SHERIFFDOM OF LOTHIAN AND BORDERS AT EDINBURGH

IN THE ALL SCOTLAND SHERIFF COURT

[2017] SC EDIN 74

PN439-17

NOTE BY SHERIFF KATHRINE E C MACKIE

In the cause

AB

Pursuer

Against

CD

Defender

Act: Oliver, Hann & Co Ltd, Solicitors, Annan
Alt: Harrison, Flexlaw, Solicitors, Edinburgh

Edinburgh, 02 November 2017

The Sheriff, having resumed consideration of the pursuer's opposed motion number 7/7 of process, grants same, finds that the pursuer sustained loss injury and damage as a result of being assaulted by the defender; finds that the pursuer is entitled to reparation therefor and decerns; reserves all questions of expenses meantime; assigns 5 December 2017 at 10 am within the Sheriff Court House 27 Chambers Street Edinburgh as a hearing thereon, on the opposed motions numbers 7/5 and 7/6, on the application under the Vulnerable Witnesses (Scotland) Act 2004, and to determine further procedure.

NOTE

Introduction

[1] In this action for damages for personal injuries proceeding under Chapter 36 of the Ordinary Cause Rules (OCR) the pursuer enrolled a motion, number 7/7 of process, in the following terms:-"In respect that the defender does not disclose a defence with a real prospect of success in the defences as adjusted to grant summary decree against the defender quoad the defender assaulting the pursuer and being liable to make full reparation therefor with the proof/jury trial restricted to quantum and to find the defender liable to the pursuer in the expenses of the cause to date."

[2] The motion was opposed and, together with two other opposed motions, numbers 7/5 and 7/6 of process and an application under the Vulnerable Witnesses (Scotland) Act 2004, called before me for hearing on 9 October 2017.

[3] The Timetable, as varied by interlocutor dated 23 August 2017, provided that adjustment of pleadings was to be completed by 21 September 2017 and a Record was to be lodged by 5 October 2017. The pursuer's motion was lodged on 20 September 2017 and no Record was lodged in process. Parties were agreed that for the purposes of the hearing the pleadings to be considered were the Initial Writ as adjusted up to 6 September 2017 and defences as adjusted up to 26 September 2017.

[4] The relevant legislative provisions are as follows:-

OCR **17.2.**

(1) Subject to paragraphs (2) to (4), a party to an action may, at any time after defences have been lodged, apply by motion for summary decree in accordance with rule 15.1(1)(b) (lodging of motions) or rule 15A.7 (lodging unopposed motions by email) or rule 15A.8 (lodging opposed motions by email) as the case may be.

(2) An application may only be made on the grounds that—

(a) an opposing party's case (or any part of it) has no real prospect of success; and

(b) there exists no other compelling reason why summary decree should not be granted at that stage.

(3) The party enrolling the motion may request the sheriff—

(a) to grant decree in terms of all or any of the craves of the initial writ or counterclaim;

(b) to dismiss a cause or to absolve any party from any crave directed against him or her;

(c) to pronounce an interlocutor sustaining or repelling any plea-in-law; or

(d) to dispose of the whole or part of the subject-matter of the cause.

(4) The sheriff may—

(a) grant the motion in whole or in part, if satisfied that the conditions in subparagraph (2) are met,

(b) ordain any party, or a partner, director, officer or office-bearer of any party—

(i) to produce any relevant document or article; or

(ii) to lodge an affidavit in support of any assertion of fact made in the pleadings or at the hearing of the motion.

(5) Notwithstanding the refusal of all or part of a motion for summary decree, a subsequent motion may be made where there has been a change in circumstances.

And

Section 10(2) of the Law Reform (Miscellaneous Provisions) Scotland Act 1968 provides:

"In any civil proceedings in which by virtue of this section a person is proved to have been convicted of an offence by or before any court in the United Kingdom or of a service offence—

(a) he shall be taken to have committed that offence unless the contrary is proved, and

(b) without prejudice to the reception of any other admissible evidence for the purposes of identifying the facts which constituted that offence, the contents of any document which is admissible as evidence of the conviction, and the contents of the complaint, information, indictment or charge-sheet on which the person in question was convicted, shall be admissible in evidence for that purpose."

