FIRST DIVISION, INNER HOUSE, COURT OF SESSION

[2018] CSIH 29
PD452/14

Lord President
Lord Brodie
Lord Drummond Young

OPINION OF THE COURT

delivered by LORD CARLOWAY, the LORD PRESIDENT

in the reclaiming motion

in the cause

GRANT GRUBB

Pursuer and Respondent

against

JOHN FINLAY

Defender and Reclaimer

Pursuer and Respondent: A Smith QC, Smart; Clyde & Co
Defender and Reclaimer: Bain QC; Digby Brown

13 April 2018

Introduction

[1] Two issues arise. The first concerns the power of the court to dismiss an action, summarily at the stage of a proof, when the pursuer is found to have acted dishonestly. The second is whether a pursuer, who has been awarded damages, should, in the absence of a tender, be the subject of a contra award of expenses because of his dishonest conduct.

The Record

[2] The pursuer sued the defender for £500,000 in respect of an accident which occurred in a petrol filling station in Dundee on 22 May 2011. The defender reversed his Peugeot into the front of the pursuer's stationary car. The defender admitted that this had happened. The only issue was *quantum* of damages.

[3] The pursuer averred that he had sustained a whiplash injury to his cervical spine. What had been a low (4 mph) impact collision had jerked the left side of his neck, left arm and shoulder at a time when the pursuer had his left hand on the steering wheel. He had suffered an impingement of the C7/C8 nerve roots.

[4] The pursuer maintained that he had ongoing symptoms, notably pain in his left shoulder, shooting pains in his left arm and numbness and tingling in the fingers of his left hand. He had developed a chronic (myofascial) pain symptom and a chronic adjustment order. He had problems sleeping. He had psychological problems with driving. He had faecal incontinence. He was unable to help with household tasks. He had been unable to continue with his work as a chef with David Lloyd Leisure, where he had worked in excess of 10 hours per week. He had initially returned to work. He had increased his hours, but had difficulty coping with this because of pain and tiredness. His employment had been terminated following his becoming irritated and frustrated and being involved in a "disagreement at work". He had stopped work as a driver for Embassy Tandoori; for which he had been paid "cash in hand".

[5] The defender averred that the pursuer was exaggerating his symptoms for financial gain. He had a pre-existing history of anxiety and depression. Although he had told the medical experts that he had not driven since the accident, he had been convicted of driving

without insurance in September 2011. He had increased his hours of work after the accident. He had been the subject of a "final warning", having been working at a market stall at Errol in June 2011 when absent from David Lloyd Leisure on the grounds of ill health. He had been dismissed for misconduct in November 2011.

The tender and the first diet of proof

[6] On 15 April 2014 the defender lodged a tender for £30,000. This was withdrawn on 31 October 2014. The proof, which had been set down for 4 days, commenced on 25 November 2014. The Lord Ordinary does not provide a narrative of the testimony adduced at this diet. It is therefore expedient to have some recourse to the transcription in order to see how matters developed.

Dr Alan Forster

[7] Unusually, the proof did not start with the pursuer's testimony, but that of Dr Alan Forster, a consultant clinical neurophysiologist, who had been instructed by the pursuer. He had examined the pursuer once in 2013, when he conducted nerve conduction studies relating to the C7/8 roots. Dr Forster was of the opinion that the pursuer's symptoms were consistent with the accident. He had reported that:

> "though the sensory assessment and the history of pain is somewhat subjective, Mr Grubb appears genuine and appears to have a chronic pain problem likely to last a long time, with a degree of C7 and possibly C8 compromise as part of this problem".

The report had continued:

> "…Mr Grubb does not show any evidence of wilful exaggeration of his pain problems and actually presents with a very positive outlook… [H]is pain problem, a well recognised physical disorder … is a direct cause of (*sic*) the accident… Mr Grubb has developed a myofascial pain syndrome affecting his neck and upper thoracic area and left shoulder".

