SHERIFF APPEAL COURT

[2018] SAC (Civ) 28
GLW-SF767-16
GLW-SF775-16
GLW-SF802-16

Sheriff Principal C D Turnbull

OPINION OF THE COURT

delivered by SHERIFF PRINCIPAL C D TURNBULL

in the appeal in the causes

SAMANTHA ARMSTRONG & OTHERS

Pursuers & Respondents

against

ERS SYNDICATE MANAGEMENT LTD t/a EQUITY RED STAR

Defender & Appellant

Pursuers & Respondents: Swanney; Lindsays
Defender & Appellant: Manson; DWF LLP

28 August 2018

Introduction

[1] At first blush, there is no obvious connection between a ship running aground on the shoals off Sherbro Island, Sierra Leone, in the course of a voyage from Kiel to Abidjan, and a minor collision involving the car in which the respondents in this appeal were then travelling at a roundabout on Great Western Road, Glasgow whilst they were on their way to an amateur football match. On closer examination, however, one of the principles enunciated by Cresswell J in the proceedings arising from the former, to which I return

below at paragraph [6], is brought into sharp focus by the facts found by the sheriff in the proceedings arising from the latter.

[2] On 21 September 2014, the respondents were each passengers in a motor vehicle travelling on its way to an amateur football match. As the vehicle was moving away from traffic lights at a roundabout on Great Western Road, Glasgow, it was struck from the right by a vehicle driven by the appellant's insured. Proceedings were commenced against the appellant by each of the respondents. It was conceded by the appellant that the accident had been caused by the fault and negligence of their insured, however, the appellant contested whether any of the respondents had suffered any injury as a result of the accident.

[3] The actions were conjoined for the purposes of proof. A notable feature of the proof was the evidence of a skilled witness, Dr AB, who gave evidence on behalf of the respondents. Before Dr AB gave evidence, counsel for the appellant objected to its admissibility. As he was required to do in terms of summary cause rule 8.15, the sheriff noted the terms of the objection and allowed the evidence to be led, reserving the question of its admissibility to be decided by him at the close of the proof. At the close of the proof, having heard submissions on the issue, the sheriff concluded that Dr AB's testimony was admissible and repelled the appellant's objection. The sheriff found in favour of each respondent and made awards of damages.

Issues in the Appeal

[4] Four questions are stated for the opinion of this court. They are in the following terms:

> 1. Did I err in law in repelling the (appellant's) objection to the admissibility of the evidence of Dr AB?

2. Did I err in giving weight to and relying upon the evidence of Dr AB in making findings in fact?

3. Did I err in holding the injuries at issue in this case were of a type which could give rise to an inference of a causal connection which ordinary people of no medical qualifications or experience could determine as a matter of ordinary experience?

4. Did I err in taking account of the consideration that the defender might have adduced a skilled witness of his own in order to challenge the approach of the (respondents') skilled witness?

Question 1

[5] The objection taken before Dr AB gave evidence fell into two parts. First, on the basis that Dr AB's independence and impartiality were questionable. Second, that no weight should be attached to his evidence since his reports demonstrated no attempt to analyse or discuss medical concepts or their application to the materials before him. In relation to the former, the terms of finding in fact 29 are of significance. That finding is in the following terms:

> "[Dr AB] acted on a contingency basis with regard to the recovery of his fees in respect of the preparation of the medical reports relied on by the (respondents). He would not seek payment of fees for the three reports he prepared for the (respondents) in the event that the (respondents) were unsuccessful in their actions."

[6] The seminal case on the duties and responsibilities of expert or, more properly in Scotland, skilled witnesses is that of *National Justice Compania Naviera SA* v *Prudential Assurance Co Ltd (No 1)* [1993] 2 Lloyd's Rep 68. As is commonplace in the English courts in maritime cases, the case is more commonly referred to by the name of the vessel in question, *The Ikarian Reefer*. As a result of what he perceived to be a misunderstanding on the part of certain of the expert witnesses in the case as to their duties and responsibilities, which

contributed to the length of the trial, Cresswell J set out, at page 81, what he described as "some of the duties and responsibilities of experts in civil cases". They are as follows:

