



OUTER HOUSE, COURT OF SESSION

[2022] CSOH 28

PD167/21

OPINION OF LADY WISE

In the cause

MARGUERITE HENDERSON

Pursuer

against

BENARTY MEDICAL PRACTICE

Defenders

**Pursuer: Milligan QC and McConnell; Slater and Gordon**

**Defenders: I Ferguson QC and Reid; MDDUS**

24 March 2022

**Introduction**

[1] In late February 2018 Marguerite Henderson made an appointment with her local GP practice having noticed a blue-ish spot in a cut on her right index finger. Subsequently, she became increasingly unwell and was eventually taken by her daughter and son-in-law to the emergency department of Victoria Hospital in the early evening of 28 February 2018. The medical staff there attempted to treat the sepsis from which Mrs Henderson was diagnosed as suffering but her condition deteriorated. On 3 April 2018 she underwent a left forearm amputation along with amputation of the fingers and part of the thumb of her right hand. The following week she underwent bilateral below knee amputations. In this action

she sues the partners and former partners of her local medical practice, claiming that a number of breaches of duty by staff of the practice led to a delay in her being treated which in turn necessitated these life changing amputations.

[2] The case came before me for a proof before answer confined to the question of breach of duty. However in advance of the hearing counsel agreed that the real issue for proof could be narrowed down to the content of a telephone call that took place at 09:34 on Wednesday 28 February 2018 between Mrs Henderson and Heather Leslie, a receptionist at the defenders' medical practice. The critical issue concerned whether an appointment Mrs Henderson had with the treatment room nurse at 14:55 that day was cancelled at Mrs Henderson's own request. In essence, if the defenders' position that Mrs Henderson had cancelled the appointment was accepted, the defenders will not be liable and decree of absolvitor should follow. The pursuer's position was that the court should make findings about what occurred during the call and fix further procedure to allow both sides an opportunity to consider the specific findings. Only the case in relation to the telephone call remains live between the parties on liability. A joint core bundle of documents was lodged for use at proof. While some documents may be referred to by production number, most references will be to page numbers of that joint bundle.

### **Undisputed facts**

[3] Mrs Henderson was at all material times registered as a patient with the defenders. On 26 February 2018 she telephoned the practice to make an appointment. That appointment was arranged for 27 February at 15:45 and was recorded as being with the treatment nurse in the practice. On the morning of that appointment, Mrs Henderson telephoned the practice and spoke to a receptionist, Brenda McDonald. She requested that

her appointment be rescheduled. Brenda McDonald duly rescheduled the appointment for 28 February at 14:55. On 28 February at around 09:34 the practice receptionist Heather Leslie telephoned Mrs Henderson. The defender's records confirm that the appointment due that afternoon was cancelled around that time.

[4] Mrs Henderson lives in Fife. The weather there on 28 February 2018 was extremely poor and forecast to deteriorate further. The unusually low temperatures and heavy snowfall experienced in large areas of Great Britain and Ireland in the last week of February and the first week of March 2018 is commonly referred to as the "Beast from the East".

[5] As indicated, the condition from which Mrs Henderson was ultimately diagnosed as suffering was sepsis. Sepsis is a progressive condition that follows a J-shaped curve where there is an initial slow increase in the severity of the illness followed by a rapid increase of severity which approaches an exponential rate. It does not relapse and remit. The perceived progression and severity of the sepsis may be influenced by factors individual to the patient (such as pain) and treatment factors (such as the administration of antipyretics and IV fluids). Together, these factors may cause the sepsis to appear as a remitting and relapsing condition.

[6] Following her traumatic experience of developing sepsis and subsequent amputations, Mrs Henderson wrote a book entitled "*My Story: Sepsis Raw and Real*" which was published by Mikamme Books on 28 August 2020 and is lodged as number 7/5 of process.

**Evidence led at proof****(1) *Marguerite Henderson***

[7] Mrs Henderson gave evidence and adopted her written statement (number 6/7 of process) as the main part of her evidence in chief. She explained that on 25 February 2018 she noticed what looked like a paper cut on her right index finger. It was about 1cm long, close to the knuckle and was not painful. She felt well that day and she was not someone with a significant past medical history. The following day, 26 February 2018 she noticed that the paper cut had a blue or purple spot in the middle of it, the size of a small pill. She thought that it looked odd because the spot appeared to be on top of the cut. She was working as a family support worker employed by her local council at the time. At lunch time on 26 February she attended a local pharmacy and spoke with the pharmacist, who looked at the cut and its unusual appearance. The pharmacist recommended that Mrs Henderson make an appointment to see her GP, so she called the practice and asked for an appointment about the cut on her finger. She spoke with a receptionist Gillian Simon and made an appointment for the following afternoon. Mrs Henderson thought that the appointment was to be with a doctor and said that the receptionist did not mention that it would be with a nurse.

[8] When she woke up on 27 February 2018 Mrs Henderson felt unwell, with flu like symptoms. She had a headache, her body was aching and she was shivering. She did not recall looking at the cut on her finger as it was not her main concern that morning. She called the practice first thing to cancel her appointment for that afternoon. She spoke with Brenda McDonald and told her that she was feeling unwell and so would not be able to come to the practice. She said that she told Brenda McDonald that she had “flu like symptoms”. She did not mention her finger which was not her concern. Mrs Henderson’s

position was that Brenda told her that there was a “virus going about”. A new appointment was made for 14:55 the next day.

[9] On the morning of 28 February 2018 Mrs Henderson was feeling worse than the day before. She was lethargic and unable to get out of bed. Her right arm and armpit had started to ache and moving her right arm was painful. She was starting to become worried but attributed her symptoms to the virus mentioned in the previous day’s telephone call. Her position was that again she did not notice the cut on her finger. She received a telephone call from Heather Leslie the receptionist at 09:34. Ms Leslie told Mrs Henderson that she was calling patients who had appointments scheduled for that day to see if the appointment was still required. Enquiries were being made because of the severe weather conditions. Mrs Henderson’s position was that she told Heather Leslie that she did still need her appointment and that she still felt unwell, worse than the day before. She said she told Heather Leslie that she was lethargic, unable to get out of bed and that her right arm was aching. She said she had been conscious that she had not seen a doctor yet about the cut on her finger and mentioned this to Heather. She stated that she certainly did not tell Heather that her finger was feeling better.

[10] Mrs Henderson’s position was that Heather Leslie told her that she would leave the appointment in place for that afternoon. She said she clearly remembered Heather saying that she would leave the appointment “as is”. She was adamant that she did not cancel the appointment and that if Heather had cancelled the appointment she did not inform Mrs Henderson that she had done so. Mrs Henderson thought she had drifted in and out of sleep during the day on 28 February and had then called the practice. She could not dispute that the second call that day was just before 5.00pm. On that occasion she spoke with Brenda McDonald. She explained her symptoms including the pain in her right arm and

right armpit. She said that her chest was tight and she was feeling more unwell than the day before. Brenda McDonald told Mrs Henderson that all the doctors had left to travel home due to the adverse weather. Mrs Henderson's position was that she did not tell Brenda McDonald that she had not attended her appointment earlier that day. Some time after the call with Brenda McDonald, Dr Filsell telephoned her. On hearing Mrs Henderson's account Dr Filsell suggested that she call the out of hours service at 6.00pm when it opened if her symptoms did not improve. At that point Mrs Henderson sought assistance from her daughter Kim and son-in-law Sean, who came and drove her to hospital. Mrs Henderson's position was that she could recall little after her arrival at hospital as she was seriously ill. There was a period when the doctors were trying to save her legs and arms from amputations but ultimately she was taken to Ninewells Hospital in Dundee for the leg amputations. She was not discharged from hospital until late August 2018.

[11] Under cross-examination Mrs Henderson was asked whether the text of the book she had published was true and accurate. She stated that it was not quite true and accurate but that she would describe it as diplomatic. She agreed that there might be some discrepancies in the times given for certain appointments with the practice in the book. A passage in the book relating to the call with Heather Leslie stated "I said that I still needed an appointment as I still needed the doctor to look at my cut finger". In evidence, Mrs Henderson disputed that she had mentioned the cut finger to Heather Leslie. She disputed also that her memory of events was poor, particularly in relation to the phone call with Heather Leslie, the later telephone call with Brenda McDonald and the phone call with Dr Filsell which she said were all "embedded in my brain". She confirmed she had no accurate recollection of arriving at the Accident and Emergency department of the local hospital or what her hands and feet looked like when "dying". The psychologist she had attended had told her that her mind

would protect her from those details. She agreed that she had discussed the events of 28 February on many occasions with her daughter Kim, her son-in-law Sean and her daughter Emma, including when the proof was imminent. Prior to that her focus had very much been on coping with life following her amputations.

