



SHERIFF APPEAL COURT

**[2021] SAC (Civ) 19
AYR-A156-15**

Sheriff Principal A Y Anwar

NOTE BY

SHERIFF PRINCIPAL A Y ANWAR

in an opposed motion for access to digital recording of evidence

in the cause

BILLY MCGOWAN

Pursuer and Appellant

against

AYRSHIRE AND ARRAN HEATH BOARD

Defenders and Respondents

Pursuer and Appellant: Mr Billy McGowan, self-represented

Defenders and Respondents: Mr Khurana QC; NHS Scotland Central Legal Office

4 March 2021

Introduction

[1] The pursuer and appellant (“the pursuer”) raised proceedings in Ayr Sheriff Court seeking damages against the defenders and respondents (“the defenders”) arising from alleged negligence in the treatment and care of his mother.

[2] Following a proof before answer, the sheriff found *inter alia* that the pursuer had not proved on the balance of probabilities that the death of his mother had resulted from

negligence by medical staff. The sheriff granted decree of absolvitor in favour of the defenders.

[3] The sheriff issued a note on 14 April 2020. Expenses were dealt with on 6 November 2020.

[4] The appellant lodged an appeal on 2 December 2020. Paragraph 9 of his Note of Appeal is in the following terms: “key testimony provided by the appellant’s expert witness has been misrepresented in the [sheriff’s] note as a result of omissions and misquotations resulting in an unfair judgement”. The appellant stated that he was confident that the transcript of the testimony of his expert witness would support his position.

[5] Having obtained the transcript, the appellant lodged a motion seeking access to the digital audio recording of the evidence. The motion for the appellant made reference to excerpts of the expert witness testimony from the transcript. The motion was opposed. In advance of a hearing on the motion, I directed the appellant to lodge the full copy of the transcript in his possession. I delivered an *ex tempore* decision on the motion on 24 February 2021.

Submissions

[6] The court had the advantage of reading and considering the note of appeal, answers thereto, written reasons for the appellant’s motion, the terms of the respondents’ opposition, the sheriff’s note, the transcript of evidence produced by the appellant, written notes prepared by the appellant in advance of the hearing on the motion and the parties’ respective notes of argument (as yet unadjusted).

[7] The appellant explained that he did not recognise many of the statements attributed to his expert witness. It was his position that there were serious omissions and errors in

both the sheriff's note and the transcript. The appellant was invited to explain each of these omissions and errors. He provided several examples. The appellant explained that he did not recognise parts of the transcript and that he considered the chronology of the testimony was wrong. He explained that the questions he had posed in examination-in-chief had not been correctly noted in the transcript; he had written questions which he posed to his expert witness and the transcript did not correctly reflect the questions he believed he had asked.

[8] On behalf of the respondents, it was submitted that there did not appear to be any discrepancy between the transcript and the sheriff's note which would justify the expense and delay which would be caused in this appeal by an examination of the audio recording. The respondents referred to the long and protracted procedural history of the proceedings.

Discussion

[9] This is an unusual motion. The court was invited to grant access to a digital recording of proceedings on the basis that the transcript produced was incorrect, incomplete or misleading. Neither party referred the court to any authority which might inform the approach to be taken by the court to this motion. I am not aware of any prior judicial consideration of the issues.

[10] In my judgment, there must be a cogent, reasonable and objectively demonstrable basis for an assertion that a transcript of proceedings is incorrect. That is particularly so when there is no obvious or material discrepancy between the contents of the transcript and the summary of the evidence contained in the sheriff's note. I have had the advantage of reading the transcript and comparing it with the summary of evidence contained in the sheriff's note at paragraphs [6] to [293].

[11] The appellant was asked to explain the basis upon which he asserted the transcript was incorrect. He referred to only one example in which he contended the transcript and the sheriff's note were at odds, namely by reference to paragraph [355] of the sheriff's note and to page 105 of the transcript.

[12] The appellant contended that at paragraph [355], the sheriff had incorrectly noted that the expert witness did not give evidence to the effect that there was a normal and usual practice in respect of various aspects of the medical treatment of sepsis.

[13] However it is clear that at paragraph [355] the sheriff is analysing the law and applying it to the evidence. When one examines the sheriff's summary of the relevant chapter of evidence at paragraph [230] of his note, it is apparent that the summary is entirely consistent with the evidence as recorded in the transcript, namely that Tazocin was a normal and usual treatment for sepsis.

[14] It is of course open to the appellant to advance an argument at appeal that at paragraph [355], the sheriff has erred in his application of the law to the evidence however it is clear from what is noted by the sheriff at paragraph [230] that there is no inconsistency between the sheriff's summary of the evidence and the transcript.

[15] The remaining examples provided by the appellant of alleged inaccuracies or omissions were simply assertions of his recollection of the evidence. In respect of those examples, the appellant contended that both the sheriff and the person who transcribed the record of the evidence were wrong.

[16] In my judgment, an assertion that a transcript does not accord with one's recollection is not a sufficient basis for an appellant to seek access to a digital recording of proceedings, particularly when the transcript is consistent with the summary of the evidence contained in the sheriff's note. I accept that the appellant is steadfast in his recollection and is convinced

that the audio recording will bear out his assertions. He took a similar position in relation to the transcript. The transcript did not vindicate his position.

[17] Finally, I note that the sheriff's observations at paragraph [3] of his note foreshadowed the submissions made by the appellant in support of this motion. Paragraph [3] of the sheriff's note is in the following terms:

"The pursuer in this case is a party litigant. He had prepared by writing out detailed questions. He read these questions out to the witnesses, interspersed with follow up questions. His questions frequently contained factual assertions and quoted extensively from medical records and other documents. Many of the questions were of considerable length and contained several sub-clauses. Often the witness was not asked to agree with, to adopt, or to comment on what had been read to him, and did not do so. In addition, the witness was often asked whether staff members had followed normal and usual practice, and gave replies which did not simply affirm or deny this. The pursuer did not make notes of the replies to his questions in the course of the evidence. It is apparent from his submissions that he erroneously understood that certain of his prepared questions had been adopted or assented to, and that he had received affirmative answers to certain questions."

Decision

[18] Accordingly, I am not persuaded that access to the digital recording is either justified or necessary and the motion is refused.