SHERIFFDOM OF GLASGOW AND STRATHKELVIN AT GLASGOW

[2021] SC GLA 42

GLW-SF119-20

NOTE BY SUMMARY SHERIFF CHARLES LUGTON

in the cause

IAN McKAY

Pursuer

against

MCE INSURANCE COMPANY LIMITED

Defender

Pursuer: Thompsons Solicitors
Defender: McIntosh, DAC Beachcroft Solicitors

Glasgow, 7 June 2021

Introduction

[1] This case came before me in the form of a telephone hearing on the pursuer's motion for certification of Mr David Donaldson, Consultant Orthopaedic Surgeon, as a skilled person, in terms of Rule 5.3 of the Act of Sederunt (Taxation of Judicial Expenses Rules) 2019 ("the 2019 Rules"). The defender opposed the motion on the ground that it had not been reasonable and proportionate to instruct him.

Background

[2] It is worth beginning by setting out the sequence of events leading up to and following the instruction of Mr Donaldson. The pursuer was involved in a minor road

traffic accident while driving his vehicle on 25 October 2017. He was stationary in a line of traffic on Dumbarton Road, Glasgow, at its junction with Bouvrie Street, when a vehicle that was insured by the defender struck him from behind.

[3] The pursuer experienced pain in his neck and back following the accident. He attended his GP on the same day. The pursuer first instructed his agents twelve days after the accident, on 6 November 2017. The claim was intimated to the defender two days later, on 8 November 2017. The pursuer's agents then took steps to recover his GP records. The records arrived on 12 December 2017 and the pursuer's agents reviewed them. On 9 January 2018 the defender admitted liability; and on the same date the pursuer's agents instructed Mr Donaldson to examine the pursuer and to provide a medical report.

[4] At the point of initially instructing the pursuer's agents, the pursuer had advised that he had a long history of chronic back pain. This was borne out by the subsequent review of the GP records, which contained details of a history of back problems dating back to 2000. The pursuer had undergone investigations that had confirmed degenerative bulging of the L4/5 and L5/S1 discs of his spinal cord. In addition, prior to the accident the pursuer had been unemployed and receiving benefits as a result of his back pain.

[5] The pursuer's agents' letter of instruction to Mr Donaldson explained that the pursuer had sustained injuries to his neck and back in the accident; and highlighted that he had a pre-existing back problem. The pursuer's agents went on to ask Mr Donaldson to deal with the pursuer's capacity for work, to comment on his absences from work resulting from his injuries and to provide a view on whether those absences were reasonable. As I shall return to, this element of the instruction is surprising given that the pursuer was unemployed at the time of the accident.

[6] Mr Donaldson examined the pursuer on 12 January 2018 and produced a report, dated 7 February 2018. In his report, Mr Donaldson recorded that the pursuer had told him that he had experienced an increased level of pain for around an hour after the accident, following which his pain had returned to its pre-accident level. According to the pursuer's agent, Mr Kenny, this was in conflict with what the pursuer had told his agents at the start of the case: he had reported ongoing back pain. When the pursuer's agents discussed the terms of Mr Donaldson's report with him, the pursuer said that he had told Mr Donaldson that he had initially experienced severe pain but that he had been unable to tell whether and to what extent his pain was attributable to the accident or to his pre-existing back problems. The pursuer's version of what he had said at the appointment was given to Mr Donaldson, but Mr Donaldson was not prepared to change his report.

[7] The pursuer's agents then considered – and discussed with the pursuer – whether to instruct a second report from an alternative orthopaedic consultant. Given the cost that would have been associated with this, a decision was taken not to do so and instead to rely on Mr Donaldson's report. The report was intimated to the defender.

[8] Proceedings were raised in February 2020 and the personal injury element of the claim was ultimately settled for the sum of £100.

Submissions

[9] Both parties provided helpful written submissions, upon which they elaborated at the hearing.

Pursuer's Submission

[10] Briefly put, Mr Kenny's submission was that the pursuer's agents had decided to instruct an orthopaedic surgeon in light of the pursuer's pre-existing back problems. The pursuer had alerted them to his history of back pain at the outset. Before instructing a report, the pursuer's agents had reviewed his GP records, which confirmed the position. They had concluded that an expert opinion was required on causation and, in particular, on the question of whether and to what extent the pursuer's post-accident symptoms had resulted from the accident itself, as opposed to being attributable to his chronic back problem. An orthopaedic consultant was best qualified to provide this. The alternative would have been to instruct a GP, but a GP would not have been qualified to give an opinion on causation in this context. In their letter of instruction to Mr Donaldson, the pursuer's agents had asked Mr Donaldson to address causation.

[11] Mr Kenny said that the pursuer's agents had understood that the pursuer's symptoms were continuing when they had reached the stage of instructing Mr Donaldson. However, he conceded that they had not discussed this with him at that stage – indeed they had not asked him about his symptoms after their original exchange with him at the start of the case. He pointed out that Mr Donaldson had been instructed within two months of the accident and said that following a road traffic accident, the majority of injuries normally result in symptoms that last longer than two months. Mr Kenny submitted that it had been reasonable and proportionate to instruct Mr Donaldson.