[12] Mrs Henderson stated that when she called the practice later in the afternoon on 28 February it was on the basis that she understood that her appointment was still to come. She did not have a clock in her bedroom, just a phone. She woke up after drifting in and out of sleep all day and thought she needed to speak to the doctor. She agreed that Dr Filsell had later said that if she (Mrs Henderson) had telephoned earlier the doctor could have made a house call. Mrs Henderson was clearly angry that Dr Filsell had not called an ambulance following their telephone call. Dr Filsell's statement (the terms of which were not disputed) records that she suspected that Mrs Henderson had sepsis. The initial complaint made to the practice was made on Mrs Henderson's behalf by her daughter Kim who held a power of attorney for her, but was based on information from Mrs Henderson about what had happened. A letter from the pursuer's solicitors to the MDDUS dated 19 November 2019 was put to the witness. It was recorded there on her behalf in relation to the 28 February appointment that when she called the surgery for help that afternoon "she was advised that her appointment had been cancelled due to the weather" Mrs Henderson disputed that account as accurate. She said she did not know that the appointment had been cancelled until the case review with the doctors some months later.

[13] Mrs Henderson agreed that she first saw her solicitors on 6 July 2018 when they attended hospital to see her. She was still critically ill at that point and had no recollection of Kim showing her a letter of claim made on her behalf. She could not comment on whether Kim would have known by 28 March 2018 when a complaint was first made to the

practice (Core Bundle pages 186-187) that the appointment on 28 February had been cancelled. The notes (Core Bundle page 228) taken by the practice manager Laura Adams from a meeting held on 3 July 2018 with Kim and Sean were put to the witness. One of the notes posed the question “why did the receptionist cancel the appointment on the Wednesday morning?” As that appeared to be a question asked by Kim at the meeting, it was put to Mrs Henderson that Kim must have known about the cancelled appointment at that time. Mrs Henderson could not explain why it appeared that others might have known that the appointment had been cancelled. Her position throughout had been that she assumed that the telephone call she had made to the doctor that afternoon was before the appointment that was still due to take place. She had thought initially that Dr Filsell had taken 2 hours to call her back but now accepted that the doctor had called shortly after her telephone call with Brenda McDonald on the afternoon of the 28 February. The initial claim stated that Mrs Henderson had telephoned at 3.30 pm but that was simply an error. The witness had genuinely thought that she had spoken to Brenda McDonald then and it was not until various documents were received during the proceedings that she saw that it was a later time. During the initial discussions she had with Kim about what had happened she was still very much under the influence of strong medication. She had been aware that Kim had enlisted the assistance of an Elizabeth Fallas, a patient relations officer with NHS Fife. Ms Fallas had framed the initial complaint to the practice (Core Bundle from page 186) and Kim had confirmed that she was happy with its terms. Mrs Henderson did not feel able to address these as she had not been involved in that sequence of events. Statements by Ms Fallas on behalf of the family that it was Mrs Henderson who thought that she might have picked up a virus when speaking with Brenda McDonald on 27 February were wrong.



Mrs Henderson disagreed that it was she who had mentioned the virus to Brenda McDonald and could not explain how that might have appeared in a complaint made on her behalf.

[14] The witness was challenged on how she could have put the issue of the cut finger out of her mind when it was blue and blistered. It was suggested that she had told Heather Leslie that her finger was looking better and that is why she did not need the appointment. Mrs Henderson was adamant that she had not told Heather Leslie that her finger was getting better. She was so ill, her hands were under the covers and she was not in pain from her finger and so she was not thinking about it. When she had looked at it a couple of days previously it had looked sore but was not in fact painful. She disagreed that the finger had always been the focus of her concern stating "how could it have looked better given what happened ...". Mrs Henderson agreed that she was the type of person who would always telephone the practice if for some reason she could not attend an appointment. In her mind the appointment had not been cancelled and she pointed out that when she spoke to Brenda McDonald later in the afternoon on 28 February Brenda McDonald thought the appointment was still to come. She had not called Brenda McDonald late on 28 February to say that she would not make her appointment but because she was so unwell that she needed to be seen. She disagreed that she could be confusing the previous telephone call with Brenda McDonald on 27 February when in fact she had cancelled and rearranged an appointment. Mrs Henderson agreed that she had been woken from sleep by the 09:34 call on 28 February as she was drowsy and drifting in and out of sleep all of that day. She was questioned further about the timing of the telephone call on 27 February when she said that she had called the practice before 9.00am. That was the first day on which she was unwell and she had telephoned her place of work to say that she would not be attending and then called the practice. While Brenda McDonald's

typed note (Core Bundle page 235) stated that the phone call was at 13:43, Mrs Henderson disputed that. An audit trail recording the times of various telephone calls printed by the practice manager was put to her which recorded that the 27 February call was at 13:43. The audit trail showed also that a minute after that call a new appointment was made for 14:55 on 28 February. When shown those documents Mrs Henderson accepted that her recollection of the time that she had called on 27 February must be wrong but that she was still clear about what was said.

[15] Passages from the pursuer's written case (Closed Record, Article 7 of condescendence) were put to Mrs Henderson where it was stated on her behalf that she had telephoned the surgery in the afternoon of 28 February to say that she would not be able to attend her appointment. The witness confirmed that statement was incorrect as she had telephoned Brenda McDonald to say that she was so unwell. If that had been said on her behalf it was simply wrong. It might have been on her mind that she had an appointment (given that she did not think it had been cancelled) but she had not stated that in terms during the telephone call. She could not explain how her advisers had got these points so wrong. A report by a Dr Wallace, an expert who had been instructed on the pursuer's behalf was put to her and in particular a passage (at paragraph 3.15) that Mrs Henderson had been unsure as to how she was going to attend the appointment (on 28 February) and that is why she contacted her practice later that afternoon seeking further help.

Mrs Henderson repeated that what she had told Heather Leslie was that she was very unwell and that she had no chance to say anything more about any appointment. After the telephone call Mrs Henderson had with Dr Filsell, the doctor had sent an email of the note she had taken. It recorded "patient has red swollen fingertip for a few days".

Mrs Henderson agreed she would have said that to the doctor although she reiterated that

she had not actually looked at the finger for a few days. She did not talk of her finger as the problem to her doctor but only about how ill she was feeling. She accepted, however, as the doctor would not have had her notes in front of her in the circumstances of her being at home due to the adverse weather, the notes she made on 28 February about the finger must have come from Mrs Henderson herself. The witness agreed that although she was frightened by the afternoon of 28 February and knew something was wrong she was in the house by herself and not using her phone and so had no one to tell. Her younger daughter Emma was out and all Mrs Henderson wanted to do was curl up and sleep it off. She thought as a result of her telephone call with Brenda McDonald the day before that the virus would last for a couple of days. While her daughter Emma had not seemed too concerned about her mother's condition and had simply lit a candle to take away the smell in the room, Mrs Henderson understood that her daughter who was 18 years old at the time was excited about going on her first adult holiday and had been told by her mother that it was a virus as Mrs Henderson did not know what was really happening. She agreed that her daughter Kim had not been concerned about what was happening with her mother until about 5.00pm on Wednesday 28 February.

[16] On the critical phone call with Heather Leslie on the morning of 28 February Mrs Henderson agreed that although she knew that the phone call had been in the morning she could not have specified the time previously and had spoken in more general terms about when it took place both in her book and to the expert Dr Wallace. She said time had not been important to her at that point and that she just knew it was the morning. In relation to whether or not she had said to Heather Leslie that she still needed to see a doctor about her finger Mrs Henderson indicated that she was not sure whether she had said that "out loud" but she knew she had said she still needed the appointment. Heather Leslie's

typed note of the phone call was put to the witness. It recorded that she had said her finger was getting better but Mrs Henderson continued to dispute that she had said that. Although her pleadings alleged that she had said she needed a GP to look at the cut on her finger when Heather Leslie had called Mrs Henderson reiterated that her main concern at the time was the symptoms from which she was suffering.

