Note

GLW-PD370-20 Sloan v Wilson

[1] The pursuer’s motion was opposed only in respect of certification of Dr Morrison which the defender asserted was not reasonable. Agreement was reached in relation to the other matters

Defender’s submission

[2] The basis for the opposition was that the pursuer had exaggerated her psychological injuries. The employment of a skilled witness was not be sanctioned automatically; the pursuer has to show to the court that it was reasonable; she have failed to do so. It was accordingly not reasonable for the defender to pay for expenditure unreasonably incurred in investigating such injury. It was not about fraud; it was about reasonableness.

[3] The recovered medical records do not show any reference to her psychological condition. The pursuer advised the GP of her accident and resulting neck and head pain; there was no initial mention of injury to eye or psychological effects. There had been no physical examination. The defender’s agents had provided material from the pursuer’s social media account demonstrating someone enjoying life, contrary to the allegations of psychological injury

[4] There was failure by the pursuer, who had at the very least exaggerated her symptoms, and by the pursuer’s agents, who had unreasonably instructed Dr Morrison without even basic investigation about the nature and extent of psychological injuries. There was no objective evidence to support Dr Morrison’s opinion about adjustment disorder. The pursuer’s agents should have investigated the matter with the pursuer rather than employing Dr Morrison. The test is whether the employment of the skilled witness is objectively reasonable not subjectively reasonable; it should have been obvious to the pursuer’s agents that there was no basis for the claim of psychological injury. The settlement reached reflected that.

Submissions for the pursuer

[5] The defender’s agent was being disingenuous claiming that this was not about purported fraud; the submissions said

“[the pursuer] had not experienced symptoms complained of…”

It alleged falsification of symptoms.

[6] The social media material was not determinative; the pursuer could not recall when the videos were taken, so the provenance could not be established; she was entitled to make the best of things. It did not undermine her claim of psychological injury; going out, and wearing make-up, did not establish a return to normality. Such an assessment could only be made after proof**.**

[7] Acceptance of a tender is not a concession, and cannot form the basis of a finding of fraud or exaggeration

[8] In any event the pursuer’s agents did carry out basic investigation; the pursuer’s agents did not anticipate seeking a report in relation to psychological injury but the pursuer’s mother said in precognition that the pursuer had changed, supporting the pursuer’s position. That prompted further investigation. The professional obligation of the firm was to investigate the matters in relation to psychological injuries, reported by both the pursuer and her mother. The obtaining of the report was reasonable. The expert opinion supported the pursuer.

[9] The pursuer does not accept that she has falsified her position. In the absence of evidence of fraud or unreasonableness, Dr Morrison should be certified as a skilled witness

Defender’s Response

[10] In a brief response the defender’s agent submitted that, in cases such as this where it was accepted that there was a physical injury, but that other symptoms were invented or exaggerated, it was always difficult for a defender. There are limited means to challenge such dishonesty; one way was to challenge the reasonableness of medical reports in relation to psychological injuries which, the defender submits did not exist. Certification should be refused.

Decision

[11] The court has a discretion in relation to certification of a skilled witness, employment of whom should be reasonable. It is objective reasonableness, thus is it is insufficient for the party seeking such certification to assert that it was reasonable

[12] The defender complains that, in circumstances where physical injury, but not psychological injury, is accepted, the defender is limited in the steps that can be taken to expose this, short of proof

[13] The complaints which the defender makes are similar to those considered by the Supreme Court in *Summers v Fairclough Homes* [2012] UKSC 26, that dishonest claims should be discouraged and that the court should penalise the dishonest party on costs. The Supreme Court recognised force in the argument that a part 36 offer (broadly equivalent to a tender) was of no assistance because of the obligation to pay costs (expenses) if the offer was accepted. But the court declined to interfere with an award made to the injured but dishonest claimant.