> 1. Expert evidence presented to the court should be, and should be seen to be, the independent product of the expert uninfluenced as to form or content by the exigencies of litigation: *Whitehouse* v. *Jordan* [1981) 1 W.L.R. 246 at 256, *per* Lord Wilberforce.
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> 2. An expert witness should provide independent assistance to the court by way of objective, unbiased opinion in relation to matters within his expertise: *Polivitte Ltd.* v. *Commercial Union Assurance Co plc* [1987] 1 Lloyd's Rep. 379 at 386, Garland J and *Re J (Child Abuse: Expert Evidence)* [1990] F.C.R. 193, Cazalet J. An expert witness in the High Court should never assume the role of an advocate.
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> 3. An expert witness should state the facts or assumptions upon which his opinion is based. He should not omit to consider material facts which could detract from his concluded opinion *(Re J, supra).*
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> 4. An expert witness should make it clear when a particular question or issue falls outside his expertise.
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> 5. If an expert's opinion is not properly researched because he considers that insufficient data is available, then this must be stated with an indication that the opinion is no more than a provisional one *(Re J, supra).* In cases where an expert witness, who has prepared a report, could not assert that the report contained the truth, the whole truth and nothing but the truth without some qualification, that qualification should be stated in the report: *Derby* & *Co Ltd and others* v. *Weldon and others (No 9)* [1991] 2 All ER 901, per Staughton LJ.
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> 6. If, after exchange of reports, an expert witness changes his view on a material matter having read the other side's expert's report or for any other reason, such change of view should be communicated (through legal representatives) to the other side without delay and when appropriate to the court.
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> 7. Where expert evidence refers to photographs, plans, calculations, analyses, measurements, survey reports or other similar documents, these must be provided to the opposite party at the same time as the exchange of reports (see 15.5 of the Guide to Commercial Court Practice)."

[7] *The Ikarian Reefer* was regularly cited with approval in the Scottish courts (see, for example, *Elf Caledonia Ltd* v *London Bridge Engineering Ltd and others*, Lord Caplan, unreported, 2 September 1997 at pages 224 - 225; *McTear* v *Imperial Tobacco Ltd* 2005 2 SC 1 at paragraph [5.9]; and *Wilson* v *HM Advocate* 2009 JC 336 at paragraph [59]) prior to the

decision of the Supreme Court in *Kennedy* v *Cordia (Services) LLP* 2016 SC (UKSC) 59, in which, at paragraph [53], the court stated that Cresswell J's guidance in *The Ikarian Reefer* should be applied in the Scottish courts in civil cases, making such allowance as is necessary to accommodate the different procedures which operate there.

[8] As noted in *Kennedy* at paragraph [38], there are four matters which fall to be addressed in the use of skilled evidence, namely, (i) the admissibility of such evidence; (ii) the responsibility of a party's legal team to make sure that the skilled witness keeps to his or her role of giving the court useful information; (iii) the court's policing of the performance of duties of the skilled witness; and (iv) economy in litigation. The requirement of independence and impartiality is one of admissibility rather than merely the weight of the evidence, see *Kennedy* at paragraph [51].

[9] The issue raised by the first question in the stated case is one which relates to the second duty articulated by Cresswell J in *The Ikarian Reefer*, namely, that a skilled witness should provide independent assistance to the court by way of objective, unbiased opinion in relation to matters within his expertise. The first question posed by the stated case requires this court to address the issue of whether or not a skilled witness who operates under a contingent fee arrangement is truly independent and impartial.

[10] The propriety of contingency fees for skilled witnesses was considered by the Court of Appeal in *R (Factortame Ltd and others)* v *Secretary of State for Transport, Local Government and the Regions* (No 8) [2002] 3 WLR 1104, a decision to which the sheriff was not referred at the close of the proof. Two passages from judgment of the court, given by Lord Phillips of Worth Matravers MR (as he then was), are worthy of note:

> "70. … Expert evidence comes in many forms and in relation to many different types of issue. It is always desirable that an expert should have no actual or apparent interest in the outcome of the proceedings in which he gives evidence,

> but such disinterest is not automatically a precondition to the admissibility of his evidence. Where an expert has an interest of one kind or another in the outcome of the case, this fact should be made known to the court as soon as possible. The question of whether the proposed expert should be permitted to give evidence should then be determined in the course of case management. In considering that question the judge will have to weigh the alternative choices open if the expert's evidence is excluded, having regard to the overriding objective of the (Civil Procedure Rules).
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> …
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> 73. To give evidence on a contingency fee basis gives an expert, who would otherwise be independent, a significant financial interest in the outcome of the case. As a general proposition, such an interest is highly undesirable. In many cases the expert will be giving an authoritative opinion on issues that are critical to the outcome of the case. In such a situation the threat to his objectivity posed by a contingency fee agreement may carry greater dangers to the administration of justice than would the interest of an advocate or solicitor acting under a similar agreement. Accordingly, we consider that it will be in a very rare case indeed that the court will be prepared to consent to an expert being instructed under a contingency fee agreement."

