SCOTLAND / JUDGMENT

Matthewson v. Graham [2009] ScotSC 21 (22 June 2009)

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[2009] ScotSC 21 [New search] [Help] Ref. A 533/05 Note by Sheriff Jamie Gilmour , Sheriff of Tayside, Central and Fife at Arbroath in the cause Mark Mathewson v Robert Graham I heard parties agents on 22 June, 2009 on the matter of expenses and on the pursuer's motion no 7/7 of Process which moved the court to:- 1. Certify Mr P K Rickhuss, Consultant Orthopaedic Surgeon as a skilled witness; 2. Certify Dr Pete McKenzie, Consultant in Pain and Anaesthesia as a skilled witness; 3. Certify Mr Gordon Cameron, Vocational Employment Expert as a skilled witness; 4. To grant Decree in terms of Minute of Tender No. of Process and Minute of Acceptance of Tender No 16 of Process; 5. To sanction the use of Counsel in this case. It was agreed by Mr Sym for the pursuer and Mrs Sutherland for the defender that parts 2 and 4 of the motion were not in issue. Mr Sym sought sanction for the employment of junior counsel because of the complexity of the case. There was the issue of chronic pain syndrome and a number matters had to be considered. The action was raised in 2005 but counsel was instructed in 2008 in view of the number of reports. Secondly, the amount craved by way of damages was increased in November 2008 following counsel's note on quantum. Because of complexity and value it was appropriate to engage junior counsel. Mrs Stevenson submitted that the pursuer's agents are very experienced reparation solicitors. The only issue was quantum since liability was admitted. There was adequate medical evidence from Dr. Peter McKenzie, accepted by the defender as a skilled witness. The details of the claim were nothing out of the ordinary. There was nothing unusual or complex to an action which started out at £20,000. As far as parts 1 and 3 of the motion were concerned, Mr Sym submitted that Mr P. K. Rickhuss was the treating surgeon. He prepared two reports containing opinions on prognosis. He was clearly an expert witness. Mr Gordon Cameron was asked to produce a report because of the pursuer's ailments. This assisted parties concerning future employment prospects. He had specialised knowledge. This was not a matter that could be dealt with by the pursuer's agents. His 12 page report contained opinion evidence. The

pursuer's syndrome had to be investigated. Mr Cameron had the expertise. Countering this Mrs Sutherland submitted that Mr Rickhuss did nothing beyond being the treating surgeon. She drew attention to the observations in MacPhail, Sheriff Court Practice, 3rd ed. Para. 19.

63. in support of her contention. As far as Mr Cameron was concerned, his employment had been unnecessary. He had been asked to do a calculation. He was not an expert. The pursuer's agents could have carried out the investigation themselves. Consideration was also given by agents to the question of expenses following the discharge of two diets of proof set down for 15 and 16 January 2008 and 7 November 2008. On 11 January 2008 the pursuer's motion to discharge the proof diet set down for 15 and 16 January was granted. The question of expenses in respect of the discharge was reserved. On 7 November 2008 there was another motion by the pursuer to discharge a proof diet set down for that day. This motion was granted with the pursuer liable for expenses except expert witness expenses which were reserved. Mr Sym submitted that the motion to discharge the proof on 15 and 16 January 2008 was necessary because the report from Dr Peter McKenzie was not available. It was therefore prudent to request a discharge to await the report. There was no fault on the part of the pursuer therefore the defender should not be entitled to expenses for that discharge. As far as the second discharge on 7 November was concerned, the pursuer was liable for the expenses of the discharge except the matter of the expenses of expert witnesses but the proof was only down for one day and the defender's agents would be aware that due to the number of witnesses to be called by the pursuer there was no need for the defender's witnesses to be present on 7 November. Mrs Sutherland, in response, referring to the discharge granted on 11 January 2008, pointed out that the report requested by the pursuer's agents from Dr Peter McKenzie had only been instructed on 21 December 2007 for a proof on 15 and 16 January 2008. The report was instructed some three years after the action was raised. Referring to the discharge granted on 7 November 2008 Mrs Sutherland submitted that, regardless of the fact that the proof had been fixed for only one day, the defender's agents had cited witnesses to attend. She also submitted that the motion to discharge was done to allow the pursuer's Minute of Amendment. On the matter of the employment of counsel it is well known that the test whether it is appropriate is determined by considering the difficulty, complexity, importance and value of the claim. When this action commenced at the end of 2005 the sum sought by way of solatium was £20,000 on a claim for £20,377. Armed with reports from Mr Rickhuss, Dr Peter McKenzie and Mr Gordon Cameron, the sum craved was increased to £125,000 following counsel's opinion on quantum. Solatium in condescendence five of the amended Record was still averred in the sum of £20,000. Liability for the purpose of the action was admitted. Considering the reports and the conclusions reached by Mr Rickhuss, Dr McKenzie and Mr Cameron coupled with the advice on quantum received from counsel, it is my opinion that the claim was not of such complexity and difficulty that it required the engagement of counsel in circumstances where the pursuer's agents have known experience in dealing with reparation actions. It was also not insignificant that liability was not in dispute. I also did not consider the value of the