[8] In cross-examination, Dr Forster acknowledged that the pursuer's description of the accident was more violent than that depicted in the CCTV images. The pursuer had told him that he had not been working because of difficulties with holding and lifting. He had said that he found driving difficult because of his pain and the medication. Dr Forster accepted that some of what he had been told by the pursuer had been "factually incorrect". Since he had been convicted of driving without insurance, that demonstrated that he was capable of driving. Lifting goods from a cash and carry was more than Dr Forster would have expected the pursuer to have been capable of doing, as would lifting ladders and satellite dishes. It was possible that the pursuer was "making it up" but, if that were so, he had had to be consistent with a lot of people over a long time. He accepted that the pursuer had not "played totally straight" on the driving issue. Dr Forster continued (p 199):

> "To say he's a 100 per cent malingerer, I don't think is correct … The level of inconsistencies you're suggesting suggests that he has conned everybody all the way through, with all clinical examinations and all findings. I don't think he's that sharp … I don't think he's capable of that … it's a very, very consistent presentation".

The Pursuer

[9] The pursuer was aged 31. At the very start of his testimony, he spoke to having stomach problems, anxiety, dizziness and headaches. He gave an account of the accident in the filling station, during which he had experienced immediate discomfort in his arm. He had felt groggy or dazed, with a buzzing in his head. The pain developed over time.

[10] The pursuer had been finding work stressful as a result of the effects of the accident. He was having mood swings and losing his temper. He did not tell the doctors that he had, as he admitted, been dismissed following an altercation with his manager because of embarrassment. He admitted being caught three times when driving without insurance. He

had not seen his father for several years, although the insurance for the car had been in his father's name. The pursuer said that he was presently physically "pretty bad". He was finding it hard to sleep and to get up. He found basic tasks difficult. He could not lift with his left hand. He suffered from depression.

[11] The cross-examination was combative. The insurance policy had been taken out in 2011 in his father's name, giving an address at which the pursuer lived. There had been a period when he had not seen his father for several years, albeit not immediately prior to the accident. He had not paid tax on his earnings at the Embassy Tandoori. He had been at Errol market after the accident because his brother had asked him to help out. The only times he had been driving after the accident were when he had been stopped by the police. He had bought a car because he wanted to push himself to drive.

[12] It was put to the pursuer that a Mr Kinney had lent him a van on a number of occasions to take goods to the market. He had been caught driving Mr Kinney's van, which he and his brothers had been using to move a bed and table. It was also put that his brother Aaron had said that the pursuer had frequently gone to the cash and carry to pick up goods, but the pursuer denied driving his brother's van. He did admit helping his brother with the installation of satellite dishes, but not after the accident. The pursuer did have a conviction for theft in November 2000 from a relative, whom he said had owed him money.

Dr Colin Rodger

[13] Dr Rodger had been interposed initially during the pursuer's testimony. He was a consultant psychiatrist, instructed by the pursuer. He had seen the pursuer in January 2013. The pursuer had told him that he had had "no contact with his father for approximately 9 years since his father was convicted and imprisoned in relation to charges regarding child

pornography". The pursuer had said that he had no psychiatric history and no previous convictions. In fact, the pursuer had had two bouts of depression; one in 2004 and another in 2008 when he had separated from the mother of his son.

[14] Dr Rodger considered that the pursuer had a chronic adjustment disorder precipitated by the accident and its associated physical difficulties and limitations. He thought that it required treatment by antidepressants and therapy. He would improve with this treatment, but might get worse without it.

[15] Dr Rodger had seen the pursuer again in October 2014. By this time, the pursuer had been having additional difficulties, which he had attributed to the medication, including blurred vision, hallucinations, faecal incontinence, sleep disturbance, low mood and anxiety. He was on an unusually high dose of amitriptyline. The pursuer's circumstances, and symptoms, were quite rare for someone who had been involved in a minor accident. Fabrication for financial gain had to be considered, but the physical findings could not be simulated. Dr Rodger remained of the view that the pursuer had a chronic adjustment disorder precipitated by the accident.

[16] In cross-examination, Dr Rodger said that the pursuer had told him that he had no children, although he later found out that he had a son. He had not told him about the conviction for theft. He did have a past psychiatric history. The pursuer had been inconsistent in telling him that he had not driven but had been convicted of driving without insurance. Dr Rodger's impression was that the pursuer had stopped working because he could not cope with the job; not that he had been sacked. Reports of the pursuer's functioning indicated a better level than the impression which Dr Rodger had gained. Despite considering the possibility of exaggeration and the inconsistencies, Dr Rodger

remained of the view, which he had expressed in his reports, about the genuineness of the pursuer's symptoms.