Pursuer's Submissions

[5] Mr Oliver referred to Statement of Claim 4 in which the pursuer's averments of fact were to be found. The pursuer avers that on 26 March 2016 within [……] the defender assaulted her. The manner of the assault is described. The pursuer sustained injuries. The

defender was convicted of assaulting the pursuer at D... Sheriff Court on 10 February 2017. Mr Oliver also referred to a number of productions in relation to the conviction of the defender. An extract of the conviction is produced, number 5/4 of process. A certified copy of the Complaint is produced, number 5/6 of process, which discloses that the defender was charged with two offences, a contravention of section 38(1) of the Criminal Justice and Licensing (Scotland) Act 2010 and an assault to injury. Number 5/7 of process is a letter dated 10 February 2017 from the Senior Procurator Fiscal Depute, D…, to the pursuer's agents. The terms of that letter comprise a report of the outcome of the trial of the defender. From its terms it appears that (1)the defender did not give evidence in his defence; (2)he was acquitted of the contravention of section 38(1), (3)in mitigation he relied upon provocation and his remorse and offered to pay compensation to the pursuer. The Sheriff imposed a financial penalty of £1,600 but declined to award compensation, apparently indicating that that could be dealt with in another way. It is not clear whether the Sheriff had in mind the present action or a claim to the Criminal Injuries Compensation Board.

[6] Mr Oliver highlighted that it is admitted by the defender that he was convicted of assaulting the pursuer. Accordingly in terms of section 10 of the Law Reform (Miscellaneous Provisions) (Scotland) Act 1968 the defender is presumed to have committed the offence "unless the contrary is proved". The burden shifts to the defender to establish that he did not commit the offence of which he has been convicted.

[7] The defender was offering to prove that he had been assaulted by the pursuer and had acted in self-defence. Mr Oliver submitted that the defender required to produce a strong body of evidence to establish that a crime had been committed by the pursuer. He submitted that the defender's plea in mitigation as outlined by the Procurator Fiscal Depute was inconsistent with the defence of self-defence, that the evidence produced was

inconsistent with the defences, that what the defender offered to prove even if established did not amount to a defence of self-defence, that the so called new evidence was irrelevant to the issue and that there were no prospects of success and no compelling reason not to grant summary decree.

[8] In considering the approach and principles to be applied in a motion for summary decree Mr Oliver referred to para 14.78 of *Macphail on Sheriff Court Practice* and para 7 of *Moir* v *Memsie* 2017 Rep L R 78.

[9] He also referred to *Frimokar (UK) Ltd* v *Mobile Technical Plant (International) Ltd* 1990 SLT 180 at page 4 where Lord Caplan emphasised that "A hearing in a summary decree motion is more far reaching [than a debate on the relevancy of pleadings] because the rules of court specifically admit material extraneous to the pleadings such as affidavits or productions. Thus the court is concerned not only to test the relevancy of the defence but the authenticity of the defence." He also said that the question of the defence was to be tested at the time of the hearing of the motion.

[10] With regard to the authenticity of the defence Mr Oliver submitted that it was understood that the defender had lodged a special defence of self-defence in the criminal proceedings which had not been established. Had he been found to have acted in self-defence he would not have been convicted of assaulting the pursuer. It was also understood that the defender made to the police a counter allegation against the pursuer. In the present action he would require to establish the essentials of a defence of self-defence. That defence was inconsistent with his plea in mitigation. The letter from the Procurator Fiscal Depute is silent about any special defence. If the defender did not offer such a defence at trial that was a significant factor to be taken into account in considering the authenticity of his defences.

[11] Mr Oliver referred to *Sloan* v *Triplett* 1985 SLT 294 and *Mullan* v *Anderson* 1993 SLT 835. In the former case Lord Allanbridge observed that "where a crime is alleged in a civil case in Scotland the standard of proof required is one based on probability but the more serious the allegation the higher the degree of probability that is required.". The latter case was a decision of five judges. In his opinion Lord Morrison said "My view that any civil case including this one must be determined on a balance of probabilities does not ignore the obvious fact that it is more difficult to prove according to the required standard an allegation of murder or serious crime because it is inherently unlikely that a normal person will commit such a crime." Thus it was submitted there was a heavy burden on the defender to establish that the pursuer assaulted him.