claim justified the engagement of counsel. As far as the certification of skilled persons is concerned MacPhail, Sheriff Court Practice , rd ed. at paras 19.61 -19.63 provide guidance together with the rule set out in the Act of Sederunt (Fees of Witnesses and Shorthand Writers in the Sheriff Court) 1992 (S. I. 1992/1878) schedule1 which now states:- "Where it is necessary to employ a skilled person to make investigation in order to qualify that person to report and/or give evidence in any action, charges for such investigations and for attendance at any hearing in the action shall be allowed at a rate which the Auditor of Court shall determine is fair and reasonable provided that the court grants a motion to that effect not later than the time at which it awards expenses and the witness's name is recorded in the interlocutor." It is worth noting that the significant change to the previous rule is that the skilled person no longer requires to have been instructed to investigate prior to giving evidence at proof. The person can simply be instructed to report after investigation in any action. Mr P. K. Rickhuss was the treating surgeon. He is certainly skilled. Having considered his reports he appeared to be speaking to matters already within his knowledge or information passed on to him. He was not specifically required to make investigation to qualify him to report or to give evidence. He did not require to carry out a further examination of the pursuer for the purpose of preparing his reports. I will not ,therefore, certify Mr Rickhuss as a skilled person -see Jones v George Leslie Ltd. 2005 SLT (Sh Ct) 113. Mr Gordon Cameron was employed to prepare a report on the pursuer's employment and employment prospects. Mr Cameron is a vocational consultant and has been since 1997. It is noted that he has engaged with insurance companies, solicitors, employers, individuals who have been injured and training organisations. I am satisfied that he comes within the category of a skilled person. It was argued by the defender's agent that it was not necessary to engage him and that he had merely produced a calculation that the pursuer's agents were capable of doing. Such a submission seriously underestimates what appeared in Mr Cameron's report which contains relevant information on loss of annual income, potential loss of future income and employment prospects. The information available is not information which could have been provided in such detail by the pursuer's agents. I conclude that to determine the likely loss of income to the pursuer, who is a manual labourer, as a result of the accident, it was necessary to employ Mr Cameron and I will certify him as a skilled person. Dealing with the issue of expenses it appears to me from an examination of the Process that the pursuer's agents have not expedited the progress of the action with diligence. The action began at the end of 2005. By August 2007 the pursuer's agents were not in a position to proceed to the proof fixed for 18 September 2007 and lodged a motion on 28 August to discharge the proof. This motion was granted. Proof was then set for 15 and 16 January 2008 but on 11 January 2008 the pursuer lodged a motion to discharge the proof because a report was not available from Dr Peter McKenzie. I was advised that the report was not instructed until 21 December

2007. No explanation was offered to the court why such late instruction was given to Dr McKenzie. There can only be speculation that the pursuer sought the discharge on 28 August to obtain the report. In view of the passage of time, however, and in the knowledge

that a two day proof had been set down for 15/16 January, I cannot accept that there was no fault on the part of the pursuer or, more particularly, his agents, in ensuring that they were fully prepared for the January proof. There was a pre-proof hearing on 17 December 2007. On that date the sheriff refused the pursuer's motion to discharge the proof . At the time the pursuer's agents had not even instructed the report from Dr McKenzie. It is in my opinion, therefore, that the expenses of the discharged diet of proof fixed for 15 and 16 January, 2008 are awarded in favour of the defender. As far as the discharge of proof on 7 November 2008 is concerned, the only issue is the question of expert witnesses, other expenses having been awarded in favour of the defender. The matter can be dealt with in short compass. Schedule 1 of the above Act of Sederunt requires a motion to be granted in respect of a skilled person certifying him as such with the person's name being recorded in the interlocutor. No such motion verbal or written was made on behalf of the defender so it is not possible to consider any person as a skilled person. It should be noted that the interlocutor of 7 November 2008, whilst reserving the question of the expenses of expert witnesses, does not specify them. This, in my opinion, was a shortcoming since the rule requires the nomination of a person alleged to be skilled. If expert witnesses had been named, the defender's agent might have been alerted to the import of the rule contained in schedule 1 of the above Act of Sederunt when parties were heard on the pursuer's motion and on the issue of expenses on 22 June. Jamie Gilmour Sheriff July 2009 BAILII: Copyright Policy | Disclaimers | Privacy Policy | Feedback | Donate to BAILII URL: https://www.bailii.org/scot/cases/ScotSC/2009/21.html

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