The application to dismiss

[17] The continued diet of proof was fixed for 22 September 2015. However, the defender sought to lodge additional productions, some of which were illegible, and this diet was lost. Expenses were reserved. On 16 October 2015 a new diet of 12 days was fixed for 27 September 2016. When it resumed, the defender moved that the action be summarily dismissed. This application had only been intimated on the previous afternoon. It took two days to debate. Under reference to *Shetland Sea Farms* v *Assuranceforeningen Skuld* 2004 SLT 30, *Hepburn* v *Royal Alexandra Hospital NHS Trust* 2011 SC 20, Lord Reed: "*Lies, damned lies: Abuse of Process and the dishonest litigant"* (Edinburgh University, 26 October 2012) and the practice in England and Wales (*Summers* v *Fairclough Homes* [2012] 1 WLR 2004; Criminal Justice and Courts Act 2015, s 57) it was argued that, since the pursuer had been found to be "fundamentally dishonest" in relation to his claim, the action should be dismissed as an abuse of process and affront to the interests of justice.

[18] The Lord Ordinary accepted that "in an appropriate case, the court may exercise a power to dismiss an action if a fair trial is impossible, or if there is a fundamental dishonesty on the part of the pursuer, or if there is an abuse of process" but that this power required to be exercised "sparingly". He was "not satisfied that dismissal [was] appropriate or justified ... at this stage". An informed decision on the pursuer's credibility was more appropriately taken after hearing the remainder of the evidence. The proof then continued. At advising, the Lord Ordinary recorded that the defender's submission based on fundamental dishonesty, which was renewed at the end of the proof, was not well founded. To dismiss

the action would have been to create injustice. The pursuer would be deprived of his (by then proven) entitlement to damages and the defender would avoid his corresponding responsibilities.

The Lord Ordinary's decision

Merits

[19] On 24 May 2017, the Lord Ordinary found in the pursuer's favour to the extent of granting decree for payment of £7,321.32 (inclusive of interest), as opposed to the £500,000 concluded for, the Statement of Valuation of £382,000 or the £183,000 ultimately sought. The Lord Ordinary provides little more than a sketch of what evidence was adduced at the continued proof. However, the Opinion is not entirely devoid of clues to his reasoning. He did say that the defender's expert, namely Dr Jon Stone, who had thought that the accident was sufficient to trigger a chronic pain syndrome, was not convinced that any cervical radiculopathy (compressed nerve) had been caused by the accident. This was because the pursuer had not reported symptoms of this at the time. Although the pursuer had not concocted the "entire story", and a link between the accident and the radiculopathy was possible, it was very unlikely.

[20] The Lord Ordinary found as fact that, at the time of the accident, the pursuer had been sitting in the driver's seat, leaning over to pull the petrol cap release lever. He had felt the force of the collision on his left arm, which was on the steering wheel. There was a sharp shooting pain that went along his arm and up to his neck. The pain got worse as the day went on. It went down his left arm to his hand and little finger. It radiated up the lateral aspect into his neck and shoulder. He telephoned his insurance company that day and attended his general medical practitioner on the following day. The effects of the accident

had persisted for a period of about 12 months. Contrary to the defender's protestations of fundamental dishonesty, the Lord Ordinary found the pursuer's account to be acceptable in its essentials in relation to that period.

[21] The Lord Ordinary was, however, prepared to "give the defender the benefit of the doubt in relation to the question of causation". He was not satisfied that, on the balance of probabilities, the effects of the accident had continued beyond the initial 12 month period. He was not saying that the pursuer did not have symptoms after that date; simply that they could not be attributed to the accident. He noted specifically that the conduct of the litigation, and the surveillance instructed on behalf of the defender, may well have had an adverse effect on the pursuer's psychological well-being. He assessed *solatium* at £6,000, exclusive of interest.

[22] In a "general discussion" the Lord Ordinary repeated that he did not accept the defender's contentions that the pursuer's claim was fundamentally dishonest. On the contrary, he accepted the pursuer's testimony about the accident and its effects over the succeeding 12 month period. It was on the basis of Dr Stone's evidence that he concluded that the symptoms after the 12 month period had not been caused by the accident. To that extent, as he put it, the Lord Ordinary gave effect to the defender's criticisms, but no further. The defence case had been robustly presented, but it had a relatively weak evidential foundation. The Lord Ordinary commented in particular that the defender's skilled medical witnesses had given evidence which was diminished as a result of their having been provided with material, which was either unfounded, unsubstantiated (eg lifting satellite dishes) or departed from at the proof.