[12] The affidavit tendered on behalf of the defender amounted to a character assassination of the pursuer. His averment that the pursuer is an alcoholic and drinks heavily was scandalous and should be removed. His production 6/6 did not in fact show what he suggested it did. The averments and productions were irrelevant to the issue before the court. The police had carried out a thorough examination of the locus. Book 1 of number 6/5 of process comprised photographs taken by scene of crime officers. The photographs show the room where the assault took place. In photograph 15 one can of beer is seen upright next to a television. There is no evidence of cans of beer having been thrown around as averred by the defender. The defender has not addressed the absence of the cans of beer in the photographs. The photographs taken contemporaneously are inconsistent with the defender's averments.

[13] At his trial the defender was represented by a competent solicitor. Only the pursuer and the defender could speak to the incident. Mr Oliver submitted that an adverse inference might be drawn from the fact that the defender did not give evidence at trial. That the

defender was injured at the time of the incident was not disputed whether or not photographs of those injuries were available at trial. The pursuer had from the outset stated that his injuries were self-inflicted when the defender hit himself with a bedside lamp. He referred to photographs numbers 10, 11 and 18. He also referred to numbers 5/9 and 5/10 of process being statements taken by police from a witness and the pursuer in which the pursuer is said to have stated at the time of the incident that the defender's injuries were self-inflicted. Medical evidence was available to confirm the injuries sustained by the pursuer were consistent with her version of the incident. This has not yet been disclosed because of the issue of confidentiality to be addressed in the opposed motion number 7/5 of process.

[14] It was further submitted that in any event even if the defender established all that he offered to prove it could not amount to self-defence unless he could establish that he was unable to escape.

[15] Mr Oliver also referred to the statement submitted by the defender in support of his application for legal aid number 5/11 of process. In that statement the defender claimed to be "essentially bankrupt". It was for the defender to show that there was a compelling reason why summary decree should not be granted. There was at best a question whether the defender would be able to continue with his defence.

Defender's Submissions

[16] Mr Harrison for the defender accepted that the legal principles and approach to motions for summary decree were as set out in para 7 of the decision in *Moir*, wherein the decision of Sheriff Principal Scott in *Maclay Murray & Spens* v *Orr* [2014] GWD 18.330, approved on appeal at [2014] CSIH 107 was adopted. The court required to make a

qualitative assessment of the case, scrutinise the pleadings and determine whether there were realistic prospects of success. Mr Harrison accepted by reference to *Hunter* v *Chief Constable of the West Midlands Police & Ors* [1982] AC 529 that the defender faced an uphill struggle.

[17] He relied upon the fresh evidence on behalf of the defender, evidence which he said was fresh because it was not before the criminal court at trial. When he recovered the defender's criminal solicitor's file he had been surprised that photographs of the defender's injuries were not in the file. He also relied upon the language used in the records of the pursuer's attendance at [……] Royal Infirmary on 26 March 2016. At page 10 of number 6/2 of process it is noted under Triage Information that the pursuer "claimed" assault by partner and under Additional Information that the pursuer "claims" to be assaulted by partner. It is also noted there that "says was strangled, no bruising". It was submitted that this implied that the person noting the information was sceptical about the pursuer's account and undermined the pursuer's credibility. It was accepted by Mr Harrison that the DVD of images number 6/6 of process were intended to attack the pursuer's character, demonstrate that she was a heavy drinker and challenge her credibility.

[18] Mr Harrison submitted that the present case could be distinguished from that of *Moir*. In the present case there was not the complication of a third party. There had been no plea of guilty tendered. The defender did not give evidence at trial and continued to maintain his innocence of the charge. He had enquired about lodging an appeal but was unable to do so due to the expense. Mr Harrison was unable to say whether a special defence of self-defence had been intimated in the criminal proceedings. He believed that the defender did not give evidence at trial having been advised that if he did so he may fill any gaps in the Crown case while under cross-examination.

[19] Mr Harrison advised that the defender was vulnerable and it was difficult to obtain instructions from him. These proceedings were causing significant distress. He submitted that the defender's affidavit was a competent and important adminicle of evidence to be considered. It provided the court with the evidence which the defender would propose to give at any proof.

