



OUTER HOUSE, COURT OF SESSION

[2025] CSOH 98

PD493/24

OPINION OF LADY POOLE

In the cause

CAROL GRANT AND OTHERS

Pursuers

against

LOTHIAN BUSES LIMITED

Defender

**Pursuers: Thomson KC; Digby Brown LLP**

**Defender: Murray KC; Clyde & Co (Scotland) LLP**

7 October 2025

**Introduction**

[1] Mr Andrew Grant sadly lost his life after a bus collided with him when he was crossing the road. An action for damages, brought by his executor-dative and bereaved family members, has settled. The pursuers wish to recover from the defender the expenses of work done by various skilled persons prior to the case resolving. It was not in dispute that the court should certify three skilled persons who prepared reports for the pursuers; Mr Frazer Davey, Consultant Road Traffic Investigator, Professor Richard Lyon, Consultant in Accident and Emergency Medicine, and Dr Neil Hunter, Consultant Physician in Geriatric, General and Stroke Medicine. However, the defender opposed certification of a

fourth expert, Professor Graham Edgar, Professor of Psychology and Applied Neuroscience.

At the request of the pursuers, this decision explains why the court declined to grant certification for Professor Edgar.

### **Governing law**

[2] Rule 4.5 of the Act of Sederunt (Taxation of Judicial Expenses Rules) 2019 (SSI 2019/75) (the “2019 Rules”) has the effect that charges of skilled persons cannot be recovered from other parties by way of judicial expenses, unless the court has granted an application for certification. The test for certification is in rule 5.3 of the 2019 Rules. As this is a personal injuries case, the applicable criteria are set out in rule 5.3(2), which provides:

“The court may only grant such an application if satisfied that—

- (a) the person is a skilled person; and
- (b) it is, or was, reasonable and proportionate that the person should be employed”.

The purpose of these provisions is to provide judicial oversight of the costs of litigation.

High litigation costs may impede access to justice.

[3] The words at the beginning of rule 5.3(2)(b) of the 2019 Rules are “it is, or was”, but there are now a number of cases which have found that the court primarily considers the circumstances at the time of instruction, when applying the test of reasonableness and proportionality (*Philip v Scottish Ministers* [2021] CSOH 52 paragraph 6, *Webster v MacLeod* 2018 SAC (Civ) 16 para [20]). It follows that the court does not take into account matters such as the later settlement of an action (*Allison v Orr* 2004 SC 453 para [38]). It is primarily for the person seeking certification to provide material to the court relevant to the application of the rule 5.3 test. What is reasonable and proportionate will depend on the circumstances of a particular case. There is no exhaustive list of relevant factors.

### **Application of governing law to the circumstances of this case**

[4] Parties were agreed that Professor Edgar is a skilled person within the meaning of rule 5.3(2)(a) of the 2019 Rules. He is a professor of psychology and applied neuroscience, with expertise in human visual perception. In *Cameron v Swan* [2021] CSIH 30, the court said of Professor Edgar: “His expertise is not in question. He is an eminent person in his fields of endeavour”. Nevertheless, the defender opposed certification on the basis that it was not reasonable and proportionate that Professor Edgar be employed to produce reports in this case, so the condition in rule 5.3(2)(b) of the 2019 Rules was not met.

[5] The court took into account the submissions of both parties, including documentation lodged by them, and all of the circumstances of the case. There were four main factors which led the court to conclude that the test for certification was not met, in the circumstances of this particular case; the subject matter of the action, the nature of the evidence otherwise available, the nature of the issues for determination, and the steps taken by the pursuer before instructing Professor Edgar.

[6] *The subject matter of the action.* The action is a relatively straightforward road traffic accident case. As put in a previous case:

“there has been a regrettable tendency in recent years in personal injury cases, both road traffic and industrial accidents, for parties to enlist the services of experts whether they are necessary or not. When they are not necessary, they simply add to the already high cost of litigation” (*Liddell v Middleton* [1996] PIQR p36).

Admission of expert evidence will not be permitted if the judge is able to form a sound judgment without the assistance of skilled persons (*Cameron v Swan* [2021] CSIH 30 at para [76], citing *Kennedy v Cordia (Services) LLP* [2016] UKSC 6; 2016 SC (UKSC) 59; see also *Taylor v Raspin (aka Raspin v Taylor)* [2022] EWCA Civ 1613 at paras [34] - [35]). Ultimately,

determination of the facts and whether there has been a breach of duty is a matter for the judge, not an expert witness. A court is unlikely to find it reasonable and proportionate to instruct skilled persons if much of their evidence is likely to be inadmissible. In this particular case, it would have been well within the capability of a judge, applying common sense and experience, to decide whether the bus driver should have seen the pedestrian and avoided colliding with him, and whether the pedestrian was at fault to any extent, without the need for expert assistance from a psychologist and applied neuroscientist.