[23] In analysing the pursuer's case in more detail, the Lord Ordinary explained that he did not accept the pursuer's evidence as credible and reliable in "several areas". These

included his account of his driving abilities. The pursuer was driving a lot more than he said he was. There were specific instances of this, including, of course, the post-accident driving without insurance convictions. The pursuer had been less than convincing in explaining why he had not told the doctors about the real reason for the termination of his employment with David Lloyd Leisure. The pursuer's evidence, in relation to claiming money for the damages to the car, when the insurance was in his father's name, had been less than convincing also. In contrast, however, there was independent support for many of the pursuer's complaints. Dr Forster, in particular, had said that the pursuer would not have been able to manufacture accurate responses to the nerve conduction tests.

[24] The Lord Ordinary was critical of the defender's approach to the case. The defender's representatives had formed a view at a "fairly early stage that the pursuer had fabricated his whole claim and that the claim was fundamentally dishonest". The Lord Ordinary did not share the defender's considerable antipathy towards the pursuer; this presumably being a reference again to the defender's representatives, rather than to the defender himself. The pursuer's character failings and flaws, and his lack of candour, were not sufficient to deprive him of his entitlement to damages. The Lord Ordinary was particularly critical of the way in which detailed allegations had been put to the pursuer by the defender's counsel in cross-examination, which turned out to be baseless. The medical evidence from the pursuer's consultant orthopaedic surgeon, namely Mr Dunston, had described the whiplash type injury as consistent with the mechanism of the accident. Even Dr Stone had been prepared to say that he thought that the pursuer had been injured and that there had been some pain afterwards, albeit that he did not think that the accident had caused any radiculopathy.

[25] The Lord Ordinary continued:

> "[40] With some hesitation I have reached the conclusion that the defender's criticisms of the pursuer's case, and the evidence of the defender's witness Dr Stone, are sufficient to prevent me from holding that the effects of the accident extended for more than a period of 12 months.
>
> [41] In short, I am satisfied that on a balance of probabilities the pursuer suffered soft tissue injury as a result of the accident and that the effects lasted for a period of about 12 months or so. However, I cannot attribute subsequent complaints to the accident even although those complaints may seem real to the pursuer and even although they find some support in the expert evidence. The necessary causal link has not been established to my satisfaction in relation to the later complaints."

Expenses

[26] The Lord Ordinary found the pursuer liable to the defender in the expenses of the action, modified to two-thirds. This of course means that the pursuer will require to pay 5/6ths of the costs of the process, even although there was no tender extant. In explaining this decision, the Lord Ordinary said that he was not prepared to ignore the fact that the pursuer had presented various parts of his case with a "significant lack of candour". Had he been candid and forthright throughout, the case would probably have concluded after a relatively short proof. A recurring theme was the pursuer's lack of candour, with a focus on his lack of credibility and reliability. That undermined most of his case, including his position on causation. Although the lack of candour had not been enough to warrant depriving the pursuer of a finding on liability, it did play a material part in the pursuer obtaining only a modest award by way of damages relative to the sum sued for (£500,000), the pursuer's statement of valuation (£382,000) and eventual submission (£183,000). The pursuer achieved very limited success, approaching almost complete failure. The court could and should mark its disapproval of a claim presented with such a lack of candour and that could be reflected in the finding on expenses. The 2/3rds award reflected the defender's substantial success after proof. The restriction reflected the extent to which the defender

had advanced propositions which proved to be unfounded and the fact that the pursuer had succeeded to some limited extent.