[20] With regard to the plea in mitigation submitted on behalf of the defender following trial Mr Harrison suggested that someone could be remorseful because someone else had sustained injury without accepting that the injury was caused by his actings. The defender did not accept that he had caused the pursuer's injuries. By saying that he acted in self-defence he was using the term as a lay person would and not in a legal sense.

Discussion

[21] It was common ground that the approach to be adopted in considering a motion under OCR 17.2 was as outlined by Sheriff Principal Scott in *Maclay Murray & Spens* and adopted in *Moir*. This involves a qualitative assessment of the case and a scrutiny of the pleadings and any other materials. From the Sheriff Principal's decision it is also clear that a disputed issue of fact does not mean that the case requires to be determined by proof. Whether there are realistic prospects of success involves an exercise of judgement following an analysis of all the material.

[22] As in the case of *Moir*, the facts in the criminal case and the present are essentially identical. The pursuer's case is that on 26 March 2016 within a room in the […..] she was assaulted by the defender. She avers that the defender jumped on her while she lay on the bed, strangled her around her neck, and bit her on her nose to her injury. On 10 February 2017 the defender was convicted, after trial, of assaulting the pursuer by seizing her by the

body, pushing and holding her down and biting her on the head and finger to her injury. Mr Oliver suggested that he may consider amending to introduce the injury to the pursuer's finger to bring the pursuer's pleadings into line with the terms of the conviction. However, it is averred, at present, in Statement of Claim 5 that the pursuer suffered injuries to her face and thumb, which is supported in the medical records from […..] Royal Infirmary number 6/2 of process.

[23] The defender admits that he was convicted of assaulting the pursuer. Contrary to the position in *Moir* the defender did not plead guilty. He adhered to pleas of not guilty to the two charges he faced and after trial was found guilty of assault to injury. It appears from the letter from the Procurator Fiscal Depute that it was found that there was no case to answer the charge of contravening section 38(1) of the Criminal Justice and Licensing (Scotland) Act 2010.

[24] The standard of proof in the criminal trial was beyond reasonable doubt whereas in the present action the standard of proof is on balance of probabilities. However, the defender in the criminal trial did not require to establish a special defence of self-defence to the higher standard. An accused, of course, does not require to prove anything and, as appears to have happened in the trial of the defender, can simply leave it to the Crown to prove to the required standard the charges if they can. A special defence gives notice to the Crown that an accused may lead evidence in support of that defence but he does not require to do so. It is for the Crown to meet the defence and prove the charge beyond reasonable doubt. It is at best uncertain if the defender intimated a special defence of self-defence but even if he did do so it is clear that the Crown proved beyond reasonable doubt that he assaulted the pursuer in the manner libelled.

[25] The matter does not end there. In terms of section 10(2)(a) of the 1968 Act the defender is presumed to have committed the offence of which he was convicted "unless the contrary is proved". Accordingly the defender has the opportunity to prove that he did not commit the offence which is the subject of the conviction. It was accepted on behalf of the defender, in my opinion correctly, that this presented him with an uphill struggle. While the standard of proof remains on balance of probabilities, as Lord Morrison said in *Mullan*, it is more difficult to prove an allegation of a serious crime and, as Lord Allanbridge said in *Sloan*, the more serious the allegation the higher the degree of probability that is required.

[26] In his defences there are a number of averments about the amount of drink consumed by the parties and in particular the pursuer both prior to and on the day of the incident. It is averred that the defender bought the pursuer a quantity of cider. It is averred that the pursuer is an alcoholic. It was accepted that these averments and the images in production number 6/6 of process were intended to attack the pursuer's character. Thus they are not directly relevant and do not assist in proving that the defender did not assault the pursuer on 26 March 2016. Even if on occasions the pursuer drank to excess that does not prove that she committed an assault.

[27] The relevant averments anent the alleged assault by the pursuer are as follows:- "She left the toilet and picked up cans of beer from within the bedroom and threw two cans at the defender, one of which struck him to his injury. She then picked up a third can and struck the defender with it to his face injuring his left eye and cutting the skin to his nose and forehead. Her blows also caused bruising to the defender's upper lip. In addition she scratched the defender's arm……..The defender reacted in self-defence by taking hold of the pursuer by her wrists to prevent further assault upon him. The parties struggled and fell to

the floor with the pursuer landing on top of the defender. Her head accidentally clashed with his during the fall."