[17] Mrs Henderson agreed that as the records indicate that the appointment for the afternoon of 28 February was cancelled, the issue became whether that was something she wanted or to which she agreed. Her position was that Heather Leslie was not really listening and was on the phone to either cancel or reschedule the appointment. Ms Leslie had never asked her how she was feeling. She agreed however that it would be odd for Ms Leslie to cancel the appointment if she had been told in terms by the patient that she still needed to be seen. The witness was unable to comment on the practice's system of having to click twice on the cancellation request to avoid inadvertent removal of appointments. What she recalled was that Heather Leslie would say that they would keep the appointment "as is". Mrs Henderson did have a recollection that Heather Leslie had said that a replacement nurse was available that day and could not explain why against that background Heather Leslie would have cancelled the appointment. Her recollection was that Heather Leslie had simply said that she was phoning to cancel or reschedule appointments. It was completely untrue that she had told Heather Leslie that her finger was looking better as a reason not to bother with the appointment. She disagreed that Heather Leslie's position might be more accurate because her note was written within 3 or 4 weeks of the events in question as her own position she said had been the same since 28 February 2018.

[18] The witness maintained that she had no recollection of anything that happened after her arrival at the Accident and Emergency desk on 28 February. The hospital admission note, recording “pain in arm yesterday - worse today” was put to her. Mrs Henderson said that was inaccurate as her arm had only become sore on the Wednesday (28). It was possible that Kim had given that information as she realised her mother was not able to answer. The A&E doctor (Dr Katy Green) had also recorded in the history that the cut index finger “appears to have settled”. Mrs Henderson was adamant that she could not recall saying anything to Dr Green or whether her finger was or was not hurting but she did recall that it was not causing her concern at that time and that many other issues were causing her concern. On a note being put to her that Dr Green had found no redness, heat or tenderness and that the finger looked healed Mrs Henderson became quite agitated and repeated that she had not told Heather Leslie, Dr Green or anyone that her finger was getting better. It was not causing her pain. She did recall that Kim had told her that the doctors at the hospital could not find where the sepsis was because there was no straight line appearing from the finger. A note from a subsequent doctor (Dr Pugh) who had examined her in hospital was put to the pursuer. The note also referred to a cut, healing finger. Mrs Henderson reiterated that she had not told Heather Leslie that her finger was better. All she recalled was waking up and being told by a consultant that her cut finger had caused sepsis.

[19] The witness agreed that her finger could have been healing but she could still have contracted sepsis but she had not looked at her finger at the time. She thought now that she may have been sick on the Tuesday as well as on the Wednesday when Sean was taking her to the hospital. If her book differed on that detail it was because it was a story of how she recollected things and what she felt. She stated “I can write what I like in my

autobiography". Mrs Henderson agreed that she disputed the accuracy of Heather Leslie's record of the phone call, Brenda McDonald's note of their phone call and Dr Filsell's email was also wrong. It was not correct that she told the doctor she had no shortness of breath as she recalled that she had a tightness in her chest. She could not explain why the doctor would not have noted that had she been told. Dr Green's lack of reference to shortness of breath might be explained according to the witness by her having been put on oxygen once in casualty. Her explanation for Heather Leslie's note that she had been told by Mrs Henderson that her finger was getting better was that Heather Leslie was making things up.

[20] In re-examination Mrs Henderson agreed that she had been really unwell in April 2018 when her lower limbs were amputated. She had not realised until about July 2018 that the appointment on 28 February had been cancelled and she had complained about that issue as soon as she was aware. She would not have been in a position to give Miss Fallas full information because of how poorly she had been at that time. She would not have been concerned about how to get to the GP practice on 28 February because relatives or friends could have taken her or she would have made herself get up to the medical practice herself. She knew she had to see someone. She had not contemplated a home visit because she thought she had a virus and it was hard to secure home visits from the practice. On the issue of what the doctors in the hospital had recorded Mrs Henderson reiterated that she had been told they could not see a direct line from her finger to her arm and so had found it difficult to work out how far the sepsis had travelled.

(2) *Dr Katy Green*

[21] Dr Green, a specialist doctor in trauma and orthopaedics graduated in medicine in 2005 and became a member of The Royal College of Surgeons (MRCS) (Edinburgh) in 2015. She adopted her witness statement dated 2 June 2021 as her evidence in chief and she had written and signed the relevant medical notes. She was not the first doctor to see Mrs Henderson on her admission to Accident and Emergency at the Victoria Hospital in Kirkcaldy on 28 February. The admission note was written by a triage nurse in Accident and Emergency. Dr Green's own note when she saw the patient recorded in the history that she had a pain in her arm yesterday and that it was worse today. She had a high temperature (39.3 degrees), a high pulse (130), a low but reasonable blood pressure reading (111/48), a high respiratory rate (30) but her oxygen saturation level was 98% which was acceptable. Dr Green was asked about a note she had made at the time when taking a history from the patient that she had a cut in the right finger which "appears to have settled" she said that she believed the patient had said the finger had improved over the preceding day. Her working diagnosis at the time had been sepsis of unknown origin. She checked that the patient was not tender or complaining of pain in the finger. She looked for redness, tenderness and heat in the finger or cellulitis which is a sign of worsening infection of the skin. There was none. There had been pain when the patient had been asked to raise her right arm above the head and pain on deep inspiration but no shortness of breath or cough.

[22] Dr Green had noted after her examination "no evidence finger cut is relevant". She explained that the patient had been very septic and she had been looking for a source. At the time the healing finger did not look to be the source and so Mrs Henderson was admitted for investigation. Dr Green was not involved in her care later although she saw that the notes indicate that the finger was later considered to be a source of infection. A CT

scan had been requested by Accident and Emergency to look for other causes of sepsis.

Dr Green's own initial view was the initial stage and she was willing to review it if required.

She could not recall whether the patient had been on oxygen. When an entry from 1 March at 03.50 was put to her recording that Mrs Henderson's oxygen saturations had been 96% on room air at that time, Dr Green said that that later reading was of no assistance in ascertaining whether the patient had been on oxygen on 28 February. It was standard if someone was admitted with sepsis that they would receive oxygen in A&E.

[23] Under cross-examination Dr Green confirmed that she did have some personal recollection of seeing Mrs Henderson in Accident and Emergency although she was mainly relying on her notes in her evidence. She agreed that it would have been closer to 8.00pm on 28 February than 7.00pm when she saw Mrs Henderson as it appeared she had been admitted to A&E at 19.08. She had been called to A&E to see the patient because the staff there wanted to check that the cut finger from a few days before was not the cause of her sepsis. It was likely that Mrs Henderson had mentioned the cut when someone took the history from her but she could not be sure about that. It was always difficult to know what the source of sepsis was. Dr Green agreed that by 1 March, the day after she saw Mrs Henderson the finger was identified as the likely source and she had no reason to doubt the note made at that time by Dr Pugh. It was put to her that Dr Pugh had noted that although the right index finger was cut and healing there was surrounding erythema (a rash or redness) and tracking up the forearm, together with further patches of erythema in the upper right arm. She agreed that it seemed that Mrs Henderson's finger had worsened although she said there was certainly no cellulitis when she had seen the patient and her consultant had found none either. She did not think she had missed the tracking. She



knew that Dr Pugh was a medical doctor and thought he was probably less used to seeing erythema. She noted that Dr Pugh had also recorded that the cut was healing.

[24] Dr Green had never seen Dr Filsell's note which was read out to her. Dr Filsell had noted that Mrs Henderson had a red swollen fingertip for a few days prior to 28 February. Dr Green repeated that there was no erythema when she saw Mrs Henderson.

**(3) *Laura Adams***

[25] Laura Adams is the practice manager of Benarty Medical Practice. She adopted her witness statement, signed 1 June 2021 as her evidence in chief. Ms Adams had prepared audit trails of the clinical system (EMIS) used by the practice which allowed her to search using various criteria such as patient or user or to conduct a data search. In particular for this case she had conducted and then printed an audit trail on 21 April 2020 in relation to the pursuer Mrs Henderson limited by date to 26 February to 28 February 2018 inclusive. The audit showed that an appointment had been booked by Mrs Henderson for 26 February and entered by a Gillian Simon who was one of the receptionists in the practice at the time. An entry of 27 February recorded that Brenda McDonald had cancelled the appointment and re-fixed it for 28 February at 14:55. Ms Adams explained that in 2018 when an appointment was cancelled the software built-in "no reason given" automatically. That has been changed such that a code is now selected that allows the practice to state who cancelled the appointment. The records show that on 28 February at 09.34 Heather Leslie cancelled Mrs Henderson's appointment for 14:55 that day. The following page was an audit trail for entries made by Heather Leslie who had logged on at 08.36 on 28 February. There was no note confirming what the purpose of the appointment had been.

