**SHERIFFDOM OF LOTHIAN & BORDERS AT EDINBURGH**
**IN THE ALL-SCOTLAND SHERIFF PERSONAL INJURY COURT**

**[2023] SC EDIN 36**

PIC-PN2701-22

JUDGMENT OF SHERIFF DOUGLAS KEIR

in the cause

NATALIA MUSIALOWSKA

Pursuer

against

ZURICH INSURANCE PLC

Defender

**Pursuer: Hannon, Solicitor; Jackson Boyd LLP**
**Defender: Thomson, Advocate; Horwich Farrelly Scotland LLP**

EDINBURGH, 30 October 2023

**Introduction**

[1] This is an action for damages following a road traffic accident on 14 November 2021. It was a matter of admission that there was a collision between the car driven by the defenders insured and the car in which the pursuer was a passenger. However, the circumstances in which that collision occurred and whether or not the pursuer had sustained injury as a result remained in dispute. Quantum was agreed on a full liability basis at £1,447.04 plus interest. Following proof, decree of absolvitor was granted in favour of the defender. The defender subsequently lodged a motion for expenses.

**Opposed motion**

[2] There was a hearing on the defender's opposed motion which was in the following terms:

> "The defender respectfully moves the court:
>
> (1) to award the judicial expenses of the cause, as agreed or taxed, against the pursuer in favour of the defender by finding that one or both of the grounds specified in sections 8(4)(a) and (b) of the Civil Litigation and Group Proceedings Act 2018 are established (OCR 31A.2.(1)(a)) and by exercising discretion to so award under OCR 31A.3.(1);
>
> (2) to certify Mr Angus Maclean, Consultant Orthopaedic Surgeon, Glasgow Royal Infirmary, 84 Castle Street, Glasgow, G4 0SF as a skilled person who prepared a report on behalf of the defender in the action; and
>
> (3) to sanction the case as suitable for the appointment of junior counsel."

[3] The pursuer opposed parts (1) and (3) of the motion.

**Submissions for the defender**

[4] The defender adopted the written submission lodged in process. Each application for expenses under the new rules turned on its own facts. The issue before the court could be concisely stated. The pursuer and her witness, Jon Brown, had tailored their evidence to suit the car damage and they became evasive and backtracked when challenged. This was not a case of nerve-induced lying. This was a pre-meditated and coordinated approach by these persons. There was an obvious, unsatisfactory and unexplained discrepancy in the physical damage. This should have been addressed when the action was first raised. The conclusion to be drawn was that the pursuer thought she could get away with it by proffering no explanation. There was a scandalous suggestion that the defender's insured's car had been somehow tampered with. The pursuer's suggestion that she sustained wage loss did not stand up to the mildest scrutiny of the wage records. In all the circumstances,

this was the paradigm case where the protection afforded by QOCS should be disapplied and the defender should receive their expenses.

[5] In terms of sanction for counsel, while the case was an outwardly simple road traffic accident, below the surface lay an attempt at fraud which could only be identified after the witnesses were seen and heard. To expose this fraud required a series of matters to be exposed to scrutiny. In these respects, the case was complex. Furthermore, the case was important for the defender. They took fraud seriously. Any fraudulent case which succeeded harmed their business. Any fraudulent case not defended discouraged insured drivers from participating in court actions. In this case, it was important to back the insured driver. Failure to defend the case with all available resources was justified.

**Submissions for the pursuer**

[6] In relation to section 8(4)(a), it was not clear that the pursuer had made a fraudulent representation. A number of the accident circumstances were not in dispute. The defender's insured had reversed her car and it had collided with the pursuer's car. While the court had taken a dim view of the manner in which the pursuer's evidence changed during cross-examination, it was submitted that this remained a straightforward road traffic accident and the pursuer had simply failed to persuade the court on the balance of probabilities that she was injured as a result of the accident.

