SHERIFFDOM OF LOTHIAN AND BORDERS AT EDINBURGH

IN THE ALL-SCOTLAND SHERIFF PERSONAL INJURIES COURT

[2023] SC EDIN 20

PIC-PN2617/21

JUDGMENT BY SHERIFF K J CAMPBELL KC

in the cause

JACQUELINE NAPIER

Pursuer

against

AXA INSURANCE UK PLC

Defender

Pursuer: Cameron; Friends Legal, solicitors, Glasgow
Defender: Fairweather; Clyde & Co, solicitors, Edinburgh

EDINBURGH, 10 February 2023

Introduction

[1] This action arises out of a road traffic accident on 4 November 2018. The pursuer sustained neck and back pain, pain radiating from her neck to her right shoulder, and loss of sensation radiating down her leg. It appears that the pursuer's course of treatment was complicated. The pursuer intimated a claim to the defender on 6 November 2018. The defender admitted liability on 22 November 2018. The action was raised on 27 October 2021. The action was sisted on 10 January 2022, that application having been initially opposed by the defender. The sist was renewed for three months on 1 August 2022. Settlement was agreed in November 2022.

[2] This matter called before me on 16 January 2023 in respect of the pursuer's motion 7/4, which is in several parts: (a) for decree in terms of a Minute of Tender and Minute of Acceptance; (b) for certification of Mr Simon Spencer, consultant orthopaedic surgeon, Dr William Durward, consultant neurologist, Dr Anupam Agnihotri, consultant psychiatrist, and Professor Alan Carson, consultant neuro-psychiatrist, as skilled witnesses; (c) sanction for junior counsel; (d) the expenses of the action on the Ordinary Cause scale. A number of elements of the motion were initially opposed, but by time the matter called before me, as a consequence of discussion between parties, the sole issue in dispute was the appropriate scale on which expenses should be awarded. Parties lodged helpful written outline submissions, though as matters turned out, it would also have been of assistance to the court to have had a chronology, agreed or otherwise.

Pursuer's submissions

[3] The pursuer's overarching submission was that she reached a recovery to her baseline in September 2022, and it was only at that point she was able to value the claim fully, and thus it was unrealistic to say the action could have settled before it did.
Ms Cameron accepted that the Personal Injuries Pre-Action Protocol ("the PAP") specifies a 5 week period of the instruction of medical evidence unless there is good cause. She submitted the pursuer could show good cause. The pursuer's condition had not stabilised and further medical investigations were triggered by the initial reports. Ms Cameron took the court through the history of the medical reports.

Mr Spencer

[4] The pursuer was initially due to be seen by Dr Simpson, and an appointment in November 2018 was cancelled (it was not clear why), and the pursuer was seen on 15 January 2019. Dr Simpson advised that the pursuer should obtain reports from a consultant orthopaedic surgeon and a neurologist. Consent for obtaining medical records was returned by the pursuer on 27 February 2019, and requests for records were sent to the GP and to Wishaw General hospital between 12 March – 15 April 2019. Records were received by 9 May 2019. An appointment was thereafter organised with Mr Spencer on 21 June 2019, and his report was provided on 6 July 2019. Mr Spencer's report was intimated on 2 September 2019, before the action was raised. He identified the possibility of a neurological problem in addition to orthopaedic injuries, and the defender was therefore on notice this was not a straightforward soft tissue injury.

Dr Durward

[5] The pursuer initially attended for a neurology appointment as a patient. The GP had received a report on 3 February 2020, which was not sufficiently detailed for the purposes of litigation, updated medical records were sought on 4 March 2020, and agents made efforts to find a suitable expert. In June 2020, Dr Durward agreed to be instructed, and an appointment was fixed for 7 September 2020. His report was provided on 12 January 2021, following four chasing emails.

[6] A further element was introduced when the pursuer fell down the stairs on 11 September 2020, something mentioned in Dr Durward's report. (I note it is also mentioned in the Initial Writ.) The pursuer sustained a fracture in her ankle, which set back her recovery from the initial injury. Further, there was an entry in the medical records,

which was different from the pursuer's account of events, and which the pursuer was disputing with the hospital. Dr Durward provided further advice in light of the pursuer's observations on his report and in light of the further accident. His view was the prognosis was at that point uncertain. He recommended further orthopaedic examination and also a psychiatric examination. The pursuer was therefore not in a position to disclose his report at that point.

Mr Spencer's second report

[7] Mr Spencer provided a second report, this dealt with the ankle fracture. There was a delay because the pursuer was challenging the accuracy of the medical records.
Ms Cameron accepted this report was not disclosed till the action was raised.