[28] There are no averments about how cans of beer came to be within the room or from where in the room the pursuer is said to have picked them up. The only alcohol which is averred to have been purchased is a crate of 24 cans of Strongbow cider of which it is averred that the pursuer consumed 6 before the parties left to go out for a meal. On their return it is averred that the pursuer consumed a further can. This would suggest that there ought to be within the room 17 cans of cider. Book 1 of number 6/5 of process comprises photographs of the room which are not disputed to have been taken by scene of crime officers following the incident on 26 March 2016. Photographs 1 to 21 appear to show views of the outside of the door to room 124 and within the room and toilet. The views inside the room, when taken together, appear to comprise a 180 degree scan of the room. There are a number of inferences that might be drawn from the photographs. Firstly, there is no evidence of any cans of cider within the room or toilet. Secondly, there is no evidence of any cans of beer having been thrown around the room. Thirdly, there is evidence of one can of what appears to be beer standing undisturbed beside the television on top of a chest of drawers. In my opinion, the photographs suggest a comprehensive examination of the room was conducted. There is no suggestion that the room was cleaned or cleared in any way after the incident and before the photographs were taken. If the incident occurred in the manner averred by the defender one would expect to see in the photographs 17 cans of cider sitting somewhere and three cans of beer which had been thrown around. There is no averment stating where the parties were when the defender says he took hold of the pursuer's wrists, where the struggle took place or where the parties are said to have fallen to the ground. Other than around the location of the bedside lamp, to which I will return, the

photographs show no sign of disturbance on the floor of the room. Indeed photograph 3 appears to show a relatively neat pile of clothes and shoes at the foot of the bed outside the toilet and photograph 16 shows another relatively neat pile of clothes and shoes in front of the chest of drawers. The absence in the photographs of evidence of cans thrown around or any disturbance, subject to the exception mentioned above, as a result of a struggle and a fall to the floor casts doubt upon the authenticity of the defence.

[29] The defender does not specifically address in his defences the injuries to the pursuer he was found at trial to have caused in his assault upon her, namely to her head and finger, or offer to prove how these were sustained. All that is averred is that the pursuer's head accidentally "clashed" with his during a fall to the floor. The defender has recovered and lodged in process, number 6/2, copies of the records of [….] Royal Infirmary relating to the pursuer. The handwritten clinical notes are virtually illegible however a typed letter summarizing the pursuer's condition was sent to her GP from the Emergency Department on the same date as the pursuer's admission and examination. From this it appears that the pursuer was found to have suffered two superficial lacerations to her right thumb and two superficial lacerations and bruising to the tip of her nose. The letter omits the clinical finding of swelling to the tip of the pursuer's nose which appears in the handwritten notes. Mr Harrison sought to draw from the use of the words "claims" and "claimed" an inference that the author was sceptical about the pursuer's account of how the injuries were sustained. The author of the entries, of course, is not in a position to verify the pursuer's version of events not having been a witness to the incident. Therefore the use of those words may be seen as an accurate account of what the pursuer said at the time. There is nothing in the entries to suggest that the author found the injuries inconsistent with the pursuer's account. Mr Harrison also sought to draw support for his criticism of the pursuer's credibility from

the absence of bruising to the pursuer's neck despite her claim to have been strangled. The handwritten notes actually record "no noticeable bruising around neck". It may be a matter for proof as to the time which bruising takes to show, if at all, depending on the force applied. However the injuries which were noted to the pursuer's nose and thumb would not seem to be such as would be caused by a "clashing" of heads and are not explained in any other way by the defender. The existence of these injuries without explanation also casts doubt upon the authenticity of the defence. It is also significant, in my opinion, that the examination of the pursuer shortly after the incident disclosed neither complaint nor evidence of injury to the pursuer's wrists, which one might have expected if the pursuer had been held by the wrists in the course of a struggle with the defender.

