OUTER HOUSE, COURT OF SESSION

[2011] CSOH 43

OPINION OF LORD BRAILSFORD

in the cause

S R C on behalf of N S E C

Pursuer;

A285/08

against

MR EWAN KEMP

Defender:

Pursuer: Smith, Q.C., Balfour + Manson LLP

Defender: McGregor; MDDUS

4 March 2011

[1] This case called before me on the pursuer's motion to certify as expert witnesses on behalf of the pursuer fifteen persons and, in addition, "....to find the defenders liable in the expenses of this motion and in the expenses of the court procedure in terms of the Children (Scotland) Act". The motion was not opposed in relation to fourteen of the fifteen witnesses, I accordingly granted that part of the motion and need make no further mention thereof. The motion was opposed in relation to one of the witnesses, a Daniel Kish, Certified Orientation and Mobility Specialist and Developmental Psychologist and I will deal with the issues regarding that witness later in this Opinion. The motion in relation to the expenses of the court procedure in terms of the Children (Scotland) Act was opposed. In order to put this matter in context it is necessary that I outline some of the procedure which preceded the enrolling of this motion. Before turning to address the substantive merits of the motion I should indicate that having regard to the circumstances of the case parties requested that I anonymise references to the pursuer and her child. It seemed to me that this position was appropriate in the circumstances of the case and I have adopted it throughout this Opinion. I shall refer to the pursuer as "Mrs C" and to her daughter as "N".

[2] The action was one of reparation in which Mrs C sought damages on behalf of injuries sustained by her daughter N as a result of the negligence of the defender. N was born in 1997. In 2005 N was noticed to have developed a squint. N was seen initially by an optician and thereafter by her GP who referred her case to an appropriate consultant. As a result of this referral N was, in May 2005, seen by the defender who is a consultant ophthalmic surgeon. In July 2005 the defender performed surgery on N to correct the squint. In October 2005 N's teacher advised her parents that she was struggling to see the blackboard at school. The defender reviewed N's case, apparently without seeing the child and diagnosed a condition which would be cured by a short course of eyedrops. This course was followed but there was no improvement and N's condition in fact deteriorated somewhat. In February 2006 the defender expressed the view to N's GP that the child's condition was non-pathological. In March 2006 the defender referred N to a child psychologist. In August 2006 a psychiatrist who had seen N referred her to another consultant ophthalmologist. N was then seen by another consultant ophthalmologist and found to be suffering from a tumour in the pituary gland which was putting pressure on her optic nerve and distorting her vision. She was admitted to the Royal Hospital for Sick Children in Glasgow as an emergency and on 11 September 2006 she underwent surgery

for the removal of the tumour which was, fortunately, successful but has as a result, left her blind. That condition is, most unfortunately, irreversible and permanent and she will remain blind for the rest of her life. Mrs C raised the present action of damages on behalf of N against the consultant ophthalmic surgeon who had initially treated N and had failed to diagnose the pituitary tumour. After sundry procedure the action settled by the acceptance of a tender on 18 November 2010. I shall return to the terms of the interlocutor pronouncing decree in favour of Mrs C at a subsequent stage of this Opinion.

[3] As I have already indicated the surgery to remove the tumour rendered N blind. Whilst N suffered a number of other consequences of the surgery she is, essentially, an entirely normal child apart from her blindness. In particular she has no cognitive deficits as a result of this surgery and I was informed that she is a highly intelligent girl. On reaching maturity there will be no impediment to N having control of her own affairs. N is however only 14 years of age and in those circumstances the question arose as to the control and management of the significant sum paid by way of damages for the loss, injury and damage sustained by N during the remainder of her minority.

[4] Section 13 of the Children (Scotland) Act 1995 provides:-

"(1) Where in any court proceedings a sum of money becomes payable to, or for the benefit of, a child under the age of 16 years, the court may make such order relating to the payment and management of the sum for the benefit of the child as it thinks fit.

(2) Without prejudice to the generality of subsection (1) above, the court may in an order under this section -

(a) appoint a judicial factor to invest, apply or otherwise deal with the money for the benefit of the child concerned;

(b) order the money to be paid -

(i) to the Sheriff Clerk or the Accountant of Court; or

(ii) to a parent or guardian of that child, to be invested, applied or otherwise dealt with, under the directions of the court, for the benefit of that child; or

(c) order the money to be paid directly to that child.

(3) Where payment is made to a person in accordance with an order under this section, a receipt given by him shall be a sufficient discharge of the obligation to make payment".

