SHERIFF APPEAL COURT

[2024] SAC (Civ) 13
EDI-SF111-21

Sheriff Principal N A Ross

OPINION OF THE COURT

delivered by SHERIFF PRINCIPAL N A ROSS

in the appeal in the cause

MICHAEL MARSHALL

Pursuer and Respondent

against

BERSKHIRE HATHAWAY INTERNATIONAL INSURANCE COMPANY LIMITED

Defender and Appellant

Defender and Appellant: Manson, advocate; Horwich Farrelly Scotland
Pursuer and Respondent: Anderson, advocate; Friends Legal

11 April 2024

[1] The defender and appellant ("defender") appeals an award of damages of £1,250 made by the sheriff following proof in a personal injury claim. It was made in the absence of expert medical evidence. Such evidence was led but was held to be inadmissible. The defender submits that the sheriff was not thereafter in a position to assess causation, symptoms or duration of injury, because he did not have sufficient evidence to make the necessary findings in fact.

[2] The pursuer and respondent ("pursuer") was involved in a vehicle accident on 16 April 2021. He was driving a van in Pilton, Edinburgh. At the material time his vehicle

was stationary at traffic lights, waiting to turn right. While stationary, the vehicle was struck from the rear by another vehicle, a large SUV, belonging to the defender's insured. The driver had failed to brake in time, and admitted fault immediately.

[3] The effect of the collision was to cause extensive damage to the rear of the pursuer's van, including significant damage to the rear doors. The vehicle was written off for insurance purposes. The pursuer sustained personal injury which he described in evidence as pain in the neck and back and down the right side of his leg. The symptoms started to get better after about 4 weeks or so, and was pain-free some 4 months after the collision.

[4] The pursuer did lead supportive expert evidence, from Dr Ravdip Bumrah. The nature of Dr Bumrah's evidence became a central issue in the proof. His evidence was objected to and heard under reservation. Following submission, the sheriff found that Dr Bumrah's evidence was inadmissible.

[5] Dr Bumrah carried out a medical examination on the pursuer and opined that the pursuer had suffered neck pain due to a whiplash injury, and low back pain and right thigh pain due to a soft tissue injury, all likely to resolve over the next three months. Dr Bumrah's evidence was that he carried out 700 to 1000 reports annually, but did not receive payment if the patient lost his claim or the case did not settle. The sheriff described Dr Bumrah as providing medical reports on a *de facto* speculative or contingency basis. Dr Bumrah had been criticised by another sheriff for giving evidence in a similar case in 2022, when his evidence had been that he was not paid for every case. His evidence also contained a material error. He examined the pursuer without having sight of his medical records, and recorded that there was no relevant past medical history. In fact, the pursuer had been involved in an earlier road traffic accident in 2019, causing him to suffer neck and back pain and requiring hospital admission.

[6] The defender gave notice prior to the proof of its intention to attack the admissibility of Dr Bumrah's evidence, on the basis that he had a direct financial interest in the outcome of the case. Despite that notice, the pursuer's agents did not lodge any evidence that Dr Bumrah would, irrespective of the result, be paid. The sheriff found that Dr Bumrah had failed to demonstrate an appropriate understanding of the full extent of his duties and responsibilities of being an expert witness. He did not accept as credible Dr Bumrah's assertion that he had no involvement in the financial aspects of his fees, noting that the sums of money receivable for 700 – 1000 reports a year would be considerable. The pursuer had failed to prove that Dr Bumrah met the third of the four considerations for an expert witness set out in *Kennedy* v *Cordia (Services) LLP* [2016] UKSC 6 at paragraph 44, and accordingly the evidence was inadmissible.

[7] Notwithstanding the inadmissibility of the medical evidence, the sheriff proceeded to find that the pursuer sustained a soft tissue injury in the accident, with some low back pain and some pain in the right thigh, which resolved over a period of three or four months. The parties' valuations in submission were, respectively, £2,200 and £1,800. The sheriff assessed solatium at a lower sum of £1,250, on the basis of his assessment of the pursuer's evidence. The question on appeal is – was he entitled to do so?

Submission for the defender

[8] Counsel submitted that the evidence of Dr Bumrah was properly excluded and found to be inadmissible. However, that had the effect of removing the expert evidence which was required for the sheriff to reach a judgment.

[9] Counsel submitted that the mechanism and symptoms of injury cannot, as a rule, be described by an unskilled witness. The only exception from that rule was where injury was

simple and visible, and the court could apply common experience (*Marsh* v *Taylor* 1992 SLT (Sh Ct) 28).

[10] The sheriff, and this court, were bound by *Armstrong and Ors* v *ERS Syndicate Management* 2019 SC (SAC) 15, which decided that lay people of no medical qualification or experience could not determine causal connection with injury, as a matter of ordinary experience. Expert evidence was required before findings on causation could be made. The sheriff should have recognised that there was no basis for his findings on causation, symptoms or duration. Inferring that injury was a consequence of the incident went beyond the experience of ordinary people.

