SHERIFFDOM OF LOTHIAN AND BORDERS AT EDINBURGH

IN THE ALL-SCOTLAND SHERIFF PERSONAL INJURY COURT

[2023] SC EDIN 32

EDI-PN2501-22

JUDGMENT OF SHERIFF K J CAMPBELL KC

in the cause

ELAINE MURRAY

Pursuer

against

ROBERT MYKYTYN

Defender

Pursuer: Swanney, Adv; Digby Brown LLP
Defender: McNulty; DWF LLP

EDINBURGH, 16 October 2023

Introduction

[1] This action arises from a road traffic accident which occurred on 29 July 2021. I heard proof in this matter on 5 and 6 July 2023. Following proof, I gave judgment extempore, and granted a decree of absolvitor, and the matter came before me again on 14 August 2023 to deal with a number of issues of expenses which arose. This is an action to which QOCS applies, and the defender enrolled a motion in the following terms:

> "To find that the pursuer's conduct of proceedings was manifestly unreasonable in terms of section 8(4)(b) of the Civil Litigation (Expenses and Group Proceedings) Act 2018, and rule 31A.2(1)(a) of the Act of Sederunt (Sh Ct Ordinary Cause Rules) 1993, and to find the pursuer liable to the defender in the expenses of the action, and *esto* the court is not minded to find that the pursuer's conduct amounted to that manifestly unreasonable, to find no expenses due to or by either party for the expenses of the action".

Defender's submissions

[2] For the defender, Ms McNulty, adopted the written submission attached to the motion. The defender's position was that the pursuer's conduct had been manifestly unreasonable. The case of *Lennox* discussed the test for manifestly unreasonable behaviour, and the court held that meant behaviour which was obviously unreasonable. The defender accepted that was a high bar. Nonetheless in this case, the pursuer's narcolepsy and the conflicting and unreliable account of events from the driver amounted to exceptional circumstances. There was the conjunction of these on which the defender relied. The pursuer accepted in evidence that she was forgetful because of narcolepsy, and the pursuer's agents were aware of that. The pursuer said she would have corrected her husband if the information which he gave in his police statement was inaccurate. The 999 call recording to the police was not consistent with the pursuer's case on record, and the pursuer did not correct her husband's account to the police. There were fundamental inconsistencies in the pursuer's case. The driver of the car in which the pursuer was travelling, namely the pursuer's husband, gave multiple accounts, none of which aligned with the pursuer's version of events. The pursuer should have accepted that there was no chance or substantially no chance of success and discontinued the action.

[3] Ms McNulty referred to *Gilchrist* v *The Chief Constable of Police Scotland*, at paragraph 29, where the court held that persisting in the face of contrary evidence might amount to manifestly unreasonable behaviour. The pursuer's account was not, in itself, inconsistent; but it was inconsistent and contrary to the account from her husband, the driver. Where the case concerned a road traffic accident that was significant. Taken together with the pursuer's forgetfulness, Ms McNulty submitted that was sufficient to cross

the threshold. This information must have been available to the pursuer's agents before proof.

[4] While it might be that in many cases small details in the evidence of witnesses might not match, the position here was that the pursuer's husband had given a number of different accounts of the position of the vehicles and of his interaction with the defender. He had given accounts of events on multiple occasions, and the more accounts he gave, the more inconsistent they became. For example, on 29 April 2022, statement 6/2 of process had been provided. The account there was internally inconsistent, and inconsistent with the pursuer's account of events. Arguably, on its own, that was manifestly unreasonable. A further example was found in 5/4 of process, information received from CIS Insurance and lodged on 10 February 2023. That information is inconsistent with the pursuer's account. It is also inconsistent with the pursuer's husband's prior account to her agents. Ms McNulty submitted that it should have been clear to agents that his account was unreliable, and could not be relied on at proof.

[5] The question arose whether the pursuer could have run the case on her own evidence. It was submitted that it was open for her to do so, but the forgetfulness caused by her narcolepsy, and the inconsistency of evidence from the driver it was critical. In a road traffic case, it would be unusual not to lead the evidence of the driver; had the pursuer decided not to lead her husband's evidence, the defender could have done so in the circumstances. The defender had a precognition, and the insurance form, and the 999 call recording. The court would have been in the same position in the result.