[7] *The nature of the evidence otherwise available.* There was a significant amount of evidence already available to assist a judge on the issue of liability. There was CCTV evidence from the bus showing the collision. There was a police collision investigation at the time, with photographs and findings. There was also some witness evidence about what happened, including admissible hearsay evidence of what the driver said afterwards had occurred. While it is accepted that there were limitations to these sources of evidence, the pursuer had also instructed a collision expert, Mr Frazer Davey, formerly a police officer and now a consultant road traffic investigator. Mr Davey's detailed report included a number of photographs which would assist the judge in fact-finding; of the location, views along the road at night, street lighting, a crossing point, the bus (including damage to it), and Mr Grant's clothing. The pursuers' first consultation with Mr Davey took place on 20 January 2025, with a formal report available on 3 June 2025. The court acknowledges that in some road traffic cases, expert evidence may assist the judge in reaching primary findings of fact. For example, if there is limited direct evidence about what happened, then circumstantial evidence, such as positions of vehicles, marks on the road, or damage, may be important. Expert road traffic witnesses may be able to assist with identifying that type of circumstantial evidence, and reconstructing what happened in an accident applying

scientific criteria (*Liddell v Middleton* [1996] PIQR p42, *Stewart v Glaze* [2009] EWHC 704 paras [8] to [10]). The types of information gathered by Mr Davey appeared likely to assist the court, and certification of Mr Davey as a skilled person who prepared a report was granted. However, Mr Davey's involvement meant that the pursuer had already instructed a report from a skilled person relevant to liability, and consulted with him, before approaching Professor Edgar. Given the evidence already available, and the issues arising in this particular case, it was disproportionate to instruct a further skilled person on liability.

[8] *The nature of the issues for determination.* In this case, the pursuer offered to prove, taking into account adjustments of 13 February 2025, that the bus driver looked away from the road; and also that the bus driver should have kept a good lookout, seen the pedestrian despite it being dark, reduced speed, and avoided a collision. The defender offered to prove various reasons why it was difficult to see the pedestrian, such as his dark clothing, other points of light, and glare; and that he should have used a designated crossing point. These matters are neither complex nor outwith judicial experience. It was the defender's use of words in adjustments made on 15 March 2025 such as "luminance contrast" and "not conspicuous" which led the pursuers to instruct Professor Edgar. But the Inner House in *Cameron v Swan* [2021] CSIH 30, another case where a vehicle had collided with a pedestrian, had already found that it was wrong for the judge to have relied on evidence of Professor Edgar on general visibility and "conspicuity", the contrast of the pedestrian with his surroundings. The matters to which this evidence related were found to be within the fact-finding capability of a judge without skilled assistance (paras [74] to [81]). The decision in *Cameron v Swan* [2021] CSIH 30 pre-dated the instruction in this case of Professor Edgar. The pursuers' focus should have been on what the court had to decide in this particular case, and what skilled input courts had previously decided was admissible. The language used in

the defender's pleadings was not of itself something that could convert a relatively simple issue - whether a bus driver should have seen a pedestrian crossing the road and avoided colliding with him - into a complex one necessitating additional skilled input on liability.

The nature of the issues for determination are not such as to make it reasonable or proportionate to instruct Professor Edgar.

[9] *The steps taken by the pursuers to satisfy themselves that the instruction of Professor Edgar was necessary.* The pursuers presented the decision to instruct Professor Edgar as a reactive and reluctant one, as a result of the defender's adjustments of 15 March 2025. The pursuers' existing liability expert, Mr Davey, said he did not have particular expertise in luminance and conspicuity. The pursuers had made inquiries of three possible further experts who professed expertise in those matters, one of whom quoted an astonishing USD \$100,000 for a report, and the pursuers selected Professor Edgar's more reasonably priced alternative. Nevertheless, there was more the pursuers could and should have done before taking any decision to instruct Professor Edgar. From a timeline produced by the pursuers, Professor Edgar's initial retainer as an expert for the pursuers on 30 April 2025 appears to have been made without any inquiry of the defenders about the basis for the averments that had caused concern, and the expertise of the person relied on. When actually asked on 19 June 2025, the defender provided information that the adjustments were based on evidence from Mr Peter Monteith, who is a consultant with MB Collision Investigation. Mr Monteith, like the pursuers' existing liability expert Mr Davey, is a former police officer who is now a road traffic investigator. Had the pursuers made further inquiry of the defender, Mr Monteith's report might have been disclosed in draft, since it is dated 6 March 2025, and existed at the time Professor Edgar was instructed. Information might have been provided, or otherwise obtainable, about Mr Monteith's expertise. (Unreasonable refusals

by a party to provide information might conceivably be a relevant factor in the reasonableness and proportionality of instructing a further skilled person, but that is not what happened in this case). The pursuers' decision to instruct a full report from Professor Edgar on 26 June 2025 is even less understandable. After the pursuers made contact with the defender on 19 June 2025 to say they were considering instructing a report "in relation to luminance/conspicuity", the defender provided information that it relied on Mr Monteith for evidence about conspicuousness. There is no suggestion this information would have been withheld if requested earlier. It was not reasonable or proportionate for the pursuers to proceed to instruct Professor Edgar for a full report on 26 June 2025 when it was known that the defender relied on Mr Monteith, a road traffic investigator. It is accepted that the pursuers did not ultimately see Mr Monteith's report until 25 July 2025, when it was lodged in accordance with the court timetable. But that did not mean it was reasonable and proportionate for the pursuers to instruct a second liability expert, whose expertise was in psychology and applied neuroscience. The case concerned a relatively straightforward road traffic accident; there was already a considerable amount of evidence from which a judge could make findings about the accident and liability; and the pursuers ought to have made further inquiry of the defender before deciding to instruct Professor Edgar.

[10] In the circumstances of this particular case, the court does not find that the instruction of Professor Edgar was reasonable and proportionate. The application for certification is refused, with the effect that the pursuers cannot recover the judicial expenses of instructing Professor Edgar from the defender.