[30] Mr Harrison relies heavily upon what he described as fresh evidence being the photographs of the defender's injuries. These photographs form Book 2 of number 6/5 of process. They were taken by police at the time of the incident. It is averred, albeit in parenthesis, that the photographs were not produced by the Crown prior to or during the defender's trial and were not made available to the defender's defence agent despite requests. Despite Mr Harrison stating that he has recovered the defence agent's file no documentation has been produced supporting the assertion that requests were made for disclosure of the photographs. If such requests were made it must follow that the defender and his then agent were aware during the criminal proceedings of the existence of these photographs. The photographs clearly existed, as is evident from their production now, and one would have expected them to be disclosed by the Crown. If they were considered to be of significance, it being averred that had they been available during the trial they could have affected the Sheriff's verdict, it is at best surprising that the defender's then agent did not seek an order from the court for their production and if appropriate a postponement of trial

until they were available. There is no criticism of the defender's then agent's conduct of the criminal proceedings. Of course the best evidence of the injuries suffered by the defender would have come from him. That the defender did not give evidence at trial is, in my opinion, a significant factor in conducting a qualitative assessment of the defender's case. He was within his rights to choose not to give evidence on his own behalf. However, there were only two people involved in the incident, the pursuer and the defender. There were no independent eye witnesses. Had he chosen to do so the defender could have given his version of the incident and, whether the photographs were available or not, spoken to the injuries he says he sustained in an assault upon him by the pursuer. The photographs merely illustrate those injuries and do not speak for themselves. In order for them to have had any evidential value before the Sheriff the defender would have required to speak to them in evidence, which he chose not to do. The photographs, in my opinion, do not advance matters for the defender. He has known, and indeed claimed in a counter-allegation, from the outset about these injuries but chose not to lead that evidence, with or without the assistance of the photographs, before the Sheriff in his trial. Even if the photographs were not available at trial for whatever reason the evidence of injuries sustained by the defender was available. For these reasons the photographs do not appear to me to amount to "fresh" evidence.

[31] That the defender sustained injuries at the time of the incident is not disputed. Mr Oliver produced and referred to statements by the pursuer and GJ, a hotel porter, taken by police at the time of the incident. In each there is a reference to the pursuer's claim at the time that injuries to the defender were caused by him hitting himself in the face with a bedside lamp. In photographs 10, 11, 17 and 18 of Book 1 of number 6/5 of process a broken lamp can be seen lying on the bed. It is on the opposite side of the bed from the toilet from

which the pursuer is said to have emerged before throwing cans of beer at the defender. There is no explanation in the defences as to how the lamp came to be broken and to be lying on the bed in the position in which it appears in the photographs. Indeed, in the defender's account of the incident in his defences there is no reference to a bedside lamp at all. The absence of any averments to address and seek to explain the broken lamp also cast doubt upon the authenticity of the defence. It appears significant that in photograph 11 part of the broken lamp can be seen on the floor at the side of a chair which is at the side of the bedside table some distance from the lamp lying on the bed. Had the lamp simply been knocked off the bedside table in the course of a struggle one might expect the parts and the lamp to be lying together.

[32] As indicated in *Frimokar* the assessment of the defence is made at the time of the hearing of the motion for summary decree. Indeed in this case the pursuer indulged the defender by agreeing that adjustments to his defences made after the end of the adjustment period be considered. It is presumed that at this stage the defender has made all factual averments that he is able to from which he offers to prove that he did not assault the pursuer and that he acted in self-defence when assaulted by her.

[33] In my opinion, the defender's averments about the manner of the pursuer's assault upon him are not borne out by the other adminicles of evidence as they have been considered above. Unless the defender can prove, on balance of probabilities, that he was assaulted by the pursuer his averments about acting in self-defence are irrelevant. I would observe that it was not clear what Mr Harrison meant by referring to self-defence in layman's terms. The law in relation to self-defence is clear. A person who is attacked or in reasonable fear of attack is entitled to use such force as is needed to ward off that attack. While allowance needs to be made for fear and the heat of the moment there are three

circumstances which must exist, namely, there must be an attack or reasonable fear of one, violence should be a last resort and if there are other means of escape they should be taken and any violence used must not be excessive. Mr Oliver's criticism of the defences, in relation to the absence of any averments which address means of escape and why the defender did not escape rather than engage in a physical struggle with the pursuer, is in my opinion a sound one. If the defender seeks to prove that he was being assaulted by the pursuer, and that he met that assault by acting in self-defence and that that was how the pursuer came by her injuries, he must show that the elements of self-defence exist, which would, on balance of probabilities, lead to a finding that the defender had not committed an assault. If he did not act in self-defence any violence perpetrated upon the pursuer would be an assault. Mr Harrison's submission appeared to me to be misconceived.

