made subject to RCS 41B.3(2), which limits the amount of expenses which the pursuer can be required to pay where a tender has been lodged in process. Additionally, the effect of the 2018 Act and Chapter 41B is that the court has the power to make an award against the pursuer in the present action only if there was unreasonable delay on his part in accepting the defenders' tender. There was undoubtedly delay: whether it was unreasonable or not must be judged objectively.

While the court may retain a discretion not to make an award against a pursuer even where there was unreasonable delay, it is difficult to envisage circumstances where that would be appropriate, and in any event, no such circumstances were advanced in submissions. Whether or not, as senior counsel for the defenders submitted, prior common law authorities are helpful in determining whether a delay in accepting a tender was reasonable, I was referred to no such authorities and in any event, necessarily, each case must be judged on its own facts.

[10] In my view, the range of relevant factors includes: the period of delay; the information reasonably available to the pursuer at the time of the tender; whether further expert evidence or information was reasonably required before the tender could be properly considered; and the stage which the action has reached: *cf* Macphail, *Sheriff Court Practice (4th Edition)*, paragraph 14.50; *Anderson* v *Emtelle*, above, para [12]. Elaborating on the last of those factors, the reasonableness of the delay in a chapter 42A action, such as this, must be judged through the prism of the steps required of each party to obtain, and exchange, information, including expert evidence, before the case management hearing, at which time parties are expected to know what the issues are and to address the court on how they might be resolved, in addition to being well on the way to having such expert evidence as they require.

[11] Dealing with the relevant factors in turn, the delay of more than 8 months is a lengthy one which calls for explanation. By the time the tender was lodged, and if not then, by March 2025, the pursuer and his advisers were aware that a crucial issue to valuation of his claim was whether his life expectancy would have been greater had he been diagnosed when he first presented to the first defenders with symptoms. The evidence available to the pursuer at that time on that issue comprised Professor Clarke's draft report of August 2024,

which was in the terms set out in the final report, as well as the defenders' draft reports that causation could not be established. At best for the pursuer, Professor Clarke's report left it unclear whether his evidence would be that on a balance of probabilities the pursuer's life expectancy would have been longer. There was ample time for the pursuer to explore and to test that view, at consultation if need be, long before August 2025. It was not suggested that the pursuer required to make further enquiries, or to seek further information, following receipt of the tender. Stated shortly, the pursuer was in possession of all necessary material in the first quarter of 2025 to enable him to reach an informed decision on the tender. Finally, it is relevant that the tender was lodged shortly after the record had been closed but was not accepted until some 2 months before the proof, some 5 months after the exchange of draft expert reports and valuations, during which time both parties were continuing to incur the expense of preparing for the proof.

[12] All of the foregoing points towards the delay of more than 8 months as being unreasonable. The only explanation offered by the pursuer for the delay is that the medical evidence evolved and his position gradually weakened in the period between the lodging of the tender and its acceptance, but that is simply not made out by the material shown to me. No new medical evidence on causation was obtained by the pursuer in that period. I took it from what counsel for the pursuer (who was not counsel previously instructed) submitted that what changed was the assessment by the pursuer and his advisers of whether Professor Clarke's evidence would be accepted, but even that submission overlooks that Professor Clarke's report hardly supported the pursuer's causation case on a balance of probabilities: it is laden with the language of possibility rather than probability. Nor can the pursuer justifiably claim that his decision whether to accept the tender could reasonably await the joint meeting of experts when, as senior counsel for the defender submitted, if

anything, the views expressed by Professor Clarke in the joint report were more favourable to the pursuer than those which he had previously expressed in his own report.

[13] Finally, and for completeness, I do not accept the submission of counsel for the pursuer that one relevant factor is the disparity between the sum tendered and the sum sued for. That may explain why, subjectively, the pursuer was unwilling to accept a tender for a sum so significantly below the sum sued for, but that begs the question as to whether his expectations had been realistically managed. The true comparison must be between the sum tendered, and the realistic value of the claim having regard to the information reasonably available at the time. It is plain from the chronology that the delay, at least latterly, was caused by the hope, in the event a forlorn one, that the defenders would increase their offer or at least refresh the tender, but that does not excuse the delay in accepting the tender.

[14] For all of the foregoing reasons, I find that there was an unreasonable delay on the part of the pursuer in accepting the tender. It follows that while he is entitled to expenses to the date of the tender, the defenders are entitled to expenses from that date. Parties did not invite me to find what that date is, both accepting that this is ordinarily a question for the auditor. (In parenthesis, I observe that the court may itself decide that date if it is apprised of all relevant information: see *Jack* v *Black* 1911 SC 691 at 700. While I probably would have had sufficient information to decide the matter for myself, I did not hear full submissions on the point and so will not make a determination. However, since the unreasonableness of the delay, and the question of what period the pursuer should reasonably have had for consideration of the tender are, if not opposite sides of the same coin, at least on any view closely linked, there is something to be said for the court deciding both matters, if only to avoid the anomalous situation which could arise of the auditor deciding, after all, that the tender was accepted within a reasonable period.)

[15] It remains to deal with the pursuer's subsidiary argument that I should modify the 75% figure found in RCS 41B.3(2). It seems to me that that argument conflates the inherent power of the court to modify any award of expenses (that such power may be exercised is confirmed by RCS 41B.3 (2)(c), which expressly refers to it) on the one hand; with, on the other hand, what is evidently a policy decision that a pursuer's liability should never exceed 75% of the amount of damages awarded. The former power may be exercised in appropriate circumstances, for example, to reflect some unsatisfactory aspect of a defender's behaviour, by restricting the expenses to which they would otherwise be entitled by a specified percentage, whereas the latter provision is clearly designed simply to preserve for the pursuer at least 25% of the damages awarded rather than to penalise the defender. There is nothing in the language of the rule to suggest that the court has any discretion, or power, to vary the 75% to some other percentage.

[16] That this is the correct construction of RCS 41B.3 is borne out by subparagraph (c) of that rule, which requires the court to order that the pursuer's liability is not to exceed the sum referred to in subparagraph (b), being a reference back to the sum which is 75% of the damages awarded. It may be noted that the consequence of this provision is that, depending on the sums involved, a defender may recover all, or only some, of the expenses incurred by it, which would be the case even if the court ordered that the expenses should not exceed, say, 50% of the damages awarded. There is simply no logical or coherent basis on which the power contended for could be exercised, even if such a power existed.

[17] Finally, I must deal with the pursuer's submission that the pursuer's delay was not so unreasonable as to justify the defenders receiving the full amount of expenses to which they would otherwise be entitled. However, I do not consider that there are degrees of unreasonableness in this context, and even if there were, there is no basis upon which I

could properly modify the defenders' entitlement in the circumstances of this case. Having found that the pursuer's delay in accepting the tender was unreasonable, there is no material before me such as to justify a departure from the consequences laid down in RCS 41B.3.

**Disposal**

[18] I will grant the pursuer's motion for decree in terms of the tender and acceptance, for expenses to the date of the tender and for certification of the skilled persons (insofar as not previously certified). I will also grant the defenders' motion for expenses from the date of the tender, ordering in terms of RCS 41B.3(2)(c) that the pursuer's liability is not to exceed an aggregate sum, paid to both defenders, of 75% of the amount of damages awarded to the pursuer, that sum to be calculated in the manner specified in RCS 41B.3(2)(c). Finally, I will grant certification of the skilled persons identified in the defenders' motion.