As already indicated the action was settled by the acceptance of a tender. The court interponed authority to the minute of tender and acceptance thereof by interlocutor dated 18 November 2010. The Minute of Tender and Acceptance were in a standard form and the said interlocutor found, again as is standard practice, "...the Defender liable to the Pursuer in the expenses of the action to the date of the tender". I was advised that payment of the principal sum was made to the pursuer's agents on 18 November 2010. Mrs C and the pursuer's agents, understandably and properly, were concerned to deal with these funds in a manner consistent with the obligations incumbent upon them and in accordance with the best interests of N. In that regard on 23 November 2010 the pursuer's agents enrolled a motion in the following terms:

"On behalf of the pursuer to remit to the Accountant of Court for her views in what arrangements would be most suitable for the future management of the award made in favour of the pursuer on behalf of N and thereafter to remit back to the court for consideration of an order in terms of the Children (Scotland) Act 1995, section 13(1) and (2)(b)(i)".

That motion called before me and after hearing parties I continued the cause By Order until 11 February 2011 and requested a report from the Accountant of Court as to whether she considered she had powers within the

said statutory provisions to comply with the request stated in the motion. On 21 January 2011 I received a comprehensive and helpful report from the Accountant of Court in response to my request. This report was seen and considered by parties to this action and as a consequence thereof a draft Trust Deed was prepared creating what is commonly referred to as a personal injuries trust to administer the funds available for the behoof of N. I was provided with a copy of the trust deed and by interlocutor dated 1 February 2011 remitted to the Accountant of Court to report as to the future administration of the award in terms of section 13 of the Children (Scotland) Act 1995. The Accountant of Court reported on 10 February 2011 approving the terms of the proposed trust and by interlocutor dated 14 February 2011 I granted authority to the creation of the proposed trust.

[5] The matter now focused in the motion before me concerned the question of the expenses involved in the procedure I have outlined which has occurred since the pronouncement of the interlocutor of 18 November 2010.

[6] The pursuer's submission was that following the interlocutor of 18 November 2010 considerable expense has been incurred in relation to obtaining advice regarding the administration of the damages fund, in preparing the personal injuries trust documentation and in court appearances having the matter regulated. It was submitted that this expenditure was necessary. The finding regarding expenses in the interlocutor of 18 November 2010 was not exhaustive of the court's power to regulate matters including expenses, after that date. The court was in no sense *functus*. Examples cited to me of the court dealing with motions after the date of a tender and acceptance were motions to modify liability under the Legal Aid (Scotland) Act 1986, section 18: motions to certify experts in terms of Rule of Court 42.13; application to modify expenses to the Sheriff Court scale; notes of objection to the Auditor's report. The motion currently before me was no different from applications of that sort. Applications of the sort desiderated by the pursuer have implications for expenses, and are frequently dealt with after the tender/acceptance interlocutor. The pursuer further submitted that not only were the expenses incurred in the procedure since the tender and acceptance necessary, but they were incurred as a direct and natural consequence of the defender's negligence. The court in the exercise of its discretion should award the expenses in favour of the pursuer.

[7] The defender's position was that the minute of tender and acceptance were in standard form, a form which has long been recognised and approved by the court In accepting the tender the pursuer had accepted an offer together with expenses of process to the date of the tender and, further, accepted that the offer was "in full of the conclusions of the Summons". The conclusions in the Summons were exhausted as at the date of acceptance of the tender. Accordingly, it was submitted, there was no basis upon which the defender could be found liable for any expenses of process beyond that date. The defenders accepted that expenses were at the discretion of the court. It was however further submitted that it was not within the discretion of the court to award expenses incurred after the date of a tender when acceptance of that tender had been given effect to by decree of the court. As I understand it the defender's position was that the setting up of a trust in circumstances such as those that have occurred in the present case could and should have been anticipated by the pursuer and, as a consequence thereof, should have formed a separate head of damages. The position is no different from that which now routinely occurs in many cases where it is anticipated that there will be a significant fund which will require administration for a disabled or incapax beneficiary throughout that person's life. The anticipated costs of administering such a fund are claimed as a separate and distinct head of damages.

[8] The precise issue raised in this motion had not, I was advised, been considered hitherto by the court.

[9] The interlocutor of 18 November 2010 is in entirely standard form. That interlocutor is, in terms, final so far as the question of liability for expenses between the parties to the action are concerned. Notwithstanding that apparent finality it is however correct, as the pursuer submitted, that it is routine and standard practice for the Court to adjudicate upon questions regarding the parties to an action's rights, including questions of expenses, after the date of an interlocutor pronouncing decree in terms of a Minute of Tender and Acceptance. The examples cited by the pursuer and quoted in this Opinion are instances of this in practice. If

