



SHERIFF APPEAL COURT

**[2017] SAC (Civ) 14
KIL-PD45-14**

Sheriff Principal M M Stephen QC
Sheriff Principal Pyle
Sheriff Morrison QC

OPINION OF THE COURT

delivered by SHERIFF PRINCIPAL M M STEPHEN QC

in appeal by

NORTH AYRSHIRE COUNCIL

Appellant;

in the cause

LAURETTE PAXTON

Pursuer and Respondent:

against

NORTH AYRSHIRE COUNCIL

Defender and Appellant:

**Appellant: Smart, Clyde & Co
Respondent: Crawford, advocate, Digby Brown**

8 March 2017

[1] In this appeal the appellant, North Ayrshire Council, asks this court to review the award of damages made by the sheriff following proof. The pursuer, Laurette Paxton, sustained a soft tissue injury to her neck on 11 October 2013 when her vehicle was struck by a Ford transit drop-side lorry owned by the appellant and driven at the material time by its

employee. Liability was admitted. The sheriff heard evidence at a proof restricted to the quantum of damages.

[2] Although we have not been provided with a copy of the pleadings, it is clear from the sheriff's judgment and from the written submissions that the sheriff required to assess damages under various headings. She awarded solatium of £2,000 together with interest. £120 was awarded under section 8 of the Administration of Justice (Scotland) 1982 in respect of services provided to the pursuer. Otherwise the sheriff required to determine whether the pursuer was entitled to recover damages under headings which may be considered as outlays. Firstly, £475 being the total of the invoice from the Independent Physiotherapy Service where the pursuer had been treated in April and May 2014. Secondly, travelling and out of pocket expenses incurred attending physiotherapy and dealing with the claim. The sheriff found that the pursuer was entitled to recover the cost of physiotherapy, together with out of pocket expenses totalling £135.71 being travel costs and additional telephone charges due to her having to contact her own motor insurers following the incident on 11 October 2013. Accordingly, the sheriff granted decree in favour of the pursuer in the sum of £2,730.71.

[3] The appellant has no quarrel with the sheriff's assessment of solatium nor, indeed, with the services claim but take issue with the award in respect of the cost of private physiotherapy and out of pocket expenses.

[4] The grounds of the appeal are in the following terms:

"(1) It is respectfully submitted that the learned sheriff erred in law by awarding damages to the pursuer for the cost of physiotherapy treatment, said treatment having occurred after the pursuer had made a recovery from accident related symptoms;

(2) It is respectfully submitted that the learned sheriff erred in law by awarding damages for travel expenses to and from the physiotherapy appointments for the same reason set out in Ground (1) above."

[5] The reference in Ground (1) to the "*treatment having occurred after the pursuer had made a recovery from accident related symptoms*" attempts to paraphrase the main issue which the sheriff required to determine at proof. The pursuer's medical records disclose that she had suffered from previous episodes of neck pain together with lower back pain. The sheriff had to determine the extent of the injury and sequelae caused by the accident in October 2013. The sheriff was assisted in deciding that matter by two orthopaedic surgeons, both of whom examined the pursuer - Mr Mohil, who gave evidence for the pursuer, and Mr Mackay who was led on behalf of the defender. It came down to this: Mr Mohil suggested that it would be reasonable to attribute nine months' pain and suffering to the accident. In other words it would have been reasonable to have expected the pursuer to have recovered from the effects of the injuries caused by the road traffic accident within such a period. Mr Mackay, having considered in detail the medical records, was of the opinion that the period would be much shorter in the region of four to six months. In the end of the day the sheriff had very considerable reservations about the pursuer's own evidence. The sheriff thought she was exaggerating and preferred the evidence of Mr Mackay. The sheriff's assessment of solatium was based upon Mr Mackay's opinion of the likely effects of the accident on the pursuer's pre-existing neck condition and the period of pain and suffering which might reasonably be attributed to the trauma.

[6] It is accepted that a pre-existing injury or condition makes it more difficult to assess with accuracy the extent to which a particular accident or trauma has affected the injured party. The court has to rely largely on the experience and judgement of appropriately

qualified doctors. It is by no means uncommon to find that such evidence can become somewhat polarised. In this case the sheriff concludes that the evidence of Mr Mackay is to be preferred for the reasons she gives, namely, he examined the full medical records with particular emphasis on the entries in respect of pre-existing neck pain. His evidence was properly scrutinised and challenged in cross-examination. It was accepted by the medical witnesses that assessment of pain can be largely subjective and will vary from person to person. Furthermore, there may well be real ongoing symptoms which makes it more difficult to be certain whether they arise from a particular accident or which may more properly be attributed to pre-existing damage. Therefore the assessment of pain and ongoing disability can be a difficult exercise for medical witnesses and for the court where there is a pre-existing condition.

[7] In this appeal the appellant urges on us a somewhat binary approach to the assessment of damages to the effect that, if the sheriff accepted that the accident caused pain or exacerbated the pre-existing problems for four to six months duration, then the pursuer is not entitled to recover any damages beyond that period. As the physiotherapy treatment began in April 2014, which was at the limit of Mr Mackay's allowance for the effects of this accident, the cost of that treatment and associated travel was not recoverable from the wrongdoer. The treatment continued until the end of May which was outwith the period which Mr Mackay considered could reasonably be attributed to the accident. Therefore, in essence, this appeal relates only to the physiotherapy invoice of £475 and out of pocket expenses, particularly the travelling costs to physiotherapy, of approximately £130. The argument advanced by the appellant amounts to the proposition that, as part of the treatment falls outwith the zone of time in which the appellant's symptoms can be attributed

to the road traffic accident in October 2013, the sheriff erred in awarding the pursuer reimbursement of all of these costs and expenses.