[11] The conclusion reached at paragraph 73 of *Factortame Ltd* is a compelling one. It is expressly referred to at paragraph 88 of the Civil Justice Council's "Guidance for the instruction of experts in civil claims", produced to assist those instructing experts to understand best practice in complying with Part 35 of the Civil Procedure Rules in England and Wales. The conclusion is also entirely consistent with the overriding duty of experts to assist the court on matters within their expertise, a duty which overrides any obligation to the person from whom experts have received instructions or by whom they are paid.

[12] As observed in *Kennedy* at paragraph [58], most forms of Scottish civil procedure do not, thus far, have case management powers that would enable them to determine, in advance of the proof, the question of whether a proposed expert who has an interest of one kind or another should be permitted to give evidence. Indeed, as noted above at paragraph [3], the rules governing the present claims compelled the sheriff to reserve the question of admissibility and decide it at the close of the proof.

[13] The conclusion in *Factortame Ltd* is entirely consistent with the relevant principle in *The Ikarian Reefer,* which I am bound to follow. For the reasons set out below, it is clear that the evidence of Dr AB was critical to the outcome of the cases. That being the case, the issue the court must consider is whether the cases before it on appeal fell into the category of "very rare" cases in which the court was entitled to conclude that an expert instructed under a contingency fee agreement can be viewed as truly independent and impartial.

[14] The stated case discloses no circumstances that would justify the instruction of an expert on a contingency basis. That is unsurprising given the nature of the cases, namely, low value personal injury claims. Moreover, it is clear that the sheriff had considerable reservations about Dr AB: he described him as not being an impressive witness; he was critical of the form and content of the reports prepared by him; he described some parts of those reports as "carelessly written"; describes a passage of his evidence as "pure speculation"; and required to warn him to be more careful in his answers. The conclusion this court is inevitably drawn to from the terms of the sheriff's observations and the terms of the reports in question is that Dr AB was almost acting as an advocate of the respondents' cases. Coupling the sheriff's criticisms with contingent fee agreement, this court has little hesitation in concluding that the present cases do not fall within the identified category and that the evidence of Dr AB was inadmissible.

[15] The sheriff erred in law in repelling the appellant's objection to the admissibility of the evidence of Dr AB. The sheriff ought to have sustained that objection on the basis that Dr AB was not truly independent and impartial. Question 1 is answered in the affirmative.

Question 2

[16] As noted above (see paragraph [8]), the requirement of independence and impartiality is one of admissibility rather than merely the weight of the evidence. To that end, and having regard to the answer reached in relation to question 1, the court finds it unnecessary to answer question 2.

Question 3

[17] The sheriff concluded that specialist knowledge was required in relation to one aspect of the case, namely, setting out the commonly understood medical position in relation to the symptoms of the type of soft-tissue injury before the court and the likely period of their onset, after an accident. It is clear that the inferential or deductive process applied by the sheriff was dependent upon these aspects of Dr AB's evidence. In the absence of that evidence, the respondents' cases in relation to whiplash must necessarily fail. The requisite specialist knowledge and related testimony was not available to the court.

[18] I am not persuaded that the question as framed properly addresses the issue this court has been asked to determine. Prefixing the question as stated with the words "On the hypothesis that the evidence of Dr AB was inadmissible" addresses that issue. The third question, so amended, will be answered in the affirmative.

Question 4

[19] The sheriff does not accept that he held that it was incumbent upon the appellant to adduce the evidence of a skilled witness of his own in order to challenge the approach of the respondents') skilled witness. It is, however, unnecessary to answer this question to resolve the appeal. The court will decline to do so.

Disposal

[20] In the case of Dylan Cameron, the sheriff found that he had sustained only a whiplash injury. In light of the court's answers to questions 1 – 3 in the stated case, that finding can no longer stand. The decree granted by the sheriff in the case brought by Dylan Cameron will be recalled; decree of absolvitor will be granted in that case; and the respondent, Dylan Cameron will be found liable in expenses to the appellant.

[21] In the cases of Samantha Armstrong and Conor Lyall, the sheriff found that each had sustained certain minor injuries, in addition to a whiplash injury. In light of the court's answers to questions 1 – 3 in the stated case, those findings, insofar as they relate to whiplash injuries can no longer stand. The makeup of the awards made by the sheriff in those cases is not set out in the stated case. The respondents, Samantha Armstrong and Conor Lyall are entitled to awards in relation to the minor injuries the sheriff found they had sustained as a result of the accident. The court will hear parties by order to be addressed on that matter and on the question of expenses relative to those two cases.

Expenses of the Appeal

[21] The appellant has been successful in the appeal. The respondents will be found liable to them in the expenses thereof, as taxed by the auditor of the Sheriff Appeal Court. In the particular circumstances of this appeal, the court is of the view that it is reasonable to sanction the employment of counsel for the appeal to this court only.