[14] No doubt the decision in *Summers* played its part in the introduction of s 57 of the Criminal Justice and Courts Act 2015, allowing a court to strike out a whole claim if an element of it is “fundamentally dishonest”. That act has no application in Scotland. The Inner House have looked at the matter in *Grubb v Finlay* 2018 SLT 463 and determined that it was theoretically open to the court to strike a case out for fundamental dishonesty (exercisable only in rare and exceptional circumstances (paragraph [34])) but declined to do so in the appeal, considering the claim to have been “good, if exaggerated” (Paragraph [35]). Significantly both *Summers* and *Grubb* were decided after evidence was led. As was said in *Grubb* at paragraph [36]

The purpose of the rules of procedure are to provide for the orderly progress of cases, some of which will involve disputed fact. The procedure laid down for the determination of fact is that the court will hear a proof at which testimony will be heard and properly assessed after due consideration, involving a comparison of the testimony of one witness with that of another.

[15] The defender’s agents are not entirely powerless; they can tender at a sum that reflects their assessment of the value of the claim, (as has been done) and can argue for an award of expenses consistent with the sum awarded, i.e. less than the ordinary scale, (as has been done).

[16] As the pursuer’s agent observed, the defender’s opposition to the certification is similar to the position in D*M v Lothian NHS Board* 2015 CSOH 89 where Lady Clark of Calton said

“18. ..[The defenders’ counsel] invited the court to condemn the successful pursuer to whom damages have been conceded and tendered and find that she deliberately falsified her symptoms for financial compensation and so penalise her in relation to her motion for expenses.

19…I have no way of resolving disputed facts of this nature. The nature of the disputed facts means it would be necessary in my opinion to hear evidence at least from the pursuer, relevant experts and the surveillance witness, before a conclusion could be reached. As no evidence was available to me to make any findings of fact, I am not persuaded by counsel for the defenders that I should decide on the basis of inference based on disputed written material about some aspects of the case.

[17] In *Allison v Orr* 2004 SC 453, the Inner House considered that employment of a skilled witness was justified if a “reasonably prudent lawyer considered it necessary” (para [46])

[18] *Allison* also makes it clear that the amount of settlement is not of itself a concession about the value or merits of the claim. The court said

[36]. A party may agree to settle an action for a variety of reasons. There may be doubts about the merits of the case; a crucial witness may have disappeared; personal circumstances may have changed; a party may feel unable to face the ordeal of the courtroom. As a result, claims of considerable complexity and significant value may be resolved by parties agreeing upon the payment of a relatively modest sum.

[37]. For that reason alone, it seems to us that it cannot be inferred from the fact that the pursuer's action settled for one-tenth of the sum sued for that her case was a simple one of modest value, and that it was unnecessary to instruct either Dr Grant or Mr Carlisle.

[19] Taking these various maters into account I conclude as follows; the acceptance of a tender at a sum under the ordinary cause limit is of no assistance; in this case the pursuer claimed to have suffered psychological effects, a matter supported by her mother in precognition. The defender disputes the existence of, or at least the extent of, any psychological injury by reference to the pursuer’s social media content which is said to undermine the pursuer’s claim. But the provenance of the social media content has not been agreed (some entries at least are said the pre-date the accident) and it need not, in any event, preclude psychological injury.

[20] While it is possible to conceive of circumstances where either there is a concession, or material is provided outwith the context of an evidential hearing that is so strikingly supportive of fraud that a decision can be made (surveillance footage for example the provenance of which is vouched), in this case the matter cannot be resolved on an *ex parte* basis. In the absence of an evidential hearing to test the respective positions, the court cannot determine where the truth lies

[21] I consider that a reasonably prudent lawyer would have considered it necessary to explore the possibility of psychological damages; the absence of reference to such consequences in an early GP appointment is not decisive. Although not every matter requires to be vouched by the provision of skilled witnesses, (*Allison* para [42], for example) it is not difficult to see that a challenge would materialise if there was no such evidence; a challenge did materialise in this case even with the report.

[22] Accordingly, it was reasonable for Dr Morrison to be instructed and there is no acceptable factual basis upon which that instruction can be criticised. The motion for certification of Dr Morrison is granted.