[8] It was submitted that if the pursuer is not entitled to recover the cost of physiotherapy then she cannot recover her travel costs in attending these appointments. Even if she is entitled to recover the cost of physiotherapy, she is not entitled to all of her travelling expenses as the pursuer herself cancelled one of the sessions. Mr Smart conceded that there had been no challenge to the calculation of travel expenses either in the pleadings or in submission to the sheriff. Nevertheless, even if we were against him on the primary argument with regard to the physiotherapy charges, we were asked to reduce the award in respect of out of pocket expenses *pro rata* taking account of the cancelled session.

Decision

[9] This court is being asked by the appellant to review the award of damages made by the sheriff solely under the heading of out of pocket expenses or outlays being the invoice for private physiotherapy, telephone and travel costs. The invoice was spoken to by Darren Cross, the Business Manager for Independent Physiotherapy Service. The invoice refers to a telephone consultation and triage together with a course of physiotherapy. It is not immediately obvious to this court why Mr Cross' evidence was essential, however, it was in short compass and the invoice itself appears to be uncontroversial. Neither the pursuer nor Mr Cross was challenged about whether the course could be less than the six sessions charged or whether the charge would be less if fewer were needed or attended. Neither was challenged about the precise number of sessions nor was the pursuer challenged on travel costs. There were, however, a number of sources of evidence on the question of physiotherapy. The sheriff heard evidence about that not only from the two orthopaedic surgeons and the pursuer but also from the pursuer's general practitioner

Dr Shelley and Miss Skeoch the physiotherapist. Both orthopaedic surgeons to a greater or lesser extent considered that it was reasonable for the pursuer to undertake physiotherapy. There appears to have developed in the course of proof an issue as to who had recommended physiotherapy to the pursuer. There was evidence from Dr Shelley, the pursuer's GP, that she had referred the pursuer for NHS physiotherapy in February 2014 but unfortunately the pursuer would not be offered physiotherapy under the auspices of the NHS before June 2014. It is not necessary for those who have sustained injuries to wait for NHS treatment (Law Reform (Personal Injuries) Act 1948 section 2 (4)). Accordingly, the pursuer was entitled to consider being treated privately as indeed the pursuer ultimately did. The sheriff accepts that the physiotherapy was a reasonable route for the pursuer to go down (page 28 of the judgment).

[10] In these circumstances the sheriff took a broad approach based on the evidence available to her. She accepted that physiotherapy had been recommended in February 2014 by her GP. A referral had been made by Dr Shelley. When the pursuer attended for physiotherapy she was acting on the advice of her general practitioner. At that stage, the pursuer did not and could not know of any other medical opinion as to the effect of the accident on her neck. Clearly, in determining whether the pursuer was entitled to recover the cost of the physiotherapy the sheriff was exercising her discretion on the evidence before her. The sheriff was entitled to assume that the full cost of physiotherapy was payable and recoverable as well as travel costs where not challenged.

[11] An appeal court may normally only interfere with the decision at first instance if the sheriff has misdirected herself materially on the law, misunderstood the facts or arrived at a manifestly unfair assessment (*Blair v FJC Lilley (Marine)* 1981 SLT 90). It is clear that the sheriff has considered the matter of the referral to physiotherapy and the physiotherapy

charges carefully. It formed part of the submissions made to her. It cannot be suggested that the sheriff has misunderstood or misused the evidence. She has clearly analysed and evaluated the differing opinions of the two orthopaedic surgeons and has assessed solatium based on Mr Mackay's evidence. She has referred, in her judgment, to the evidence insofar as it relates to physiotherapy and that comes, not only, from the GP and the two witnesses from the private physiotherapy service but also from the skilled medical witnesses. Both orthopaedic surgeons approve the decision to refer the pursuer for physiotherapy and consider it was reasonable for the pursuer to pursue that. The pursuer, of course, has a duty to minimise her loss and accepting medical advice is a measure of whether the pursuer has behaved reasonably in that regard.

[12] We do not consider that the criticism of the sheriff's approach to these heads of damages is well founded. The assessment of damages in cases involving a pre-existing condition can rarely be approached with scientific exactitude and usually requires the sheriff to exercise judgment as to the evidence available especially the medical evidence. There was no evidence before the sheriff that the whole sum was not due. We detect no error in the sheriff's approach to the evidence and to the issue she had to decide in determining whether to make the award of damages for the cost of physiotherapy.

[13] We consider that the second point raised by the appellant in this appeal to be without merit. It does not form a ground of appeal nor could it colourably fall within ground of appeal (2) as an error of law. The argument strays into an area of fact relating to a cancelled physiotherapy appointment. The sheriff has noted that one appointment was cancelled but beyond that there is no information as to the circumstances and effect of that cancellation. We cannot know how the travel expenses component was calculated and whether these related to journeys undertaken for purposes which may be related to the

claim such as attending medical appointments other than physiotherapy. Crucially, this point was not raised in submission before the sheriff. The pursuer was not challenged as to her calculation of out of pocket expenses. We cannot comment on whether the point is adverted to in the pleadings as the appeal print does not include the pleadings in this case. For these reasons this point cannot be raised before an appellate court. It cannot be argued that the sheriff misunderstood the facts if this issue was not raised in front of the sheriff.

[14] Accordingly, we propose to refuse the appeal.