SHERIFFDOM OF LOTHIAN AND BORDERS AT EDINBURGH

[2018] SC EDIN 41

EDI-PD35-18

NOTE BY SHERIFF KENNETH J McGOWAN

in the cause

GARY KEDDIE

Pursuer

Against

ABDALAZIM CLTIYBC

Defender

Pursuer: Moffat, Solicitor; Digby Brown
Defender: Kelly, Solicitor; Plexus Law

Edinburgh, 28 June 2018

Introduction

[1] This case came before me on the pursuer's motion for decree in terms of minutes of tender and acceptance. The motion for decree also sought certification as a skilled witness of Mr Matthew Moran, a consultant orthopaedic surgeon. That part of the motion was opposed on the ground that it had not been reasonable to instruct him.

Submissions for pursuer

[2] On 30 October 2017, the pursuer was involved in a road traffic accident. On 1 November, he consulted his GP. He was diagnosed as suffering from a whiplash injury. He was absent from work for a short time. On 9 November, a precognition was taken from him. At that stage he was suffering from neck and back pain.

[3] On 8 December a letter of instruction was sent to Mr Moran. The letter set out the pursuer's details in the heading and then continued in the following terms:

> "We act on behalf of the above named in connection with a claim for damages arising out of an accident which occurred on 29/10/2017 (*sic*). On that date our client was involved in a road accident.
>
> We should be obliged if you examine our client and provide a full and detailed report dealing with the injuries sustained, treatment received and present condition, dealing in particular with the capacity for work, if relevant and giving a prognosis. Please send our client an appointment direct for this purpose. Should you be able to offer a cancellation appointment, please contact us direct. We confirm we will be responsible for your reasonable fee.
>
> We are obtaining the GP and hospital records and will forward them to you when they are to hand. Please do not meet our client before 22 January 2018 to allow for receipt of the records in advance of the appointment.
>
> We look forward to receiving your report as soon as possible. If there is likely to be any unusual delay in providing the report, please telephone us upon receipt of these instructions.
>
> When acknowledging these instructions, it would assist if you could give an estimate as to the likely timescale for the provision of the report and also an indication as to your fee."

[4] On 26 January 2018, the pursuer was seen by Mr Moran and diagnosed with a soft tissue injury. On 2 February Mr Moran's report was received by the pursuer's solicitors. On 22 March, a writ was warranted. It was served on 30 March. On 30 April defences and a minute of tender were lodged in process. On 9 May a minute of acceptance and motion for decree were lodged.

[5] At the point when Mr Moran was instructed, the pursuer's symptoms were ongoing. Neither the pursuer nor his agents were medically qualified. It was necessary for his agents to gather appropriate medical evidence.

[6] The defender's position was that a GP report would suffice – but a GP was not an expert in any particular field. Pursuers' agents could be criticised if they had not obtained

medical evidence to prove the extent of injuries incurred. There required to be a proper assessment of the extent of a pursuer's injuries. If the matter proceeded to proof, Mr Moran would have had the appropriate qualifications and experience to give evidence about the nature and extent of the pursuer's injuries.

[7] A GP could give some evidence but the true extent of the pursuer's injury could only be determined from Mr Moran's report. Without his report, the prognosis would be unknown.

[8] The test was whether it was reasonable to instruct Mr Moran: paragraph 1(2)(b), Act of Sederunt (Fees of Witnesses and Shorthand Writers in the Sheriff Court) (as amended) SSI 1992/1878 ("the 1992 Act of Sederunt").

[9] It was appropriate that experts be instructed as early as possible: paragraph 15.17, *Sheriff Court Practice*, MacPhail (3rd edition).

[10] At the stage when Mr Moran was instructed, the pursuer's agents could not know the course which the case might take and whether or not it might settle prior to proof: *Allison* v *Orr*, 2004 SC 453, paragraph 38.

[11] In the present case, evidence from Mr Moran would have been the best evidence about the nature and extent of the pursuer's injuries: *Blackie* v *Woods* SC 132/11, Sheriff David Mackie, 17 August 2011, unreported. The defender's insurers might not have been prepared to accept the opinion of a GP. It would not be appropriate to obtain a report from the treating GP since there could be an allegation of a lack of independence if that GP had an existing doctor/patient relationship.

Defender's submissions

[12] Although no point was being taken about the action having been raised prematurely, the medical report was not disclosed before the action was raised.

[13] It was not clear what information was available to the pursuer's agents or to Mr Moran about the pursuer's condition at the time of the instruction of the medical report.

[14] Nevertheless, it was clear that the pursuer had already returned to work and contact sport.

[15] It was not being suggested by the defender that the pursuer's agents were restricted only to utilising the terms of the pursuer's medical records or even just commissioning a report from his treating GP. But a report by *a* GP would, on the face of it, have been adequate in this case given what was known and what was capable of being discovered about the pursuer's injuries.

[16] For example, when did the pursuer's medical records become available to his agents? That was relevant in the context of what the pursuer's agents knew.

[17] It was for the pursuer to show that it had been reasonable to instruct a consultant orthopaedic surgeon in the circumstances of the case: *Webster* v *MacLeod* PIC-PN1494-17, Sheriff Appeal Court, 31 May 2018.