[7] While it was clear that the court did not find the pursuer to be credible or reliable, the high threshold required for fraudulent representation had not been met. As per the decision in *Gilchrist* v *Chief Constable of Police Scotland* [2023] SC EDIN 30 at para [25], there required to be a finding that the pursuer had acted intentionally to mislead. There was no such finding in this case.

[8] In relation to section 8(4)(b), it was a similarly high test to establish manifestly unreasonable behaviour. While the court had been critical of the evidence of the pursuer and Jon Brown, that did not equate to unreasonable behaviour.

[9] In terms of sanction for counsel, the case involved a straightforward road traffic collision. It was not complex.

**Decision**

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

> **"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."

[11] There is also a growing number of decisions where section 8(4) has been considered by the court and I was referred to *Lennox* v *Iceland Foods Ltd* [2022] SC EDIN 42, *Gilchrist* v *Chief Constable of Police Scotland*, *Manley* v *McLeese* (unreported 16 August 2023), *Carty* v *Churchill Insurance Company Ltd* [2023] SC EDIN 31 and *Murray* v *Myktyn* [2023] SC EDIN 32.

[12] In *Murray* at para [11], the presiding sheriff helpfully summarised a number of principles that can be decerned from these recent decisions. I would concur with this approach and repeat that summary here:

> "(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 [26]).
>
> (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 [26]).
>
> (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 [27]).
>
> (f) Unusual circumstances may or may not be exceptional; whether they are is context-specific (*Love*, paras [56] & [65])."

[13] In addition to these principles, with particular focus on section 8(4)(a), I would concur with the approach adopted by the presiding sheriff in *Gilchrist* at paras [23] to [25]. While the governing legislation does not provide any further definition of what might constitute "a fraudulent representation" or "otherwise acts fraudulently", these are not new legal concepts. The threshold for establishing a fraudulent representation or otherwise

acting fraudulently is a high one and in considering the application of section 8(4)(a), the court will require to consider the whole facts and circumstances of the claim or proceedings. Having conducted such an exercise, if the court then concludes on the balance of probabilities that the pursuer or their legal representative has acted intentionally to mislead the court, the threshold will be met.

[14] Turning to the particular facts and circumstances of this case, having had the opportunity to see and hear the evidence of the pursuer and her witness Jon Brown at proof, I concluded that neither could be viewed as credible or reliable. Their evidence contained significant inconsistencies and contradictions. They were evasive and defensive during cross-examination.

[15] During the course of their evidence, both the pursuer and Jon Brown stated that their car (an Audi A3) had been stationary behind the car driven by the defender's insured (a Lexus ES) when the latter commenced a U-turn manoeuvre; that the Audi had moved forward when the Lexus crossed entirely onto the opposite carriageway; that the Lexus had then reversed and collided with the front offside of the Audi; that the damage to the Audi was to the front offside wheel arch and driver's door; that it was the rear nearside of the Lexus that had struck the Audi; and that there had been two separate collisions caused by the defender's insured - following the first collision, she had driven the Lexus forward and then reversed for a second time causing a further collision involving the same parts of each car.

[16] During the course of cross-examination by the defender both the pursuer and Jon Brown were provided with matchbox-sized toy cars to demonstrate the respective movements of the Audi and Lexus. Significantly, both positioned the Lexus in a similar position following its initial right hand turn, namely that the Lexus had turned right past a

90 degree angle and had stopped at around a 120 degree angle relative to the Audi. According to their evidence, it was at that point, with the Lexus positioned at that approximate angle to the Audi, that the Lexus had then reversed into the front offside of the Audi. Notwithstanding their oral evidence and this visual demonstration, both maintained that it was the rear nearside of the Lexus that had collided with the Audi. However, if one accepted their evidence regarding the movement of the Lexus, it would have been the opposite side of the Lexus, namely the rear offside, that made contact with the Audi and not the rear nearside. When challenged by the defender on the obvious discrepancy between their description of the collision and the damage allegedly noted on the rear nearside, both became evasive and attempted to backtrack on their evidence. The pursuer suggested that she had not seen the first collision and she had simply made an assumption of the movement of the Lexus. Jon Brown stated that the accident had happened a long time ago.