[26] Ms Adams had conducted an audit trail for other patients (anonymised) who had appointments booked for 28 February 2018. For example at 09.16 that day an appointment had been fixed for a patient to see a doctor at 10.40. The records illustrate that the patient arrived early. Then a patient "AS" had an appointment fixed after Heather Leslie had called Mrs Henderson that morning. Ms Adams confirmed that Heather Leslie had been contacting all of the patients due to the adverse weather that day but that when she could not reach a patient she kept the appointment. The practice also kept a modern version of an appointment book which appears as a single page for each day on a screen. The appointment screen illustrated that for the Tuesday and Wednesday afternoon (27 and 28 February) a Mrs Thompson, the treatment room nurse could not make it into work. NHS Fife had provided a replacement a Ms Mackie. Both Mrs Thompson and Ms Mackie are NHS Fife employees. The screen also shows patient appointment details and the time they are booked. Ms Adams had searched under the appointments for 28 February with the practice nurse, she could see that patients had been seen on that day and that Dr Brown of the practice had also seen patients on 28 February. The times at which the patients left had been typed and read on the sheet. Dr Filsell also saw patients both morning and afternoon on 28 February with the last patient leaving at 15.31. She was also the on call doctor that day. If home visits were requested in the morning the morning on call doctor would do them before or after morning surgery. Dr Filsell was the afternoon on call doctor who would conduct home visits if required after surgery depending on the urgency of the visit.

[27] The witness confirmed that she had received a complaint to the practice on behalf of the pursuer through Elizabeth Fallas on 28 March 2018. The pursuer's condition as reported from the hospital had been a shock and the issue was fresh in her mind at that time. She had sent a letter of response on behalf of the practice on 5 April 2018. Both Heather Leslie and

Brenda McDonald had prepared statements and given them to her before she had sent that letter of response. Her normal practice was to ask for statements as soon as she receives a complaint. Subsequently, on 3 July 2018 Laura Adams had met with Mrs Henderson's daughter and son-in-law, Kim and Sean. She had made notes immediately after the meeting and spoke to those in evidence. She confirmed these were comments made by the family at the meeting. Attention was drawn to a question they had asked about why the appointment for the afternoon of 28 February had been cancelled that morning. Secondly, there was a note about the receptionist (Brenda McDonald) telling the patient that it was probably a virus (on 27 February) and that recorded the family telling Laura Adams that their version of events was that Mrs Henderson had left the issue of coming to the practice as a result. On the cancelled appointment the note stated "patient said she did not cancel appointment and that she was to phone back if not coming" and Ms Adams confirmed that was what the family had told her. The note also referred to "desk aid" which was a tool to assist in alerting staff to possible signs of sepsis and the practice had sought advice on securing this tool. Ms Adams showed Sean and Kim a copy of the significant event report the practice had prepared after the events in question.

[28] Under cross-examination Ms Adams confirmed that she was not sure the precise date on which Heather Leslie and Brenda McDonald's statements were prepared. She did not know why they were not dated; she would leave it to the witness. She stated "I had no input and don't know if they were done at the same time". She took no further information from either Heather Leslie or Brenda McDonald after she received their statement.

Ms Adams agreed that she would have tried to answer the family's question about why the receptionist had cancelled the appointment on Wednesday 28 February. She thought she had said to the family that the receptionist did not cancel the appointment other than on the

patient's instruction. She agreed that the issue of cancellation by Mrs Henderson was disputed from an early stage. She confirmed that the practice received about four complaints per year. These have to be reported to NHS Fife and her normal practice would be to respond as soon as possible.

[29] On the issue of what audit trail had been performed to recover the typed notes of Heather Leslie and Brenda McDonald, Ms Adams said that both members of staff would have handwritten their statements first and then they would have typed them up. Ms Adams would not know how to check them when they were uploaded to the system. They will have had the letter of complaint when they prepared their statement although could have made a note before that. She will have asked them to write what they remembered but they would not see any documentation and would just be told that a patient was going to make a complaint and to give their personal recollection. In particular they would not be able to access the audit trail that she had recovered when matters were being investigated.

**(4) Brenda McDonald**

[30] Miss McDonald is a 58 year old receptionist who has worked at the defenders' medical practice for over 15 years. She adopted a statement she had given and signed on 1 June 2021 as her evidence in chief. Miss McDonald grew up in the same area as the pursuer and she was on first name terms with her. The first relevant call she took from the pursuer was on 27 February 2018 which the audit trail has confirmed was at 13:43. Her position was that Mrs Henderson had said that she was not feeling well that day, that she had been sick and thought she had picked up a virus. Miss McDonald thought that she had responded by saying something like "you could be right Marguerite, it's maybe a wee

virus". The call was chatty and relaxed and she had no concerns. She had no recollection now but saw from the audit trail that she cancelled the appointment for that day and shortly afterwards booked another appointment for Mrs Henderson with the treatment room nurse for 14:55 on the following day.

[31] The witness recalled the extreme weather the following day, 28 February. It was easier for her than others to make it to work as she lives very close to the practice. She recalled that she stayed at the practice until 6.00pm on the Wednesday because she lived so close by. The practice manager was letting the rest of the staff go home early where possible. Not long after 5.00pm she took a call from Mrs Henderson whose voice sounded totally different from the previous afternoon. She could tell something was wrong and realised Mrs Henderson needed to speak to a doctor. Mrs Henderson told Miss McDonald that she had pain in her arm and into her breast. She said that it had felt like that for a couple of hours. Miss McDonald had recalled at the time that she had made an appointment the previous day for Mrs Henderson to see the treatment room nurse and asked if she had gone to the appointment. She did not have the appointment screen opened and so was unaware at the time that the appointment had been cancelled. After the call with Mrs Henderson that day Miss McDonald telephoned Dr Filsell straightaway on her mobile and reported the detail of the patient's symptoms to her. Miss McDonald spoke subsequently to Dr Filsell, first when the doctor called to get Mrs Henderson's details then when Dr Filsell telephoned to confirm that she had spoken with Mrs Henderson and had asked her to contact the out of hours service. Miss McDonald left the practice that day at 6.00pm. On Friday, 2 March 2018 Laura Adams had telephoned Brenda McDonald and told her that she had heard Mrs Henderson was "on life support". It was a few weeks after that that a complaint was received by the practice about the care Marguerite Henderson had

received. Laura Adams asked her to make a note of her recollection of the phone calls so that she could respond to the complaint on behalf of the practice and that was done.

[32] Under cross-examination the witness confirmed that she could still recollect the call she had with Mrs Henderson on 28 February at 5.00pm. She had not realised that Mrs Henderson's appointment had been cancelled until perhaps when the complaint arrived a few weeks later. Her recollection was that she had asked Mrs Henderson if she had attended her appointment and Mrs Henderson had told her "no". She did not recollect any reference to the appointment having been cancelled. Her overriding memory was that Mrs Henderson was not well at all when they spoke after 5.00pm on 28 February.

Miss McDonald's initial statement was written at the start of April 2018. Prior to that she was aware about how unwell Mrs Henderson was. She specifically recalled saying to the pursuer "Marguerite, please tell me you've not been like that all day" and she said "no just a couple of hours". Although she had known on 27 February that Mrs Henderson was not well she was not concerned because the pursuer had told her that she had just picked up a wee virus and was not going to come in. Her recollection was that both she and Mrs Henderson had mentioned a virus, with Miss McDonald repeating what Mrs Henderson said about that. She said she was sure that it was Mrs Henderson who had used the word virus first. She did not think it possible that she had mentioned the word virus to Mrs Henderson first.