Submissions

Defender and Reclaimer

[27] The defender maintained that the Lord Ordinary had erred in refusing to terminate the proceedings summarily because they had amounted to an abuse of process. The evidence, which the Lord Ordinary had heard at the time of the initial motion for dismissal, ought to have led him to conclude that the pursuer was presenting a claim which was fundamentally dishonest. The pursuer had accepted that he had stated to the insurers that he was his father, thus inducing them to send him a cheque for the damage to the car. This demonstrated a willingness to lie to an insurer for financial gain. The pursuer had misled the court, and lied to medical experts, about his ability to drive after the accident. He had not been honest on whether he had returned to work after the accident and/or the reasons for his employment being terminated. He had represented to the medical experts that the accident had been a violent one, with immediate pain and discomfort, but this had been contradicted by the CCTV images. He had said that he had had no contact with his father for a long number of years, but this was inconsistent with the insurance being in his father's name. He had admitted that he had not paid any tax on his earnings as a takeaway driver. He was accordingly a person prepared to defraud the tax authorities. He had a conviction for theft, which he had not disclosed to the medical experts. In these circumstances, it was impossible for the court to ascertain where the lies stopped and the truth began.

[28] If a pursuer was dishonest within the context of an action, a defender could not be afforded a fair hearing. The court had a duty to intervene and stop the case. Once it was

established that the pursuer was not an honest person in relation to the claim, a defender should not be obliged to incur the expense of going through a continuing court process. The pursuer had been representing to the court that his left arm was substantially or completely disabled, leading to a significant wage loss and services claim. Even in the absence of a rule, the court had power to stop the proceedings (*Hepburn* v *Royal Alexandra Hospital* (*supra*); *Shetland Sea Farms* v *Assuranceforeningen Skuld* (*supra*) at paras [143]-[146]). The power to bring proceedings to a halt was not restricted simply to forensic fairness, but to fairness as a generality as it affected defenders. The concept of fundamental dishonesty had been discussed in the context of the English rules of procedure (*London Organising Committee of the Olympic and Paralympic Games (in liquidation)* v *Haydn Sinfield* [2018] EWHC 51 (QB)).

[29] Reclaiming motions solely on expenses were severely discouraged (*Lord Advocate* v *Mackie* 2016 SLT 118 at para [11]). Expenses were incidental to a cause and the terms of an award lay at the discretion of the judge before whom the case had been heard, provided that the discretion had been exercised along conventional lines (*ibid*). The Lord Ordinary had taken into account all of the relevant factors. It could not be said that his decision had been so manifestly unfair as to amount to a miscarriage of justice. Although the usual rule was that, in the absence of a tender, the pursuer would be awarded the expenses. The statement that expenses followed success was subject to innumerable qualifications and a successful party could be refused expenses in certain circumstances (*Howitt* v *Alexander and Sons* 1948 SC 154 at 158). The feature here was that there had been a lack of candour.

Pursuer

[30] The pursuer maintained that the Lord Ordinary had been correct to refuse to accede to the defender's motion for dismissal after the court had heard only four days of evidence.

Dismissal was a draconian measure, only to be exercised in exceptional circumstances and with the overriding emphasis being on whether a fair trial of the issue between the parties remained possible. The defender did not assert that this was such an exceptional case or that he had not received a fair trial. The Lord Ordinary referred to the evidence available and adequately explained why he had resolved this issue in the pursuer's favour, having ultimately carried out a detailed assessment of credibility and reliability. He found that the pursuer had been injured in an accident caused by the defender. He found that the pursuer continued to suffer from symptoms as at the date of the proof, although "with some hesitation" he felt unable to make a continuing award because of issues of medical causation.

[31] The pursuer's false statement to the insurers, that he was his father, was a collateral matter and irrelevant to the facts in issue. Any fraud committed was purely technical. The point about the pursuer lying to the doctors about his ability to drive was something canvassed during the proof and taken into account. It did not undermine the expert medical opinion in support of the pursuer's case. Similar considerations applied to the pursuer's account of not returning to work. The defender's contention, that the accident had not been a violent one, was not supported by the CCTV images. The degree of contact which the pursuer had with his father was a peripheral and not a straightforward issue. The Lord Ordinary had been aware of the pursuer's earnings as a takeaway driver. The pursuer's conviction for theft was irrelevant.