[17] The pursuer asserted that there was visible damage to the rear nearside of the Lexus consisting of a dent and a deep scratch. She also maintained that there had been no pre-existing damage to the Audi and the damage visible in the images lodged with the court had been caused by the Lexus. With reference to those images, specifically the images at the bottom of page 64 of the Joint Bundle where four separate indentations could be seen around the front offside wheel arch of the Audi, she maintained that damage had been caused by the Lexus. However, even if one accepted that the Lexus had caused damage to the Audi, adopting a common sense and reasoned approach, the damage visible in the images did not correspond either with any damage noted to the Lexus or with the alleged single or double collision with the rear bumper of the Lexus. I considered that there was an obvious and particularly unsatisfactory discrepancy between the physical evidence as detailed in the images and the evidence of the pursuer and Jon Brown.

[18] Both the pursuer and Jon Brown maintained that they had taken photos of the damage to the Lexus in the immediate aftermath of the collision and that the damage shown in those photos was significantly different to the images lodged in process. These photos had not been lodged in process. Neither provided a convincing explanation as to why those photos had not been made available to the court.

[19] Both the pursuer and Jon Brown made the serious allegation that the images of the Lexus had been tampered with or that the Lexus had been repaired following the collision, conduct which might be construed as analogous to attempting to pervert the course of justice. I did not consider that there was any evidence to support such an allegation.

[20] The pursuer maintained that she had taken time off work due to the injuries sustained to enable her to attend physiotherapy sessions. However, with reference to the documentation provided by her employers which detailed the pursuer's eight documented absences (page 48 of the Joint Bundle), there was only one date that coincided with a physiotherapy appointment vouched by the physiotherapy records lodged in process (page 23 of the Joint Bundle). The pursuer asserted that her employer's records were wrong and that she had sustained a financial loss as a result of the accident but did not provide a satisfactory explanation for the discrepancy and there was no further documentation lodged with the court to vouch any claimed loss of earnings.

[21] The pursuer claimed that she could not remember the chronology of when she first consulted a solicitor about making a claim for damages. However, with reference to the documentation lodged by the defender, it was clear that she had completed a medical mandate for her solicitor on 15 November 2021 (page 101 of the Joint Bundle) which was sent to her GP by letter dated 17 November 2021 (page 100 of the Joint Bundle). The pursuer's GP records (page 84 of the Joint Bundle) disclosed that the first (and only)

accident-related entry was a telephone consultation on 18 November 2021 - four days after the collision and three days after completing the medical mandate for her solicitor.

[22] In summary, the pursuer was neither credible or reliable in relation to the core issues of her claim. In other words, she was a wholly incredible witness. The significant issues with her evidence went far beyond the more common scenario where there are competing versions of events and the court has preferred one version over the other.

[23] As per section 8(5), the standard of proof for the purposes of section 8(4)(a) is the balance of probabilities. Given all the facts and circumstances of this particular case, I am satisfied on the balance of probabilities that the pursuer acted intentionally to mislead the court. The threshold for section 8(4)(a) has accordingly been met.

[24] Turning to section 8(4)(b), standing my conclusion that the pursuer was neither credible or reliable in relation to the core issues of her action and, having regard to the particular facts and circumstances of this case as detailed at paras [14] to [22] above, I am satisfied that the threshold for manifestly unreasonable conduct has also been met.

[25] Finally, in relation to sanction for counsel, having regard to both the complexity of the claim and the importance of the claim to the defender as detailed in para [5] above, I am satisfied that it was reasonable for the defender to instruct counsel for the purposes of the proceedings.

**Conclusion**

[26] I will therefore grant the defender’s motion in full.

[27] Expenses of the motion should follow success. I therefore find the defender entitled to the expenses of the motion.