Professor Carson

[8] Agents enquired about an appointment with Professor Carson on 21 June 2021, and followed up in October 2021. In November 2021, Professor Carson advised he had no appointments available until 2022. Between 23 December 2021 – 9 February 2022, agents contacted four different consultants to try to obtain an earlier appointment. On 22 February 2022, Professor Carson advised he had a cancellation appointment on 28 February 2022, and the pursuer was seen then. His report was available on 15 March 2022. His view was that the pursuer ought to have returned to her pre-accident state within approximately six months, taking things to September.

[9] Counsel was instructed, and consulted with Professor Carson on 7 June. By the time of the consultation, the action had been raised and sisted. The pursuer had ongoing functional neurological symptoms.

The pursuer's position

[10] Ms Cameron accepted the PAP had not been complied with to the letter, and in hindsight the case was perhaps not one which was appropriate for the PAP because the pursuer's medical condition was not straightforward. The defender was of course entitled to get its own medical reports. The action was raised on 27 October 2021. The defender had opposed a motion to sist in December 2021, but had withdrawn opposition when the medical reports were disclosed. The action was sisted further in July 2022. The pursuer's preference at that time was for variation of the timetable; however, the defender wanted a sist to consider the medical reports further. Professor Carson's report was sent to the defender on 5 September 2022.

[11] Ms Cameron submitted there had been no delay by the pursuer once settlement discussions began. The pursuer should perhaps have made it clear earlier the case was not suitable for the PAP, but, she submitted, there was a good reason for the delay. Failure to comply was not wilful. She sought expenses on the Ordinary scale. As a fallback, the court had power to modify those, and a deduction of say 10% might mark any concern the court might have about the sequence of events.

Defender's submissions

[12] For the defender, Mr Fairweather explained that there had been almost no communication from the pursuer's agents before or during the action, and he was hearing for the first time the explanation of events tendered to the court on behalf of the pursuer. Before turning to the sequence of reports, Mr Fairweather submitted that the defender had no idea that there was a possibility of a neurological injury until Dr Durward's report (dated

January 2021) was disclosed in January 2022. It was not clear why the pursuer's position was that she was not able to disclose reports until September 2022. In March 2022, Professor Carson had advised that the pursuer's expectation that she might be back to her pre-accident state within 6 months was reasonable. Reports often offer a prognosis with a period to return to pre-accident capacity or best post-accident capacity. It could not be correct that a party could hold on to the report till that period elapsed. The report could and should have been disclosed with the pursuer's Statement of Valuation, and the defender could have taken a view.

[13] Even if the pursuer's explanation for delayed disclosure of Professor Carson's report was accepted, that did not explain the failure to disclose Mr Spencer's second report timeously. His first report contained no prognosis, and his second report said the pursuer had made a full recovery from her orthopaedic symptoms by June 2021. The defender did not receive Mr Spencer's reports or Dr Durward's report till 2022. Again, those should have been disclosed earlier and the defender could have taken a view about them. As for the pursuer's explanation for the time taken for the various reports to be produced, Mr Fairweather accepted Mr Spencer's report raised the issue of neurological injury for the first time, and that that had to be followed up, but that did not fully explain the delay. Dr Durward's report was delayed by the covid-19 pandemic, but that did not account for the delay between June 2019-March 2020.

[14] The pursuer's position was that she was not able to quantify her claim fully. But that is not a justification for withholding Mr Spencer's reports or Dr Durward's report; the PAP provides for disclosure unless there is good reason not to do so. The issue relating to the pursuer disputing the accuracy of part of the medical records ought not to have delayed disclosure of Mr Spencer's second report: he was not commenting on those records, and his

assessment was the pursuer had recovered. In relation to the pursuer's submission that the case was not suitable for the PAP, the defender submitted that the fact the action settled for £25,000 including interest suggested it was suitable, because it was within the ceiling for the PAP, and the sum claimed in the action of £50,000 was clearly overstated. There was no obligation on the defender to get its own reports in a case like this where liability had been admitted. The defender only became aware of the neurological injury when Dr Durward's report was disclosed in January 2022, and the pursuer's agents were saying at that point Professor Carson was being instructed.

[15] In short, the defender submitted, had the reports been instructed and disclosed sooner, the defender could have taken a view, or instructed its own experts. The pursuer should not be entitled to litigation expenses if those were avoidable and had the matter progressed under the PAP. It was noteworthy the action was sisted for most of its life, while the pursuer complied with her PAP obligations. The pursuer had forced herself against the triennium, and the defender should not bear the cost of that where it had not done anything wrong. The defender's fall-back position was that there should be a modification of at least 50% in any award of expenses. Mr Fairweather referred to *Hill* v *Menzies Distribution Ltd* 24 October 2022 Sheriff Fife, and *Gibson* v *Menzies Aviation* Sheriff McGowan [2016] SC EDIN 5.

[16] In a brief exchange at the end of the defender's submissions, Ms Cameron maintained that Mr Spencer's first report was intimated on 18 September 2019, before the action was raised. Mr Fairweather said the defender had no record of receiving that report then.