[33] In relation to the typed note prepared at the start of April 2018 Miss McDonald agreed that she knew by then that it was being suggested that she had raised the issue of the virus with Mrs Henderson. She disputed that she was simply defending herself and said she was concentrating on what had been said by the patient. She did not have records in front of her to prompt her recollection when she made the April 2018 note. The witness was

challenged on how she could recollect something so detailed about a call with a patient several weeks before and indicated that with Mrs Henderson it had stuck in her mind because of the dramatic thing that had happened to her afterwards. She agreed that she spoke to many patients in a day but had been able to recollect those particular calls.

Miss McDonald agreed that Mrs Henderson had not said something like “I’ve just missed it” when asked whether she had made her appointment on 28 February she had just said “no” when asked if she had attended. She did not question why Mrs Henderson had not attended but she recalled that she had made the appointment for her the previous day. She was not surprised that Mrs Henderson had not made the appointment on 28 February because she was not well. Although the conversation on 28 February had been over the telephone Brenda McDonald felt that Mrs Henderson was so different from the day before that although she did not know exactly what was wrong she knew that the patient was different from the first call on 27 February.

[34] When asked by reference to Dr Filsell’s note exactly what Mrs Henderson had said on 28 February, Brenda McDonald said that Mrs Henderson had told her she had been unwell for the last couple of hours and that she had a pain from her arm into her breast. She asked Mrs Henderson how long she had been like that and Mrs Henderson responded “the last couple of hours”. By the expression “like that” Miss McDonald was not being specific but was referring to the period during which Mrs Henderson felt so unwell.

(5) *Heather Leslie*

[35] Heather Leslie is a 56 year old receptionist at Benarty Medical Practice where she has worked since 2008. She had signed a witness statement on 1 June 2021 which she adopted as her evidence. Like Miss McDonald, she had also given a statement or note of what she

recalled in April 2018 just after the complaint was received. She explained that Laura Adams had asked her and Brenda McDonald to write down what they could remember about the events of that day. She had given a handwritten account and she thought that Laura Adams had typed it up. She was content that the typed note accorded with what she had written at the time. In relation to the telephone call at mid-morning on 28 February 2018 Ms Leslie's recollection as recorded in the typed note was as follows:

“The patient informed me that she didn't think the appointment was needed and that she thought her finger was getting better. I confirmed that the nurse would still be here and she could be seen but Mrs Henderson said she would leave it just now”.

[36] Ms Leslie explained the method of cancelling appointments at the practice. This was done by bringing a patient's name up on the screen and clicking the “cancel” option. The programme then asked the user whether they could confirm the cancellation and the user required to click that they confirmed. Although it might be possible to cancel inadvertently the user would have to click twice that they were cancelling and so it was not an easy option. This was built in to the system. Heather Leslie disputed that Mrs Henderson told her that she was feeling worse and needed to see the GP. There was nothing mentioned in the call on 28 February about any illness or symptoms. In particular, Heather Leslie denied that Mrs Henderson had said that she was lethargic or unable to get out of bed or that her right arm was aching or that she had not seen a doctor yet about her finger cut. The witness disputed that Mrs Henderson had told her to keep the appointment “as is”. It was a very brief conversation. Ms Leslie would not have cancelled the appointment if the patient had told her that she needed to see a doctor about her finger. Her recollection was that Mrs Henderson had told her that her finger looked better and so she did not need the appointment.



[37] Under cross-examination Ms Leslie agreed that when she prepared the typed note in April 2018 she and Brenda McDonald did look through things such as the complaint letter and had access to the practice computer. She recalled that Laura Adams had shown them what the complaint was. It was a written complaint. Prior to that she had no reason to think she would be asked to recall what happened on 28 February and it was a bolt from the blue. However as 28 February had been a day where things had been different because of the snow she did remember the calls she had made to confirm or cancel appointments. It was not that the day had been any busier than normal but it was unusual because of the weather. Ms Leslie specifically remembered calling the other treatment room patients. She called each of them and said that there would be another nurse available in the treatment room. She could not remember the specific details but recalled parts of her conversation with Mrs Henderson because it had been on her mind a lot over the years.

[38] When pressed on how the typed note had been prepared, Heather Leslie reiterated that she had handwritten it by herself and then given it to Laura Adams to type up. She was confident that she will have checked it afterwards and she had signed the handwritten copy but not dated it. She had not been asked to do that. Turning to the audit trail, Ms Leslie agreed that this illustrated that she had signed into work at 8.36am on 28 February.

At 8.38am she had cancelled an appointment but could not now recall who the patient was or why it was cancelled. The documentation indicated that at 8.41am she had booked an appointment and she confirmed that would have been by a telephone call. She could not remember the details of that. At 8.42am there was a note for a telephone consultation and she thought this would have been a change from a face to face meeting to a telephone call. At 8.42am the notes record that a patient arrived at the practice but she could not recall who that was. There were various other entries that morning. Appointments were booked such

as an appointment with the midwife for 20 minutes at 10.40am. Some appointments were cancelled and others were booked such as one slot for 10 minutes at 3.50pm. Patients' appointments had been cancelled at 9.12am and 9.14am but Ms Leslie could not recall who those patients were. In essence she agreed that she had been trying to put any appointments into the morning that day to free up the afternoon due to the weather. The treatment room was an afternoon clinic covered by the nurses and there was a note in the records that at 9.30am a patient had been booked for the treatment room that afternoon.

[39] It was at 9.34am that the records illustrated that Mrs Henderson's 2.55pm appointment was cancelled. She thought that her telephone call with Marguerite Henderson that morning will have lasted for less than a minute. After the call the notes record that Heather Leslie continued to make and cancel appointments between 9.35am and 10.15am on 28 February. When taken through the record of all of the other calls that morning, Heather Leslie agreed that she could not now remember a single detail about any other patient. Had she been asked a few days after the event she would have been able to do so. Whether or not she would recall a conversation with a patient that took place a month ago would depend on the circumstances. Her 1 minute call with Marguerite Henderson did stand out. The witness agreed that it was not normal for her to cancel 12 appointments in 2 hours as she had done on 28 February. She denied, however, that she was on a mission that morning. Her task was to confirm appointments and was seeking to bring them forward. There were still clinicians in the building in the afternoon and so the purpose of her call was not to cancel but to confirm the appointment and to see if patients could come in earlier.

[40] Ms Leslie disputed that her aim had been to get away early that day although she did want to get home safely. She did ultimately leave the practice early although she could

not remember exactly when. She had no involvement in the investigation other than to provide the handwritten statement that had been turned into the typed note. The only person that spoke to her about her statement was Laura Adams. She recalled going over with Ms Adams what she could remember a few weeks after the event. This coincided with the time that the handwritten note was prepared. She thought that she would have spoken to Laura Adams both before she wrote her note and after it was typed up. She recollected that Laura Adams had shown her the note after it was typed up just to go over it together with the written statement. Ms Leslie agreed that she had looked at the appointment screen at some point. She could not remember exactly when but it would probably be after the complaint came in in late March early April 2018. She had no reason to look at it prior to that.

[41] Ms Leslie had no recollection of looking at any records in relation to Mrs Henderson and the events of February 2018 since she gave her handwritten statement in early April that year. She did recall seeing the significant event report. There was a meeting in the practice about it a few weeks after it was prepared but she could not recall the dates. Laura Adams had shared the information from the significant event report with them. Ms Leslie thought it would have been shown to her because she had been involved. The significant event report dated 14 June 2018 was put to the witness. Section 3 included a part headed "What Went Wrong". Two points were made in that section. The first was "communication between patient and practice" and the second "extreme weather conditions". Ms Leslie did not agree that there was anything wrong with the communication between her and Mrs Henderson. She knew what Mrs Henderson said, she knew the response that she had given to Mrs Henderson and what happened thereafter. Ms Leslie accepted that Mrs Henderson might have her own interpretation of what took place. When asked

whether she agreed that the words both she and the patient said had been used such as “leave it” were ambiguous, Heather Leslie said that she could not be 100% sure what words had been used but the clear gist was that matters were being left without a further appointment. No replacement appointment had been discussed. While the words “leave it just now” could suggest that the matter had not been fully resolved, as Mrs Henderson had said that her finger was better and she did not ask for another appointment, then Ms Leslie was left just with the cancellation. She had not offered Mrs Henderson a fresh appointment.