Reply for pursuer

[18] It was not clear what it was being suggested the pursuer's agents should have done.

[19] It was accepted that they did know that the pursuer had been absent from work for only one week.

[20] The precognition disclosed that the pursuer was still suffering pain.

[21] At that stage, the prognosis could not be known and the pursuer's agents were entitled to investigate that.

[22] The letter of instruction followed the recommended style set out in the relevant pre-action protocol.

Grounds of decision

Webster

[23] The starting point now for any discussion of a motion of this type is the recent decision of the Sheriff Appeal Court.

[24] In my opinion, the following matters derived from that case are relevant here:

a. whether or not to certify is a matter of judgement, not discretion: paragraph [19];[1]

b. it is not possible or appropriate to provide an exhaustive list of factors which may be relevant to the determination of that question: paragraph [20];

c. the purpose of the rule is to provide some judicial superintendence of one aspect of the cost of litigation: paragraph [20];

d. it is the responsibility of the person seeking certification to provide adequate material to enable the sheriff to be satisfied as to skill and/or reasonableness, as the case may be: paragraph [20];

e. reasonableness falls to be determined objectively;

[1] For my own part, and with respect to the Sheriff Appeal Court, I am not sure that I understand the distinction that is being drawn. It is said that the question is a matter of judgement and not discretion; but that appeals concerning certification fall "… within the rules relating to expenses." But questions of expenses are matters of discretion, albeit a discretion which must be exercised judicially (taking account of relevant factors, discounting irrelevant factors *et cetera*).

f. it falls to be assessed at the time of instruction which in turn requires consideration of the state of affairs at the point of instruction;

g. implicit in the concept of reasonableness is proportionality between the decision to instruct a particular skilled person at that particular time and the matters in issue or likely to be in issue.

The present case

[25] It was common ground that reasonableness is to be determined at the date of instruction of the skilled person. But that in itself does not shed any light on whether it was reasonable to instruct a particular skilled person. It merely fixes the point in time at which reasonableness must be determined. In my opinion, what must then follow is an evaluation of the circumstances then prevailing.

[26] The circumstances which will be relevant will vary from case to case. As the SAC pointed out, it is impossible to come up with a comprehensive list which will cover all situations. To take an obvious example, the circumstances prevailing which would justify (in the sense of making reasonable) the instruction of *liability* expert will be different from those pertinent to the instruction of skilled witness to provide an opinion on matters relevant to *quantum*.

[27] As a matter of generality, it appears to me that relevant circumstances for the latter are likely to include (but not necessarily limited to) such matters such as:

a. what matters are in issue between the parties?

b. what is the apparent nature of the injury suffered?

c. how long has elapsed since the date of the accident?

d. what apparent level of recovery has been achieved?

e. does it seem does likely that there will be a full recovery?

f. does it seem likely that there will be *sequelae*?

g. if so, what, of what nature and duration?

h. has there been an absence from work?

i. if so, for how long?

[28] In my view, it is important to understand that information about these types of factors is merely the starting point. What must be shown is that it was "reasonable to employ" the skilled witness: Article 2(a), Schedule 1, 1992 Act of Sederunt. Thus, in my opinion, what is under scrutiny by the court is the *decision* to instruct a particular person about particular matters at a particular time, and decide whether, in the circumstances, it was reasonable.

[29] Thus, the court needs to understand not only what factors were taken into account by the instructing solicitor – which will involve a consideration of the information that was (or should reasonably have been) available at the time – but also *the basis on which he or she exercised his or her professional judgement as a lawyer* and reached the decision that the instruction was appropriate in the circumstances of the case.

[30] I now turn to consider the particular circumstances of this case.

[31] When precognosced, the pursuer had been diagnosed with a whiplash injury, had returned to work after a short absence and had ongoing neck and back pain. The precognition was not produced and I was given no information about the nature or intensity of the ongoing pain. Given the return to work, it does not seem likely that this was acute.

[32] I was told that the letter of instruction to Mr Moran followed a recommended style. In the context of a motion for certification, that is beside the point. The letter gives no clue as to the matters specific to the case in hand influencing the decision to instruct Mr Moran. Accordingly, it is of no value. If anything, the slavish use of a standard letter of instruction

points *away* from appropriate professional judgement having been exercised and tends to indicate a decision to employ taken by rote or in accordance with a 'policy'. In my view, that will not do: *Webster*, paragraph [14].

[33] I accept that neither the pursuer or his agents are medically qualified. But the point made is disingenuous. It is part of human experience to suffer injuries and to know how one feels. It was not suggested to me here that the pursuer, when precognosced, complained of severe pain or that he feared some long term *sequelae*. He had seen a doctor and returned to work. The pursuer's solicitor is a professional person with experience in personal injuries cases. In these circumstances, absent any suggestion of some complication arising, it appears to me that instruction of a consultant report at that stage was premature.

[34] I agree that there was a need to gather appropriate medical evidence: but the key word is "appropriate". It is not apparent that the pursuer's GP was not an appropriate source of evidence.