[32] The Lord Ordinary had erred in awarding the defender the expenses of process, albeit restricted. He had exercised his discretion wrongly, taken into account irrelevant factors and left important ones out of account. It was accepted that expenses were a matter for the discretion of the first instance court, but the appellate court could interfere in these

circumstances and where the Lord Ordinary had reached a decision which was plainly wrong (*Ramm* v *Lothian and Borders Fire Board* 1994 SC 226 at 227). The Lord Ordinary had to exercise his discretion in accordance with established principles. The first principle was that the cost of litigation should fall on the person who had caused it (*Shepherd* v *Elliot* (1896) 23 R 695 at 696; *Howitt* v *Alexander and Sons* (*supra*) at 157). If a defender sought to avoid the expenses of a litigation, then he had a straightforward remedy; that was to use the tendering system (Macfadyen ed: *Court of Session Practice "Expenses"* at para L [104]). This system provided parties with a reasonably certain basis upon which they could proceed (*Hodge* v *British Coal Corporation (No. 3)* 1992 SLT 1005 at 1007).

[33] The pursuer had succeeded in the action and obtained a decree. The Lord Ordinary had rejected the defence to the effect that the pursuer had suffered no injury and that his claim was fundamentally dishonest. He had found the approach taken by the defenders to be unjustified. He had rejected significant proportions of the defence evidence, which had taken up several days of proof. At a pre-trial meeting, on 18 November 2014, following upon the withdrawal of the tender, the defender's representatives had advised that there would be no offer in settlement. The proof diet set down for 22 September 2015, had been discharged as a result of the production of late evidence by the defender. The motion to dismiss, which had been intimated only the day before the continued proof, had taken up two days. The Lord Ordinary's Opinion in relation to expenses seemed to be different from that which he had expressed on the merits. The considerations that the pursuer had insisted on propositions which had been unfounded, and that he had presented a case that was lacking in candour, were irreconcilable with his conclusions on the merits. The Lord Ordinary failed to exercise his powers in accordance with established principles. He had not recognised that the defender had consciously departed from the recognised means of

protection (*Hodge* v *British Coal Corporation (No. 3)* (*supra*); *Summers* v *Fairclough Homes* [2012] 1 WLR 2004 at paras [12] and [17]). In short, the decision of the Lord Ordinary on expenses had amounted to a manifest injustice.

Decision

Application to Dismiss

[34] It is not disputed that the court has an inherent power, in appropriate circumstances, to dismiss an action summarily, even in the absence of a rule permitting it to do so. That was determined in the context of excessive delay in *Hepburn* v *Royal Alexandra Hospital* 2011 SC 20, LP (Hamilton) at para [27], following *Moore* v *Scottish Daily Record and Sunday Mail* 2009 SC 178, LJC (Gill) at para [13], following in turn *Tonner* v *Reiach and Hall* 2008 SC 1; and Lord Reed at para [47]). It is neither practical nor desirable to define the situations in which this power may be exercised, but the question of whether a fair trial remains possible is a factor of considerable, although not always determinative, weight (*ibid*, LP (Hamilton) at paras [25]-[26]; Lord Reed at paras [47]-[51]). The power is a draconian one which should be regarded as an option of "last resort" (*Tonner* v *Reiach and Hall* (*supra*), Lord Abernethy, delivering the Opinion of the Court, at para [123]). This will be especially so when the court is asked to dismiss a case on grounds which do not feature in the averments or the pleas-in-law (see *Hepburn* v *Royal Alexandra Hospital* (*supra*), Lord Carloway at paras [56]-[57]). It requires particular care where, as here, the parties have not only already agreed, or the court has determined, that the cause is to be determined after a proof but that step of process has also already commenced. It must be in a very rare and exceptional case indeed that the court will bring a case to a sudden and permanent end, whilst one party is in the process of leading evidence to prove his or her averments.

[35] Even if it were appropriate to dismiss a case summarily because a pursuer had been "fundamentally dishonest" in relation to his action, a matter which in this jurisdiction will at least remain one dependent upon the particular facts and circumstances (cf Criminal Justice and Courts Act 2015, s 57; *London Organising Committee of the Olympic and Paralympic Games (in liquidation)* v *Sinfield* [2018] EWHC 51 (QB)), this pursuer has been found by the Lord Ordinary not to be fundamentally dishonest in relation to his claim. On the contrary, his contention, that he was involved in an accident of the nature which he described, was found to be accurate. It was supported by CCTV images, witnesses and an admission of liability. His claim to have been injured in this accident was also found to be a valid one, despite the defender's contrary position. The Lord Ordinary accepted the pursuer's evidence that he had sustained an injury with effects lasting for a year and which sounded in an award of £6,000 by way of *solatium*. That claim was supported by medical evidence, notably from Dr Forster, and Mr Dunston and even, to a degree, Dr Stone. The pursuer did not make a fundamentally dishonest claim. He made a good, if exaggerated, claim. Even that exaggeration has to be seen in the context of the Lord Ordinary's finding that the pursuer has continuing symptoms, albeit that they cannot, in the Lord Ordinary's view and preferring one body of medical evidence over another, be causally linked to the accident.