[42] In re-examination Heather Leslie agreed that appointments were being rearranged for the morning simply because the GPs were still in the building and not so that she personally could leave early. Looking again at the audit trail, there were three entries relating to Mrs Henderson that had been cancelled at the 9.34am call. She had been given three 5 minute slots. A “screengrab” of the appointment system was put to the witness and she confirmed that this was the screen that she would have been looking at on 28 February. The audit trail was something different that had been recovered subsequently. On the screengrab for appointments for 28 February there was no reference to Mrs Henderson’s appointment because it was cancelled.

**(6) *Unchallenged evidence***

[43] In addition to the oral evidence led at proof, five witnesses gave witness statements that were not challenged and are worthy of note. First, Kara Mackie gave a signed statement on 2 June 2021. Ms Mackie is a community staff nurse working with NHS Fife. On Wednesday 28 February 2018 due to the heavy snow she was unable to travel to her own work base. She was advised to call her nearest GP practice and to cover the essential visits to patients. Ms Mackie duly called the Benarty Medical Practice and was asked if she could

see a couple of patients in the treatment room that afternoon. Under reference to her 2018 diary, the relevant page of which is referred to in her statement and lodged, she was able to confirm that she saw and treated a patient Mr JH that afternoon. Ms Mackie left the practice some time after 3.00pm that day.

[44] Dr Susan Filsell signed a witness statement on 31 May 2021. Much of her evidence does not go to the critical issue that I must determine in relation to the telephone call on the morning of 28 February. Her unchallenged evidence in so far as relevant confirms that the practice in which she is a partner, Benarty Medical Practice, was not very busy in the afternoon of Wednesday 28 February 2018 as most patients had either cancelled or attended earlier in the day. Dr Filsell saw three patients that afternoon who had kept their appointments. She was confident that the practice did not receive a phone call from Mrs Henderson while she was in the practice premises that afternoon. She finished writing up the consultation note for her last patient at about 3.31pm. She left for home at 4.45pm and planned her route home carefully given the treacherous weather. It was while she was driving home, at 5.11pm, that she received a call from Brenda McDonald to say that she had just received a call from Mrs Henderson complaining of pain under her arm. Dr Filsell arrived home just after 5.20pm and immediately phoned the practice back at 5.24pm when she was given Mrs Henderson's contact details by Brenda McDonald. She spoke with Mrs Henderson for 8 minutes commencing 5.27pm and then telephoned Miss McDonald back at 5.35pm to confirm that she had done so. She then typed an email to Laura Adams with her clinical entry relating to the telephone call which sent at 5.42pm that day. The email reads:

"... Here is my entry for patient telephone call today ... patient had red swollen fingertip for few days (right index). Today developed worsening pain right axilla into breast. No SOB or chest pain. Has been shivery, vomited yesterday, diarrhoea

today. Feels really weak and unwell. Struggling to move from bed to toilet. Not eating, reduced fluid intake. Passed urine 5 mins ago but small amount. No aching. Tender right axilla. ? painful lymph node secondary to finger infection. ?? Early sepsis symptoms. Time now 1730 and in view of severe weather conditions no GP on site so advise to call OOH at 6.00pm. Patient happy to do so and I feel safe to wait until then."

Dr Filsell retained some recollection of the telephone conversation with Mrs Henderson but only because of the unusual circumstances.

[45] Dr Filsell also explains the system in the practice where a call is taken from a patient who needs to speak to a doctor. So far as the morning of 28 February 2018 was concerned Dr Filsell's colleague Dr Brown was the on call doctor and her surgery list did not start until 10.30am that day. Dr Filsell states that had Mrs Henderson told Heather Leslie in the call at 9.34am that she was extremely unwell, had a sore arm and underarm and needed a doctor to look at the cut on her finger it is likely that Heather would have passed the call straight through to Dr Brown. Dr Filsell could see from the records that on 28 February Dr Brown had just finished dealing with a patient at 9.33am and did not see her next patient until nearer 10.00am. There were also emergency slots available that day in which Mrs Henderson could have been seen. Dr Filsell would have been available to see Mrs Henderson for an emergency appointment at around 11.00am that day. Alternatively if Mrs Henderson had told Heather Leslie how unwell she was, a home visit could have been arranged.

[46] Gillian Simon, one of the other receptionists at Benarty Medical Practice also signed a witness statement, on 1 June 2021. She confirmed that she took the first call from Mrs Henderson, on Monday 26 February and made the appointment for her to attend the treatment room the following day, 27 February, at 15:45. She states that she would have confirmed with Mrs Henderson at the end of the call the date and time of the appointment

and who she would see. Miss Simon does that routinely for all patients. Had Mrs Henderson been really concerned about the cut or was unwell and had wanted to see a GP Miss Simon would have offered her an appointment with one of the doctors on the same day that she called. Elizabeth Fallas signed a witness statement on 10 December 2021. In that she confirms her role as a patient relations officer with NHS Fife. She is engaged in the handling of more complex complaints in NHS Fife which require investigation. She dealt with the complaint raised by Mrs Henderson's daughter Kim on 14 March 2018 although it was initially lodged only as a concern. She recalls receiving the call from Kim because unusually the complaint was about a GP practice and the patient was now seriously unwell. Ms Fallas had noted that verbal consent had been received from Mrs Henderson that Kim had authority to make the complaint on her behalf. The complaint centred on the phone calls between Mrs Henderson and the practice. So far as the appointment on 28 February 2018 was concerned Elizabeth Fallas had typewritten a note stating that "Mrs Henderson then was unable to attend the GP due to the weather conditions ...". She appreciated that the complaint letter that she subsequently drafted stated that on 28 February Mrs Henderson was not able to be seen due to the bad weather. Dr Fallas could not confirm with any certainty the detail of her conversation with Kim or why there had been a difference in emphasis between what she had noted of the complaint and what she had written in the complaint letter. Her recollection was that the complaint was not about the telephone call between Mrs Henderson and Ms Leslie on 28 February when she was dealing with matters. The practice responded to the complaint written on behalf of the family by Dr Fallas which was forwarded to the pursuer's daughter Kim on 18 April 2018 by email. Dr Fallas had no note of any further contact between her and the family.

[47] Finally, the pursuer's daughter Kim Donnachie gave a statement and was not called to be cross-examined. She had seen her mother Mrs Henderson on the evening of 26 February when Mrs Henderson had shown the cut on her finger. She recalled that her mother had no other symptoms that evening and appeared to be well. On 27 February she did not see her mother but received a message from her mother's then partner to say that Mrs Henderson was unwell. She spoke to her mother from her car on the telephone and recalled that Mrs Henderson sounded groggy and lethargic. On 28 February 2018 Kim did not speak to her mother until some time after 5.00pm. She recalled that her mother sounded really drained and groggy on the phone. She was breathless and wheezy and it was an effort for her to speak. It was a quick call and Mrs Henderson told Kim that she had spoken to a GP who had told her to call NHS 24 after 6.00pm. When Kim reported the call to her husband Sean he was concerned and offered to take Mrs Henderson to the hospital. When they arrived at Mrs Henderson's house Kim was struck by the smell in her mother's room which was like that she had experienced in the room when her grandmother had died.

## **Decision**

[48] The matter that I have been asked to determine in this case involves the difficult issue of the approach to take to evidence based on recollection. Issues of credibility and reliability are part of the assessment. As Lord Pearce put it in *Onassis v Vergottis* [1968] Lloyd's LR 403 at 431, the issue of credibility includes not just issues of whether a witness is truthful or untruthful but whether the memory of a generally truthful witness has correctly retained information.

“Also, has his recollection been subsequently altered by unconscious bias or wishful thinking or by over much discussion of it with others? Witnesses, especially those who are emotional, who think that they are morally in the right, tend very easily and



unconsciously to conjure up a legal right that did not exist. It is a truism, often used in accident cases, with every day that passes the memory becomes fainter and the imagination becomes more active. For that reason a witness, however honest, rarely persuades a judge that his present recollection is preferable to that which was taken down in writing immediately after the accident occurred. Therefore, contemporary documents are always of the utmost importance.”

[49] Counsel were agreed that the most useful judicial observations about evidence based on recollection are those of Leggatt J (as he then was) in *Gestmin SGPS SA v Credit Suisse (UK) Ltd & Another* [2020] 1 CLC 428; [2013] EWHC 3560 (Comm) at paragraphs 16-20. While the whole section is of considerable interest, the following excerpts are particularly pertinent in the present case;

“16. While everyone knows that memory is fallible, I do not believe that the legal system has sufficiently absorbed the lessons of a century of psychological research into the nature of memory and the unreliability of eye witness testimony. One of the most important lessons of such research is that in everyday life we are not aware of the extent to which our own and other people’s memories are unreliable and believe our memories to be more faithful than they are. Two common (and related errors are to suppose: (1) that the stronger and more vivid is our feeling or experience of recollection, the more likely the recollection is to be accurate; and (2) that the more confident another person is in their recollection, the more likely their recollection is to be accurate. ...