[35] While it may be true that GPs are not experts in any particular field, they do have qualifications, skills and experience which would bring them into the category of skilled witnesses as a matter of generality. Whether a higher level of expertise is required will again depend on the circumstances of each case. Nothing in the present case suggested to me that that was so at the point at which Mr Moran was instructed.

[36] It is true as a general proposition that a party's agents could be criticised if they had not obtained medical evidence to prove the extent of injuries incurred, but in my view a report from a GP would have been sufficient at the initial stage. Had that appeared to be insufficient in some way, there was plenty of time to resolve any evidential inadequacies, had they arisen.

[37] I agree that there required to be a proper assessment of the extent of a pursuer's injuries. But again the point is elliptical and simply brings us back to a consideration of the basis on which it is that the (or a) GP could not carry out that assessment, given the other circumstances of the case.

[38] I agree that if the matter had proceeded to proof, Mr Moran would have had the appropriate qualifications and experience to give evidence about the nature and extent of the pursuer's injuries. But the point is whether it was reasonable to instruct him, taking account of the relevant factors, including proportionality. Given the apparent nature of the injuries, I do not agree that only an orthopaedic surgeon could have determined their true extent, nor that without his report the prognosis would be unknown. It appears to me to be likely that at least some GPs would have sufficient knowledge and skill to offer the type of opinion given by Mr Moran in the circumstances of this case – especially if properly directed to the issues to be considered by an appropriately framed letter of instruction.

[39] Reliance was placed on MacPhail, paragraph 15.17, but that paragraph also says that "… an expert witness…should be selected with care having regard to the appositeness of their qualifications and experience…". The question of timing may be relevant also to the issue of reasonableness.

[40] The submission that, at the stage when Mr Moran was instructed, the pursuer's agents could not know the course which the case might take and whether or not it might settle prior to proof also appears to me to be disingenuous. When Mr Moran was instructed, no action had been raised: c.f. *Allison*. Taking that proposition to its logical conclusion, a pursuer's agent would be entitled to assume that every aspect of every case merited the instruction of a skilled witness from the very outset. That cannot be right, since one factor potentially bearing on reasonableness will be what matters are in issue.

[41] I question the suggestion that evidence from Mr Moran would have been the best evidence about the nature and extent of the pursuer's injuries. In my opinion – based on my experience – the evidence of a treating GP who has contemporaneous contact with an injured person may carry greater weight than evidence of a witness of apparently greater 'skill' who has provided a report based on an examination some months later.

[42] I accept that it was necessary to ascertain whether the continuing symptoms related to the accident and if so when, if at all, they were likely to resolve. But as already noted, the pursuer does not appear to have been presenting as somebody who had suffered a serious injury. In other words, what was the rush to instruct a medical report at all at that stage? In any event, who is to say that a GP would not have sufficient knowledge and expertise to offer an opinion on causation and ongoing symptoms? The answers to these questions were not apparent.

[43] As a general proposition, I agree that pursuers' agents must proceed on the basis that certain matters required to be proved. But the question of proof arises when a matter of fact is challenged. Who is to say that a GP report would not have been accepted by the insurers?

[44] It is true that if a GP report was obtained, insurers may reject such evidence as being inadequate. But, as was accepted by the defender, if that were to happen, the insurers would be in a very difficult position in seeking to argue against the certification of a person as a skilled witness who had been instructed to provide a more "heavyweight" report in face of a rejection of a GP report.

[45] Insofar as Mr Moran offered his opinion as well as speaking to fact, it is not apparent that a GP opinion would not have sufficed.

Conclusion and disposal

[46] I did not find that factors relied on by the pursuer were persuasive, either individually or collectively. At the point of instruction, this had the appearance of a straightforward low value claim.

[47] Had the pursuer's ongoing symptoms or a GP report suggested that things were not so straightforward, a more specialised person could have been instructed.

[48] Furthermore, there was no clear information before me as to the basis on which the decision to instruct Mr Moran had been taken. For example, as alluded to in *Webster,* there was no specific file note recording why that particular practitioner was chosen. The letter of instruction shed no light on this issue.

[49] I do not say that there must be a file note (though that might be useful). But what must be demonstrated in some meaningful way is an answer to the question: what was in the mind of the instructing solicitor at the point when the skilled witness was instructed?

[50] In this case, at the point of instruction, the pursuer's agent knew that the pursuer had consulted his GP, had been diagnosed as suffering from a whiplash injury, had been absent from work for a short time and was suffering from neck and back pain.

[51] As a matter of generality, whiplash injuries tend to be at the lower end of the scale of seriousness. No information was provided as to the apparent intensity or seriousness of the pain, but the pursuer had returned to work. The accident was recent. His injury, on the face of it, was not serious. I accept that when Mr Moran was instructed, the pursuer's symptoms were ongoing. But in my view, that is an over simplistic approach. If, to all appearances, somebody is likely to make a recovery from a minor injury, the need for a report from a skilled witness with a higher level of expertise may never arise at all. One cannot get round that by instructing prematurely.

[52] In the circumstances, I have concluded that the instruction of Mr Moran was both disproportionate and premature and it was not reasonable. I refuse that part of the motion seeking his certification.