Pursuer's submissions

[6] For the pursuer, Mr Swanney adopted his written submission. He was acutely aware that he had not been present at the proof. Nonetheless, the pursuer's position was that there was nothing exceptional or out of the ordinary about the circumstances before the court. The defender was indulging in a granular examination of the prospects of success, but with the benefit of 20/20 hindsight. The defender's position appeared to be that the pursuer's case was bound to fail because of (1) the pursuer's memory difficulties, and (2) inconsistencies in her husband's evidence. Counsel submitted there were, however, several features which pointed in the opposite direction.

[7] Firstly, counsel pointed to the absence of a finding that the pursuer was unreliable in her evidence. The pursuer's submission was that it was not inevitable that she would be found unreliable. The court had been able to assess the evidence in total and make an assessment distinguishing between the pursuer's evidence and that of her husband. Secondly, the defender's' position was undermined by the absence of a finding by the court that Mr Murray was incredible as a witness. Thirdly, it was open to the court to disregard Mr Murray's evidence and to find the pursuer reliable. It was not uncommon, counsel submitted, in road traffic accident cases for there to be at least two versions of events. The pursuer's evidence was consistent with her case on record; the pursuer's evidence was consistent with that of her husband in relation to some of the mechanics. Weighing up the risks of leading evidence from the pursuer and her husband, agents had taken a reasoned view that both should be led. Counsel submitted that the court was "a million miles" from a situation where the only conclusion was that the pursuer was bound to lose.

[8] Counsel submitted that this was an example of the thin end of the wedge. For example, there were many cases where a witness, particularly a pursuer, might have given

multiple versions in different medical records; taking the defender's argument to its logical conclusion, such witnesses would be criticised for that. Again, where two witnesses gave one account and a third witness gave a different account, the same point might be taken. Counsel submitted that was not the intention or aim of the legislation. The word "manifestly" or "exceptional" was used for a reason. A defender had to pass a high hurdle for the new rule to be disapplied. In this case, it was not possible to say from the outset that it was inevitable that the pursuer was going to lose. All that was required was that the pursuer was found to be reliable on her own without her husband's evidence. In counsel's submission it could not be said that the QOCS exception was made out, and counsel invited the court to refuse the motion.

Defender's reply

[9] In a brief reply, Ms McNulty took issue with the notion that there were "slightly different" versions offered in evidence. In her submission, the differences in the evidence were more than mere details. Dealing with the floodgates argument, in her submission that was not the case here. Mr Murray was the driver, not a passer-by. He was, accordingly, a key witness in the pursuer's case, and the inconsistencies in his evidence should be viewed accordingly.

Analysis and conclusion

[10] The starting point for this motion is section 8 of the Civil Litigation (Expenses and Group Proceedings (Scotland) Act 2018, which provides:

> **"8 Restriction on pursuer's liability for expenses in personal injury claims**
> (1) This section applies in civil proceedings where—
> (a) the person bringing the proceedings makes a claim for damages for—

(i) personal injuries, or

(ii) the death of a person from personal injuries, and

(b) the person conducts the proceedings in an appropriate manner.

(2) The court must not make an award of expenses against the person in respect of any expenses which relate to—

(a) the claim, or

(b) any appeal in respect of the claim.

(3) Subsection (2) does not prevent the court from making an award in respect of expenses which relate to any other type of claim in the proceedings.

(4) For the purposes of subsection (1)(b), a person conducts civil proceedings in an appropriate manner unless the person or the person's legal representative—

(a) makes a fraudulent representation or otherwise acts fraudulently in connection with the claim or proceedings,

(b) behaves in a manner which is manifestly unreasonable in connection with the claim or proceedings, or

(c) otherwise, conducts the proceedings in a manner that the court considers amounts to an abuse of process.

(5) For the purpose of subsection (4)(a), the standard of proof is the balance of probabilities.

(6) Subsection (2) is subject to any exceptions that may be specified in an act of sederunt under section 103(1) or 104(1) of the Courts Reform (Scotland) Act 2014.

(7) In subsection (1)(a), 'personal injuries' include any disease and any impairment of a person's physical or mental condition."

[11] Section 8(4) has been considered by the court in a number of decisions. Subsections 8(4)(b)&(c) were considered in *Lennox* v *Iceland Foods Ltd* ([2022] SC EDIN 42) 2023 SLT (ShCt) 73. Subsections 8(4)(a)&(b) were considered in *Gilchrist* v *Chief Constable of Police Scotland* ([2023] SC EDIN 30) (2023) SCLR 244. Subsections 8(4)(b)&(c) were also considered in *Love* v *Fife Health Board* [2023] SC EDIN 18. While the number of cases continues to grow, a number of principles can be discerned from these decisions thus far.