19. The process of civil litigation itself subjects the memories of witnesses to powerful biases. The nature of litigation is such that witnesses often have a stake in a particular version of events. This is obvious where the person is a party or has a tie of loyalty (such as an employment relationship) to a party to the proceedings. Other, more subtle influences include allegiances created by the process of preparing a witness statement and of coming to court to give evidence for one side in the dispute. A desire to assist, or at least not to prejudice, the party who has called the witness or that party’s lawyers, as well as a natural desire to give a good impression in a public forum, can be significant motivating forces.

20. Considerable interference with memory is also introduced in civil litigation by the procedure of preparing for trial. A witness is asked to make a statement, often ... when a long time has already elapsed since the relevant events. The statement is usually drafted for the witness by a lawyer who is inevitably conscious of the significance for the issues in the case of what the witness does nor does not say. The statement is made after the witness’ memory has been ‘refreshed’ by reading documents.”

These observations have been cited with approval in a number of cases in this court and beyond - *Prescott v University St Andrews* [2016] CSOH 3 at paragraph 42; *Johnstone v Grampian Health Board* [2019] CSOH 90 at paragraph 127 and *Sheard v Tri Do* [2021] EWHC 2166 (QB). While it continues to be acceptable to take the demeanour of a witness into account in appropriate circumstances, it is the consistency of a witness' evidence, both internally and taken with other evidence, that tends to provide the best guide to reliability.

[50] In the present case, while I have taken account of the demeanour of each witness, I have found it of relatively limited assistance in the decision I must make. For example, it was submitted on behalf of the defenders that the pursuer was combative at times in evidence. I agree that Mrs Henderson was emphatic in some of her answers and that she made her assertions strenuously. That is hardly surprising given the life changing injuries from which she has suffered and the importance of the case to her. Similarly, while I observed that the defenders' witnesses were a little defensive in their manner, that can easily be attributed to how any person might respond if they feel that their honesty or integrity is being impugned. What really matters is the extent to which the evidence of each witness is consistent with other extraneous evidence; how their account fits with other relevant facts proved. This is particularly so in the present case where no real issue of credibility (in the sense of honesty) arises in respect of the critical witnesses, namely the pursuer and Heather Leslie. The only issue of alleged dishonesty that was raised was in relation to Laura Adams' evidence. While Ms Adams' evidence did not go directly to the issue of the content of the telephone call between Heather Leslie and the pursuer, she was able to explain how the audit trail of the phone calls at the material time were recorded. She is clearly familiar with the software system in relation to the making and cancelling of appointments and I accept her evidence on that. The issue on which her credibility was

challenged was that of the creation of the initial statements of Brenda McDonald and Heather Leslie. On Ms Adams' account the typed statements of those witnesses were effectively their own responsibility and she had nothing to do with them. Heather Leslie's account was that she and Brenda McDonald had prepared handwritten statements which they handed to Laura Adams. Heather Leslie had signed her handwritten statement and confirmed that its contents then appeared to be recorded in the unsigned typed version. I accept the submission made on behalf of the pursuer that the layout and appearance of the two documents being as they are in the same font, size and alignment is far more consistent with Heather Leslie's evidence than that of Ms Adams. Heather Leslie was very clear that while the typed note reflected the terms of her handwritten account she was not the author of the latter. That is consistent with Ms Adams co-ordinating and drafting the response to the complaint on behalf of the defenders. On that specific point I have rejected the evidence of Laura Adams and preferred Heather Leslie's evidence. With that one exception, I found all of the witnesses (including Laura Adams in relation to other matters) were doing their best to tell the truth.

[51] There is only one relevant dispute in relation to the period prior to the telephone call on the morning of 28 February. The pursuer's recollection was that it was Brenda McDonald who first raised the possibility of her suffering from a virus during the telephone call on the morning of 27 February. Mrs Henderson requested that her appointment be rescheduled and that was done. On balance, however, I prefer Brenda McDonald's evidence in relation to that issue. It makes sense that an experienced receptionist having been told by the patient that she thought she had picked up a virus would respond by repeating the patient's words in a chatty and relaxed manner providing such reassurance as she could. It seems inherently unlikely that an experienced member of non medical staff would suggest the source of a

patient's ailment to them. More importantly, Brenda McDonald's recollection about that exchange is consistent with the terms of the initial complaint to the practice made by Elizabeth Fallas (Core Bundle pages 186-187) with information emanating from Mrs Henderson (via her daughter) to the effect that it was Mrs Henderson herself who thought she might have picked up a virus. Ms McDonald has stated consistently since April 2018 that it was Mrs Henderson who mentioned having picked up a virus. The pursuer told her daughter Kim she had a virus, without reference to Brenda McDonald. The suggestion that it was Brenda McDonald who raised it appears to have developed later. I conclude that it was Mrs Henderson who first mentioned having picked up a virus when she spoke to Brenda McDonald on 27 February.

[52] Turning to the critical phone call on the morning of 28 February it was not in dispute that the call was made by Heather Leslie to the pursuer against the backdrop of the deteriorating weather. Ms Leslie was calling all the patients to see if they still required their appointments. She was keen to try to fit patients into the morning session if she could. However, I accept the evidence that there was availability in the afternoon to see a treatment room nurse should any patient request it. Ms Mackie, provided by NHS Fife as a replacement for the usual nurse was available if the pursuer had said she wanted to keep her appointment. The pursuer's evidence was that she had told Heather Leslie that she did still need the appointment. Leaving aside that the pursuer's appointment was with the treatment nurse and not with the GP, the pursuer's account if accepted would render inexplicable the fact that the appointment was cancelled by Heather Leslie contemporaneously with the telephone call at 09.34. The pursuer's position was that Heather Leslie was determined to cancel the appointment, that she was not listening to her but that she ultimately agreed to leave the appointment "as is". Both witnesses recalled the

word “leave”, with Heather Leslie stating that the pursuer wanted to cancel and leave matters for now. There are a number of adminicles of evidence that tend to militate against the pursuer’s account being accurate.

[53] First, there was no reason for Heather Leslie to cancel the appointment other than at the request of the pursuer and I am satisfied that it is unlikely to have occurred accidentally. I accept the evidence about the software system for making and cancelling appointments in the defenders’ practice. Heather Leslie would have required not just to select the cancellation option but to “click twice” on that option before the appointment would be cancelled. That made it more difficult for it to be cancelled inadvertently. Secondly, the audit trail recovered by Laura Adams and lodged in process illustrates that Heather Leslie arranged appointments for 28 February for other patients almost immediately before and immediately after she spoke with the pursuer. That tends to negate the pursuer’s suggestion that Ms Leslie had been “on a mission” to cancel appointments that day. Thirdly, the short duration of the call tends to support Heather Leslie’s account that this was a brief and uneventful conversation rather than one in which Mrs Henderson complained of a number of symptoms separate from the cut on her finger while still maintaining that she required to see a doctor. It was only as a result of the subsequent dreadful news about Mrs Henderson’s condition that Heather Leslie was able to recall some of the detail of the appointment. Her position on that makes sense and I accept it.

[54] The issue of the condition of Mrs Henderson’s finger on 28 February, what she said about that and whether she has been consistent also sheds light on what was said during the critical call. The pursuer’s written pleadings indicate that her case was that when Heather Leslie telephoned her, she told Ms Leslie that she still needed a GP to look at the cut on her finger. In oral evidence, under cross-examination, Mrs Henderson said initially that

although she did still need the appointment she had not told Heather Leslie that it was about her cut finger. Later in cross-examination she stated that she could not in fact remember whether she said anything about her finger “out loud” but was very clear that she said she still needed the appointment. The pursuer was adamant in oral evidence that her finger was not her main concern on the morning of 28 February although it was in her mind that she still needed to see someone about it. When asked to reconcile her earlier claim that she had mentioned her finger to Heather Leslie with her finger not being her concern, Mrs Henderson said that it was as the sepsis symptoms evolved that her finger became less of a concern. She was insistent that Heather Leslie’s statement that she had been told by the pursuer that her finger looked better and that she would not then bother with the appointment was completely untrue. She claimed that the finger could not have possibly been getting better given the severe sepsis from which she was subsequently found to have been suffering.