[34] With regard to the inconsistency in the defender's plea in mitigation it is true that reference to provocation is different from self-defence and if someone acted under provocation it would not lead to an acquittal. However having been convicted of assault it would not have been appropriate to make any submission about self-defence in mitigation. Expressions of remorse can be open to interpretation and it may not always be clear whether any remorse is for the victim of a crime or for the accused in finding himself convicted of an offence. However the offer of compensation seems inconsistent with protestations of innocence.

[35] In support of his opposition to the motion Mr Harrison also produced what purports to be an affidavit of the defender. The formalities of an affidavit appear to be missing from the document produced quite apart from the fact that the document produced appears to be a copy and not a principal document, although I understand that sometime after the hearing of the motion a principal document was tendered. The person before whom the defender

appears to have been compeared is not fully designed nor is there any statement or docquet to indicate that that person is authorised to administer oaths or affirmations. It is not declared in the opening paragraph whether the defender was sworn or affirmed. In these circumstances the document appears to be no more than a statement by the defender and does not have the character of evidence which he would give in court having taken the oath or affirmed to tell the truth.

[36] Initially I had reservations about the competency of lodging an affidavit, even assuming it had the necessary characteristics and formalities to be treated as such, which was intended to amount to the evidence which the defender would give in court at any proof, notwithstanding that Mr Oliver was content to refer to parts of it. Having reviewed the authorities I accept that it is competent in a hearing of a motion for summary decree for affidavits to be lodged and relied upon. OCR 17.2(4) allows the sheriff to ordain a party or others to lodge an affidavit in support of any assertion of fact in the pleadings or made at a hearing of the motion. In paragraph 14.78 of Macphail reference is made to the court considering matters of evidence such as an affidavit. Affidavits appear to have been produced in *Maclay Murray & Spens* and referred to in other cases. My reservations, which were based upon a view that it was inappropriate to try to include evidence to be led at proof at a hearing of a motion designed to show that proof was unnecessary, would appear to be unfounded.

[37] If this document falls to be considered as evidence which the defender would give in court at any proof it is necessary, in my opinion, to consider its terms carefully. Up to the final paragraph on page 2 of the affidavit the defender speaks of matters unrelated to the issue in this case. He makes a number of assertions about the pursuer's drinking habits and behaviour. Despite making a number of statements about the pursuer drinking heavily and

regularly he does not describe her as an alcoholic, that is someone with a dependency on alcohol, or give any basis for such a description. There is an inconsistency between what is contained in the statement and the defender's averments in relation to the alcohol which the defender claims to have purchased for the pursuer. In his defences the defender avers that he purchased 24 cans of Strongbow cider however in his statement he says that he purchased 24 cans of Stella for her. Nonetheless the defender says the pursuer drank cider. There is also an inconsistency between the defender's averments and his statement in that in the latter he says he fell backwards and hit the bedside cabinet but there is no such averment in his defences. In his statement the defender does not address the issues of the absence of any sign of alcohol in the room apart from one can of beer, the absence of any cans of beer which have been thrown around the room or the circumstances in which the lamp came to be broken and found lying on the bed. The statement by the defender is the only source of evidence informing the defence of self-defence. At this stage of the proceedings it would be expected to be the totality of the defender's evidence to be led at proof and yet there are these issues which have not been addressed. For the reasons already discussed the photographs and medical records do not assist the defender in establishing that he was assaulted by the pursuer. The evidence to be led by the defender as outlined in his statement does not answer the many questions raised.

[38] Nothing arises from the defender's statement in support of his application for legal aid that has not been addressed above.

Decision

[39] Following an assessment of the pleadings and all other materials, in my opinion, for the foregoing reasons the defender has failed to aver facts or produce evidence which would be more likely than not to establish that he had been assaulted by the pursuer and that he acted in self-defence, particularly given the high balance of probabilities that he requires to achieve. In these circumstances I am satisfied that the defence stated by him has no realistic prospect of success. No compelling reason why summary decree should not be granted has been shown. Accordingly I will grant the pursuer's motion.

[40] I was not addressed on the question of expenses as craved in the pursuer's motion and a hearing will be necessary to do so and for the purpose of consideration of the remaining opposed motions and the application for special measures.