[36] It would have been quite inappropriate for the Lord Ordinary to have dismissed the pursuer's action summarily during, or at the end of, the proof. The purpose of the rules of procedure are to provide for the orderly progress of cases, some of which will involve disputed fact. The procedure laid down for the determination of fact is that the court will hear a proof at which testimony will be heard and properly assessed after due consideration, involving a comparison of the testimony of one witness with that of another. This process should not be interrupted except, as indicated above, in rare and exceptional cases involving

considerations far different to those involved here. It is particularly important that parties should not be allowed to invoke the court's inherent power in the manner which occurred here; with a motion intimated on the eve of a continued proof some months after the bulk of the material relied upon by the defender had become known. For all of these reasons, the reclaiming motion is refused.

Expenses

[37] Appeals on expenses "should not be entertained except where there has been an obvious miscarriage of justice" (*Lord Advocate* v *Mackie* 2016 SLT 118, LJC (Carloway) at para [11], following *Miller* v *Chivas Bros* 2015 SC 85, Lady Dorrian, delivering the Opinion of the Court, at para [23], citing *Caldwell* v *Dykes* (1906) 8 F 839, LP (Dunedin) at 840). Awards of expenses are discretionary and will only be reversed upon the conventional grounds applicable to the exercise of a discretion. The appellate court must take care not to substitute its own view, based on the limited, printed material in the process before it, in contrast to the first instance judge's complete knowledge and understanding of the whole proceedings before him or her.

[38] The Lord Ordinary's award in favour of the defenders is, at first sight, a surprising one. After all, the defenders had declined to lodge a tender (after withdrawal of an earlier one). In normal circumstances, the rules applicable to tenders ought to be applied, even where the award is small (if not *de minimis*). The rules on tenders ought not to be lightly departed from (see Lord Carloway in Macfadyen ed: *Court of Session Practice* (L/105) para [104]). Expenses ought normally to follow success, and the pursuer was successful in that he achieved an award in his favour.

[39] There are exceptions to the general rule. One is where the conduct of a party has been improper (eg dishonest) or unreasonable. This was the position in *Ramm* v *Lothian and Borders Fire Board* 1994 SC 226 (see LJC (Ross), delivering the Opinion of the Court, at 227 and following Maclaren: *Expenses* at 21). As in this case, the pursuer in *Ramm* had succeeded in obtaining an award of damages and there had been no tender. Yet the Lord Ordinary declined to award him expenses because much of the proof had been taken up exploring a ground upon which the pursuer had failed. The Lord Justice Clerk stated that the starting point ought to have been the fact that the pursuer had succeeded in obtaining a decree (for £688) and, in the absence of a tender, he "clearly had to vindicate his right to damages". In that case it was doubted whether the Lord Ordinary had done that, but, even then, that was not regarded as fatal to the award, as he had put forward a number of reasons for his decision. In this case, the Lord Ordinary noted the tender and its withdrawal. He regarded the presence or absence of a tender as "an important factor (often the decisive factor)" but correctly stated that it was not the only consideration. The conduct of the parties was also something to be taken into account.

[40] The Lord Ordinary appears to have had regard to all the relevant factors, and does not mention any irrelevant ones in adjusting the balance. He has explained, perhaps with greater force in his Opinion on expenses than that on the merits, the importance of what he politely describes generally as a "lack of candour", in relation to several aspects of the pursuer's testimony, notably (reverting to the earlier Opinion), but by no means exclusively, his driving after the accident and moving furniture. The Lord Ordinary's view was that, if the pursuer had been candid and forthright throughout, the proof (were there to have been one at all) would have been a short one. In all these circumstances, the court is unable to hold that there are any grounds upon which the Lord Ordinary's discretionary decision on

expenses could be successfully impugned. No miscarriage of justice has occurred. The cross appeal is accordingly refused.