[55] The notes of Dr Green from the hospital admission later on 28 February are of some interest in this context. Dr Green had recorded a history of events as including that 4 to 7 days previously the patient had cut her right index finger at work but it “appears to have settled”. That note is consistent with what Heather Leslie states she was told in the telephone call by the pursuer and conflicts with the pursuer’s evidence. Dr Green’s evidence was that she remembered thinking it was an odd presentation because “in the patient’s own words” the finger had been improving. When asked about this, Mrs Henderson reiterated that the finger was not causing her concern but she had no recollection of it not hurting just that she had many other issues. She could not explain how Dr Green would have gained the impression that her finger was improving. The pursuer also said in evidence that her finger had been under the duvet cover and was not causing

her pain and that is why she could not have mentioned it to Heather Leslie. She could not comment on how the note of Dr Pugh's examination later on 28 February was to the effect that the right index finger was cut but healing. It is understandable that the pursuer may have thought less about her finger as her flu like symptoms increased and she was focused on feeling unwell. It is also understandable that the pursuer could not recollect some of the detail, for example in relation to whether she had told Dr Filsell later that day that her chest was tight. When challenged about the matter Mrs Henderson accepted that what she really recalled at the time of the call with the doctor was the pain in her arm. The consistency between Heather Leslie's account and the notes from the examinations of Dr Green and Dr Pugh all militate against acceptance of the pursuer's account(s) of what, if anything, she said about her finger to Heather Leslie during the phone call in question. I conclude that Heather Leslie's evidence on that issue is to be preferred. Mr Milligan accepted that the pursuer had given inconsistent accounts of whether she had mentioned the cut finger at all during the phone call with Heather Leslie.

[56] There is little doubt, now, that the pursuer's medical condition was serious and deteriorating during the day of 28 February. She had been too unwell to attend the GP surgery the day before and by the late afternoon of 28 February her GP suspected sepsis. However, Mrs Henderson's response to feeling unwell on 27 February was to cancel her appointment for that day. It would have made no sense for her to cancel her appointment on 27 February because she was feeling unwell, but to insist on it being kept the following day when she was even more unwell. Her answers to questions about how she would have managed to attend illustrated that she had given the matter no thought. Had she insisted on keeping her appointment against a backdrop of a deteriorating condition she would have had to consider whether she was well enough to attend the practice or whether to request a

home visit. There was no evidence that she had considered either option. Elizabeth Fallas' typewritten note following her conversation with Kim recorded that it was Mrs Henderson who was unable to attend the practice on 28 February due to the weather conditions. That fits with the evidence that the pursuer was informed by Heather Leslie that the weather was the reason for her call at 09:34 and Mrs Henderson realising at that time that she was not well enough to attend for the afternoon appointment. I accept also that the focus of the appointment was on whether the pursuer wished it to remain in place and not the developing symptoms that were later diagnosed as sepsis.

[57] The defenders rely on the consistency between the account given by Heather Leslie in the note or statement she gave relatively shortly after the events of 28 February and what she said in evidence. As already indicated, I reject Laura Adams account of the statements having been created exclusively by Brenda McDonald and Heather Leslie. I reject also the contention made on behalf of the defenders that those statements are to be regarded as effectively contemporaneous with the event. By the time Heather Leslie was asked for her recollection of events she knew that there was to be a complaint and she had access to some material such as the complaint letter and the practice's computer on which she could look to the appointment screen relating to the date in question. That said, I have accepted that she had no difficulty in recalling the day in question partly because of the seriously adverse weather that had necessitated a number of calls that morning and the information received soon thereafter of the terrible outcome for Mrs Henderson. Ms Leslie said in evidence that it had been an unusual day because of the challenges posed by the weather. She explained that she could even now remember parts of the conversation she had with Mrs Henderson who had been on her mind a lot over the years. Accordingly, while the typed note produced as her statement cannot be regarded in the strictest sense as a contemporaneous account,



that does not detract from her position in evidence that it reflected her best recollection within a few weeks of the event. The dreadful news of Mrs Henderson's condition had reached the practice within days of the telephone call and so Ms Leslie had already reflected on what had taken place. It is regrettable that her original signed handwritten statement was not produced, but I accept her evidence that the subsequent typed note reflected what she had written.

[58] Further, the pursuer's account of telling Heather Leslie the detail of the pain in her arm and underarm and that she needed a doctor to look at her finger sits uncomfortably with the unchallenged evidence of Dr Filsell. She noted that Dr Brown was available at the time of the 09:34 call and that Heather Leslie would probably have passed Mrs Henderson's call through to her if such an account had been given. Heather Leslie was an experienced receptionist whose general competence in her role was not questioned. I accept that she would have acted as Dr Filsell suggests. For completeness I record that I do not regard it as material that the appointment on 28 February was not rearranged given the evidence that the finger cut appeared to be getting better and the attribution by the pursuer of her symptoms to a virus.

[59] There was some focus on evidence on the second telephone call between Mrs Henderson and Brenda McDonald, this time in the afternoon of 28 February 2018. On behalf of the pursuer it was suggested that the terms of that phone call supported the pursuer's account that she had not initiated any cancellation of the appointment. Brenda McDonald accepted in evidence that she had asked the pursuer whether she had gone to her appointment earlier that afternoon and the pursuer responded that she had not. It was only subsequently that Brenda McDonald found out that the appointment had been cancelled earlier that day. Miss McDonald confirmed that the pursuer had not made any

reference to a reason why she had not attended the appointment or to it having been cancelled. Ultimately, I do not consider that the second conversation on 28 February adds anything to how it came about that Mrs Henderson's appointment was cancelled. She answered in the negative when asked whether she had made her earlier appointment which would be consistent either with her knowing that it was not going ahead at her instigation or her simply having been too unwell to attend. There were other aspects of the evidence that indicated Mrs Henderson's recollection of the particular times at which things happened was inaccurate. For example, she maintained that the time of her telephone call to Brenda McDonald in the afternoon of 28 February was at 3.30pm until she gave evidence when she accepted that it was at about 5.00pm. The book she wrote "*My Story: Sepsis Raw and Real*" timed the call with Brenda McDonald before 4.00pm. Statements provided by the pursuer to experts involved in the case appeared to time that call at 3.30pm and the initial letter from Mrs Henderson's solicitors intimating her claim stated that she had called the practice back at around 3.30pm on 28 February as she felt she needed help. In short, there was no evidence supportive of the pursuer's accounts of her two telephone calls with Brenda McDonald.

[60] In conclusion, I accept the evidence of Heather Leslie in relation to the contents of the telephone call of 28 February 2018 between her and the pursuer as accurate. The principal reasons for that include (1) that two steps were required to cancel an appointment and that Heather Leslie had no reason to proceed with cancellation had the pursuer expressed a contrary view, (2) the evidence that some appointments were still being kept and new ones made for that day including with the replacement treatment room nurse, and (3) the consistency between Heather Leslie's account of being told by Mrs Henderson that her finger was getting better and the contemporaneous note of Dr Green about the history given

by the pursuer shortly after her admission to hospital. Accordingly, I find that the appointment Mrs Henderson had with the treatment room nurse at 14:55 on 28 February 2018 was cancelled at her own request.

[61] This is an extremely poignant case in which I have concluded that, while Mrs Henderson is convinced that the recollection of the telephone call she now gives is accurate, her account is based on the kind of “wishful thinking” referred to by Lord Pearce in *Onassis v Vergottis* [1968] Lloyd’s LR 403. Her ordeal has been prolonged and her determination to pursue those she deems responsible for any delay in having her condition diagnosed and treated is understandable and appropriate. Her account of the call is, however, simply not tenable when examined in the context of other unchallenged evidence.

[62] While it will follow that the defenders are entitled to decree of absolvitor, I am conscious that there is one finding that I have made (in relation to Laura Adams’ evidence) that does not accord with the defenders’ position. Lest anything is said to turn on that I will have the case called By Order to address any outstanding issues before pronouncing final decree. I would expect to be addressed also at that hearing on the issue of expenses which I meantime reserve.