the pursuer's submission is correct that the procedure which followed the interlocutor of 18 November 2010 in this case, that is the investigation of and ultimate setting up of a personal injuries trust for the benefit of N, were properly to be regarded as necessary incidents of the award of damages that could only be dealt with after the date of the acceptance of the tender then it would, in my view, be correct to equiparate such expenses with the types of instance hitherto noted and, therefore, to allow the expenses as a proper charge against the defenders. I am not, however, persuaded that that is necessarily the case in an application of this sort. It appears to me that it must have been tolerably clear to those instructing the pursuer that, in the event of the action being successful, there would be a significant damages fund available for N's behoof which fund would, as a matter of probability, require to be administered in a way consonant with her best interests during the remainder of her minority. In that regard I noticed that one of the witnesses certified as skilled was a Mr John Biggar, a partner in the legal firm of Anderson Strathern. Mr Biggar is known in this Court as a person who not infrequently prepares reports on the costs associated with administering trust estates created for the beneficiaries of damages awards. I caused inquiry to be made with the pursuer's agents and it was confirmed that Mr Biggar had in fact prepared a report dated 26 October 2010 in the present case. I have been provided with sight of that report and it offers advice as to the likely costs that would be incurred in managing a trust fund for N. The report expressly raises the possibility of the creation of a personal injury trust with N as the beneficiary. In these circumstances it appears to me that there was no impediment in the present case to the costs associated with the creation and administration of a personal injury trust for the benefit of N forming a separate head of damages in this action. It further seems to me that the defenders in seeking as they did to conclude this action by the making of an offer in the form of a Tender were entitled to expect that the issue of the administration of the damages funds would have been included in the claim presented by the pursuer. Having regard to these considerations I am of the view that an application of the present sort is not properly to be equiparated with applications of the sort desiderated by the pursuer as instances of the Court dealing with matters concerning both parties after the acceptance of a Tender. The expenses which have been incurred since 18 November 2010 should have been anticipated and therefore in my view do not form a recoverable charge against the defenders. I will accordingly refuse that part of the motion seeking to find the defenders liable to the expenses of the Court procedure in terms of the Children (Scotland) Act.

[10] For the avoidance of doubt I should make it clear that I do not consider that an application under section 13 of the Children (Scotland) Act 1995 could however constitute a legitimate charge against defenders after the settlement of an action. Whether or not such a charge could be made would, in my view, depend on the circumstances of the case. The issue would, again in my view, require to be considered on a case by case basis.

[11] I turn to deal with the witness, Daniel Kish. Mr Kish is an American. He is himself blind. I was provided with his CV which informs me that he is the lead founder and President of a non-profit organisation "World Access for the Blind". The purposes of this organisation are to assist "blind people to foster freedom". Mr Risk holds Master's degrees in Developmental Psychology and Special Education. Although Mr Risk works mainly in the USA his organisation operates in the UK and he visits this country to further the aims of the organisation. His initial contact with N and her family was in 2007 when they attended a seminar he had given under the auspices of an organisation named "Visibility in Scotland". Thereafter he met with N and her parents, by arrangement, in September 2007 and March 2010. He was able to offer advice in relation to N's particular needs as a blind person. In particular he offered advice in relation to "Flashsonar", an advanced form of active echolocation that he has developed to aid blind persons. He also produced two reports designed to offer assistance in relation to N's "orientation and mobility". Counsel for the pursuer informed me that Mr Kish's advice and recommendations were insightful and helpful and, potentially, not available from any other source. They were supplemental to, and developed upon the advice tendered by Mr Marc Beale, a witness who gave advice on aids that might assist N and who's certification as a skilled witness was not opposed by the defenders.

[12] The defenders opposed the certification of Mr Kish on the ground that his report was unnecessary; the matters he offered evidence upon had already been covered by Mr Beale, and that in any event Mr Kish's

reports were "unintelligible".

[13] The rules regarding certification of skilled witnesses are set forth in Rule of Court 42.13. This provides that the charges incurred in engaging a skilled person to investigate and report on any matter will be allowable, at a rate to be determined by the Auditor of Court as fair and reasonable, if it was "reasonable in any cause to employ a skilled person". It is to be noted that the test of reasonableness is less stringent than the rule that pertained up until 2006, before which time certification was only made if it was "necessary" to employ a skilled person.

[14] In this case, as I have already noted, the person who sustained the loss was a normal 10 year old girl rendered blind by the causative act of negligence. That is obviously a tragic event and one which, no matter N's abilities, will have profound effects on her future life. Having regard to these considerations I consider it entirely understandable, and indeed proper that her parents and advisers seek to do all they can to assist her. Seeking advice from a person such as Mr Kish who offered insight and advice beyond that which appeared to be proffered from any other experts in the field would, in my view, constitute such a step. I consider that this factor answers the objection advanced to certification by the defender that obtaining Mr Kish's advice was unnecessary, the issue of aids having already been covered by Mr Beale. Mr Kish was offering something in advance of that which had already been done by Mr Beale. I also reject the submission that Mr Kish's report was "unintelligible". I read Mr Kish's report of August 2010. I accept that its layout, format and style might be regarded as uncommon in this jurisdiction. It may well be stated in a form used in American courts. Whatever its style it is however, in my view, intelligible and in fact offers advice and makes recommendations that can be appreciated and followed. In all these circumstances I am of the opinion that it would be reasonable to certify Mr Kish as a skilled witness. The charges that he is allowed will, of course, be a matter for the Auditor of Court.