Defender's Submission

[12] Conversely, Mr McIntosh submitted that it had not been reasonable and proportionate to instruct an orthopaedic consultant. This was a case in which the pursuer

had sustained a minor injury that was bordering on *de minimus*. The pursuer had only offered to prove that he had symptoms caused by the accident for a period of one hour; and the personal injury element of the claim had settled for £100. In the four weeks following the accident the pursuer had had no further treatment. The pursuer's agents ought to have clarified with him the extent of his symptoms prior to instructing Mr Donaldson, particularly as this came ten weeks after the accident. There was nothing to indicate that this was a sufficiently serious injury to merit the instruction of an orthopaedic consultant and a GP might well have been able to provide an opinion. Mr McIntosh criticised the letter of instruction to Mr Donaldson. The reference to an absence from work was not appropriate given that the pursuer was unemployed. A "stock letter" appeared to have been used, which implied that when instructing Mr Donaldson, the pursuer's agents had not properly applied their minds to whether and why this was appropriate. Mr McIntosh referred to *Gary Keddie* v *Abdalazim Clitybc* (2018) SC Edin 41, in which Sheriff McGowan had criticised the use of a stock letter in similar circumstances.

Decision

The Test for Certification

[13] The certification of skilled persons is governed by rule 5.3 of the 2019 Rules, the relevant parts of which are in the following terms:

> "5.3.— Certification of skilled persons
>
> (1) On the application of a party the court may certify a person as a skilled person for the purpose of rule 4.5 (skilled persons).
>
> (2) The court may only grant such an application if satisfied that—
>
> (a) the person is a skilled person; and

> (b) it is, or was, reasonable and proportionate that the person should be employed."

It was not disputed that Mr Donaldson was a skilled person in terms of rule 5.3(2)(a), but the parties were divided over whether his instruction was reasonable and proportionate, as per rule 5.3(2)(b).

[14] The 2019 Rules came into force on 29 April 2019. Rule 5.3(2) of the 2019 Act replaced paragraph 1(2) of schedule 1 to the Act of Sedurant (Fees of Witnesses and Shorthand Writers in the Sheriff Court) 1992 ("the 1992 Act"), under which the sheriff required to be satisfied that "(a) the person was a skilled person; and (b) it was reasonable to employ the person." In contrast to its predecessor, rule 5.3(2) introduced the requirement that the employment of the skilled person must have been proportionate.

[15] In *Carol Webster v Bianca MacLeod* (2018) SAC (CIV) 16 the Sheriff Appeal Court laid down the following guidance on the application of the test of reasonableness under the 1992 Act:

> "It is neither possible nor appropriate to provide an exhaustive list of factors which may be relevant to a determination as to whether the employment of the skilled person is reasonable. The purpose of the rule is to provide some judicial superintendence of one aspect of the cost of litigation. It is the responsibility of the person seeking certification to provide adequate material to enable the sheriff to be satisfied as to the matters specified in paragraphs 1(2)(a) and (b). It is then for the sheriff to reach a view on such material. Reasonableness falls to be determined objectively; it falls to be assessed at the time of instruction. That requires consideration of the state of affairs at the point of instruction." (Paragraph 20).

The Court also made clear that when assessing reasonableness the sheriff should consider the question of proportionality:

> "Implicit in the concept of reasonableness is proportionality: proportionality between the decision to instruct that skilled person at that particular time and the matters in issue or likely to be in issue." (Paragraph 20).

This approach is now embodied in rule 5.3(2)(b) of the 2019 Rules. The express reference to proportionality in the terms of the rule serves to emphasise its prominence within the test. But it is clear from *Webster* that reasonableness and proportionality are interrelated concepts that fall to be considered together.

Application to the Present Case

[16] Turning to the present case, the pursuer's agents place reliance on the pursuer's history of back problems. They contend that causation was likely to be in issue, as it would be necessary to determine to what extent the pursuer's symptoms were attributable to the accident rather than to his pre-accident difficulties. They argue that as this was a matter that lay within the field of expertise of an orthopaedic consultant, it was reasonable and proportionate to instruct one.

[17] The problem with this argument, I think, is that when the pursuer's agents instructed Mr Donaldson in January 2018 they were not in a position to assess, even on a provisional basis, the potential seriousness and significance of the pursuer's injury. They were in possession of only limited knowledge at the time. They knew that the pursuer had been involved in what appears to have been a minor "rear-shunt" accident, that he had attended his GP on the day of the accident and that he had still claimed to be experiencing symptoms when he instructed them twelve days later. At the point of instructing Mr Donaldson they knew that over two months had elapsed since the date of the accident and that they had no up to date account from the pursuer of his symptoms. They also knew that the pursuer had a longstanding history of back problems, as a result of which he was unemployed and a recipient of benefits. This was the sum of their knowledge and was not, in my opinion,

sufficient for them to decide whether it would be reasonable and proportionate to instruct an orthopaedic consultant to prepare a report.