(a) Each case in which the issue of disapplying QOCS arises must be considered on its own facts and circumstances (*Lennox*, para 61; *Gilchrist* para 27).

(b) "Manifestly unreasonable" means "obviously unreasonable" (*Lennox*, para 60).

(c) The legislative history and language indicates that the circumstances where proceedings were not conducted in an appropriate manner are likely to be exceptional (*Lennox*, para 61).

(d) Where there is a finding that the pursuer is incredible on a core issue in the action, the issue of manifestly unreasonable conduct may arise, but does not invariably arise (*Gilchrist*, para 27).

(e) The court preferring the defender's witnesses over the pursuer's account does not of itself give rise to disapplication; whether it does depends on the court's reasons (*Gilchrist*, para 28).

(f) Unusual circumstances may or may not be exceptional; whether they are is context-specific (*Love*, paras 56 & 65).

[12] With those observations in mind, I turn to the circumstances of this case. I found that the pursuer's account of the accident in her evidence was broadly in line with her pled case. The account given by her husband, who was driving the car, differed in a number of important respects from the pursuer's account. The defender's criticisms of the inconsistency of his account compared with earlier occasions were well made, and I found that these were more than mere differences of detail. I held that the pursuer's husband was not a reliable witness, and that I was unable to place any weight on his evidence.

[13] I considered the evidence of the pursuer separately. As I have indicated, I found her account broadly consistent with her pled case. There was one passage of the pursuer's husband's evidence which gave me concern in that respect. Her account was put to him in cross-examination, and particular that their car had been in the inside lane and had moved out, and that she had said nothing about the car being stationary. In response, the pursuer's husband said that the pursuer was getting mixed up; he went on to say that she could not pay attention to the route or the lane they were travelling in because of her disability. That was quite at odds with the pursuer's own evidence that she paid close attention. The pursuer suffers from narcolepsy, and she explained that makes her forgetful, but, she said it

does not affect her memory. She had a clear memory of events because they stuck in her mind. Beyond that explanation from the pursuer, I did not hear any evidence, particularly not from an appropriately qualified clinician, about the effect of narcolepsy. Further her account of her husband's interaction with the defender was not entirely consistent about where the men were during this part of events, nor did she suggest that the defender attempted to open the door of their car (which was something said by the pursuer's husband in one of his earlier accounts, though not in his oral evidence).

[14] Against that background, I came to the view that I could not be certain that the pursuer was a reliable witness. The challenge to the defender's evidence was premised on the accounts of events by the pursuer and her husband being consistent, and thus mutually reinforcing. Nothing put in cross-examination caused me to conclude the defender was incredible or unreliable. The action failed accordingly.

[15] While it will be evident that I was unimpressed by the evidence of a key witness for the pursuer, that is not of itself sufficient to make the pursuer's conduct manifestly unreasonable. Nor did I find her to be incredible in her own evidence, albeit I had some concerns about her reliability, these were based on matters external to her evidence. Again, that is not sufficient to meet the threshold of manifestly unreasonable conduct. Similarly, I do not consider that analysis of the evidence discloses any circumstances which are exceptional.

[16] Accordingly I will refuse the defender's motion for expenses.

Expenses

[17] Having heard submissions, I indicated to parties that I intended to make avizandum. I invited submissions about the expenses of the motion. Mr Swanney sought the expenses in

the event of success and also made a motion for sanction for junior counsel (albeit for the purposes of the motion only). In support of the motion for sanction, counsel pointed to the importance to the pursuer in a case where a defender sought to disapply QOCS rules. Secondly, counsel relied on the importance of the motion, given that there have only been a few cases on the issue thus far. Ms McNulty opposed the pursuer's application for expenses. If expenses were not awarded to the defender, in her submission no expenses should be awarded to or by either party. She did not oppose sanction for counsel.

[18] I am satisfied that the expenses of the motion should follow success. Having regard to each of sub-section 108(3)(a)(i) and 108(3)(a)(ii) of the Courts Reform (Scotland) Act 2014, I am satisfied that it was reasonable to instruct counsel for the purposes of the motion on expenses.