Analysis and decision

[17] Even allowing for the challenges which the covid-19 pandemic has undoubtedly caused for solicitors practising in ASSPIC in relation to obtaining expert medical reports, the history of this case is lamentable. Further, the picture of poor communication between agents which emerges from the submissions is not what the court expects in any litigation, but particularly not in ASSPIC.

[18] It will be remembered that the PAP is annexed to the Ordinary Cause Rules, and is given statutory force by OCR3A. It is convenient to re-state the purpose of the PAP as set out in paragraph 3:

> "3. The aims of the Protocol are to assist parties to avoid the need for, or mitigate the length and complexity of, civil proceedings by encouraging:
> • the fair, just and timely settlement of disputes prior to the commencement of proceedings; and
> • good practice, as regards:
> – early and full disclosure of information about the dispute;
> – investigation of the circumstances surrounding the dispute; and
> – the narrowing of issues to be determined through litigation in cases which do not reach settlement under the Protocol."

[19] Paragraphs 19, 20 and 21 are directly relevant to the circumstances of this motion:

> "19. Medical reports are to be instructed by the claimant at the earliest opportunity but no later than 5 weeks from the date the defender admits, in whole or part, liability (unless there is a valid reason for not obtaining a report at this stage).
>
> 20. Any medical report on which the claimant intends to rely must be disclosed to the other party within 5 weeks from the date of its receipt. Similarly, any medical report on which the defender intends to rely must be disclosed to the claimant within 5 weeks of receipt.
>
> 21. Parties may agree an extension to the issuing of medical reports if necessary."

[20] I accept that there will be cases in which a pursuer's medical history proves to be more complicated than at first appeared. This is plainly such a case. In my view, agents owe a responsibility to their clients, to the defender(s), and to the court to review matters

and to respond timeously and appropriately to such a development. Ms Cameron came close to acknowledging that point in her submission that, in retrospect, the case was perhaps not suited to the PAP. In my view, the point goes further, in that, while claims are adversarial before and after proceedings are raised, the court expects timely disclosure of expert reports as a cornerstone of personal injuries procedure. That is written into the PAP, and also the timetable provisions of OCR Ch36. The pursuer's agents have not advanced compelling reasons for the failure to disclose their medical reports in a timely fashion.

[21] Although the covid-19 pandemic played a part in the delays in this case, it is noteworthy that the accident occurred in November 2018. Further, the claim was intimated a few days later in November of that year, and liability was admitted the same month. Accordingly there was more than a year to investigate medical matters before the pandemic cast its pall over medical services. Mr Spencer's first report appears to have taken some time to organise, and was provided on 2 July 2019. There is a dispute about whether it was intimated to the defender before the action was raised; that is a surprising state of affairs in itself, as the court would expect agents not to be in doubt about something as foundational as that. Be that as it may, Mr Spencer identified the possibility of a neurological dimension. I accept that Dr Durward's report was delayed by the pandemic, but the explanation of why it took nine months before he was instructed, namely that the pursuer was being seen in the first instance as a neurology out-patient, clearly indicates that matters would be delayed, and further investigation potentially required. In my view, that was a point in the life of the case at which the pursuer's agents ought to have reviewed progress, and put the defender on notice that matters were potentially more complex.

[22] That is one instance of a broader problem of poor communications between agents about the emerging medical problems. Given the defender could not have been aware of

these additional problems until the pursuer's reports were disclosed, the bulk of responsibility for that must rest with the pursuer's agents. Because the defender's agents were initially not aware of the possibility of a neurological dimension, in my view, the pursuer's submission that they could have instructed their own reports is moot. Until the defender had Mr Spencer's report raising that for the first time, and Dr Durward's report discussing it, they were not on notice about that matter.

[23] Further, the pursuer's explanation for the delay in disclosing Professor Carson's report, which appears to have hastened settlement, is unsatisfactory to put it no higher.

[24] As in the cases of *Gibson* and *Hill* to which I was referred, the questions for me are (i) whether the failure to disclose the reports timeously caused or contributed to the action being raised rather than the claim being resolved extra-judicially before action; (ii) whether the court should mark its disapproval of the conduct of the claim in any particular way.

[25] In the circumstances set out above, I am not satisfied that the pursuer's agents' management of the case was reasonable. However, it cannot be assumed this case would have settled without litigation, given the complications in the pursuer's condition which emerged. However, there was a very early admission of liability and the defender was deprived of the opportunity of exploring settlement before proceedings were raised. In all the circumstances, therefore, I consider the pursuer should be awarded the expenses to the date of tender on the Ordinary Cause scale, and that those should be modified by 50%.

[26] I will therefore grant decree in terms of the Minute of Tender and Acceptance, together with expenses as modified. Parties are now agreed that Mr Spencer, Dr Durward and Professor Carson should be certified as skilled persons, and that the cause should be certified as suitable for the instruction of junior counsel.

[27] I will award the expenses of the motion to the defender.