[18] Before proceeding the pursuer's agents ought to have spoken to him again about his symptoms. Without wishing to be too prescriptive about what the pursuer should have been asked, it seems to me that the discussion should have covered: (i) whether and in what sense the pursuer's symptoms were different from or worse than they had been prior to the accident; (ii) whether any new or heightened symptoms had manifested themselves in some tangible way, such as limiting the pursuer's ability to engage in certain activities, interrupting his sleep or necessitating the use of pain medication; and (iii) whether the severity of his symptoms had improved or varied in the two months since the accident.

[19] Once the pursuer's agents had obtained this information they would have been able to undertake a proper assessment of whether it would be reasonable and proportionate to instruct Mr Donaldson; balancing the cost of instructing an orthopaedic consultant against the potential significance of the injury and of the litigation. As the pursuer's agents had not had a discussion with the pursuer along the lines that I have outlined, they were in no position to make an assessment of this kind. The context was that the pursuer already had a back problem that was sufficiently serious to prevent him from working. His agents did not know whether the pursuer considered his symptoms to be materially worse than they had been before the accident, in which case the instruction of an orthopaedic consultant to provide an opinion on causation might have been reasonable and proportionate in the circumstances; or whether the pursuer perceived any change in his symptoms to be trivial or transient, in which case a report from a GP might well have sufficed. Depending on precisely what the pursuer had told them, consideration might have been given to instructing a GP in the first instance, while retaining the option of instructing an orthopaedic

report further down the line should the need arise. But having failed to ask the pursuer the salient questions, the pursuer's agents were not armed with the requisite knowledge to decide between these options and to conclude that Mr Donaldson's instruction would be reasonable and proportionate. Objectively, there was no basis for reaching such a conclusion.

[20] While that is sufficient to dispose of this motion, before concluding I will deal with two points that were made by the defender's agent. Firstly, Mr McIntosh invited me to place weight on the content of Mr Donaldson's report and, in particular, on the fact that the pursuer was noted as saying that his symptoms had returned to their pre-accident level an hour after the accident. He submitted that this suggested that Mr Donaldson's instruction had not been reasonable and proportionate, particularly when coupled with the fact that the personal injury head of claim had settled for £100. An immediate difficulty with this is that there was a factual dispute over exactly what the pursuer told Mr Donaldson about his symptoms, as I have narrated above. But more fundamentally, the flaw in this approach is that it involves assessing the decision to instruct Mr Donaldson with the benefit of hindsight. As the Sheriff Appeal Court made clear in *Webster*, the question of whether it was reasonable and proportionate to instruct a skilled person falls to be determined at the point of instruction and requires consideration of the state of affairs at that time. In the present case the point is not that the pursuer's agents should have foreseen the eventual content of Mr Donaldson's report: it is that at the time of instructing him they did not have the necessary knowledge to assess whether to do so would be reasonable and proportionate in the circumstances.

[21] Secondly, Mr McIntosh placed considerable emphasis on the pursuer's agents' use of a "stock" letter of instruction. He submitted that this implied that they had not properly

thought through the reasons for Mr Donaldson's instruction, as the letter included a reference to absences from work that was obviously not applicable to the pursuer. In this connection, Mr McIntosh referred to Sheriff McGowan's observation regarding the use of a similar letter in *Keddie* that

> "If anything, the slavish use of a standard letter of instruction points *away* from appropriate professional judgment having been exercised and tends to indicate a decision to employ taken by rote or in accordance with a 'policy'" (paragraph 32).

There may be cases, such as *Keddie*, in which an examination of the wording of a letter of instruction is relevant to the determination of a motion for certification (although this appears to have been only a relatively minor factor in Sheriff McGowan's reasoning). But it should be remembered that in each individual case the question is whether the court is satisfied that the employment of the skilled person was reasonable and proportionate. Whatever the particular thought process of the individual solicitor involved may in fact have been, reasonableness and proportionality fall to be determined objectively by the court on the basis of the material that the solicitor had (or should have had) in his or her possession. There may be occasions when despite the fact that agents have resorted to the use of a style letter of instruction, it is apparent from the circumstances as a whole that objectively, the employment of the skilled person was reasonable and proportionate.

[22] In the present case the letter included a specific reference to the pursuer's pre-existing back problems. There was no explicit instruction to comment on causation, but any orthopaedic surgeon versed in medico-legal work would understand that this was implied. The letter did flag up the question of causation, therefore, which was the pursuer's agents' rationale for instructing Mr Donaldson. While the mention of the pursuer's employment was inappropriate given his unemployed status, this does not seem to me to be a particularly important factor in the determination of the present motion. The problem with

Mr Donaldson's instruction lay in the pursuer's agents' failure to properly explore with the pursuer the nature and extent of his symptoms before proceeding with the instruction. This was readily apparent from the other material before me; and in the overall context of the case I did not consider the terms of the letter to be of any great moment.

Disposal

[23] Accordingly, I shall refuse to certify Mr Donaldson as a skilled person for the purpose of rule 4.5 of the 2019 Rules.