Submission for the pursuer

[11] There is no cross appeal for the pursuer, and the sheriff's ruling on the admissibility of medical evidence is not challenged.

[12] Counsel submitted that the reliance on *Armstrong & Ors* was misconceived, and the approach to causation erroneous. There was sufficient evidential basis for the sheriff to have made the relevant findings in fact. *Armstrong & Ors* fell to be distinguished as it dealt primarily with admissibility of expert evidence, and did not decide that expert evidence is required in every case. Causation was always a matter for the court, not the witness, and common sense was part of the assessment. A pursuer's own account may provide prima facie evidence of a connection between an incident and medical consequences (*McDonald* v *Indigo Sun Retail Ltd* [2022] SAC (Civ) 15). The sheriff's findings can only be disturbed if they are findings which no reasonable judge could have reached, or if there is an error in law, misunderstanding of evidence, no basis in evidence or failure to consider relevant

evidence (*Woodhouse* v *Loch & Glens (Transport) Ltd* 2020 SLT 1203 at para [31] to [33]). There being no challenge to the quantification of solatium, the appeal should be refused.

Decision

[13] In my view the sheriff had a sound evidential basis for making the award of solatium, and the appeal must be refused. The sheriff did not have a sound basis for describing the injury as a soft tissue injury, as this went beyond the knowledge of a lay person of no medical qualifications or experience. That does not, however, invalidate his other findings, or the award.

[14] The sheriff accepted the pursuer's evidence of the incident and the result. The incident involved a collision of sufficient impact to cause extensive damage to the rear of the pursuer's van, including significant damage to the rear doors. The vehicle was written off for insurance purposes. The immediate effect of the collision on the pursuer was that his head and neck jerked forwards and backwards upon impact. The sheriff found that, on the balance of probabilities, the pursuer sustained injury caused by the collision.

[15] The sheriff also accepted the majority of pursuer's description of that injury. The pursuer described having pain in the neck and back and down the right side of his leg. He did not attend hospital. He self-medicated, taking different substances. The symptoms started to get better after about 4 weeks or so, but he continued to have some pain. It took a while to get better. He was pain-free by August 2023, some 4 months after the collision. The sheriff accepted that the pursuer suffered a soft tissue injury with some low back pain and some pain in the right thigh, which resolved over a period of three to four months, and that any longer term complaints of pain were not caused by the accident.

[16] The defender's submission related to causation, symptomatology and duration of injury. These are all questions of fact, to be decided on all of the information before the sheriff (*McDonald*, above). Setting aside the inadmissible medical evidence, the sheriff had evidence about the significant nature of the collision, the immediate jerking of the pursuer's head and neck, and subsequent pain in the pursuer's head, neck and leg which lasted for a limited period. He assessed that evidence and accepted it as proved. The question for him was then whether, on the balance of probabilities, the collision caused subsequent injury, and what the nature of the injury was. He decided that it did, and the nature of the injury was consistent with the collision. It is not possible to categorise that decision as irrational, unsupported by the evidence, or otherwise to be findings which no reasonable judge could have made (*Woodhouse*, above). The collision was of significant force, the mechanism of injury clearly discernible, and the injuries at least prima facie consistent with such an incident, and not excessive. A finding on the balance of probabilities is justified.

[17] The sheriff did stray beyond lay expertise in a single respect. He assessed the injury as a soft tissue injury. While the sheriff is a personal injury specialist of considerable experience and expertise, including many soft tissue injury claims in similar circumstances, and indeed had heard the injury so described by Dr Bumrah, he required to limit his findings to what evidence was left. Whether an injury is of a soft tissue nature, or of osteopathic, psychological, neurological or other origin, is a matter which would be beyond a lay person to infer, even on the balance of probabilities. The sheriff's findings on this point required to be restricted to the fact of injury alone. In the circumstances of this case, that was enough.

[18] The defender's position was that the decision was made in error of law, founding on *Armstrong & Ors*, at paragraphs [17], [18]. That is a binding decision for present purposes

(Courts Reform (Scotland) Act 2014 section 48 (c)). The defender's position is that *Armstrong & Ors* decided that a sheriff could not hold that injuries could give rise to an inference of a causal connection, in situations outside the ordinary experience of ordinary people of no medical qualifications or experience. The court held that a sheriff could not make that determination in the absence of expert medical evidence.

[19] *Armstrong & Ors*, however, dealt principally with another issue, namely whether medical evidence was admissible. It did not bear to decide any general principle in relation to the requirements of proof of injury. The discussion of the absence of expert evidence was brief and focused on the particular facts of the case. Critically, the facts of *Armstrong & Ors* included (i) that the sheriff himself concluded, on the facts, that specialist knowledge was necessary; and (ii) that the sheriff based his findings on expert evidence. Following appeal, having found that expert evidence to be inadmissible, the court had little choice but to recognise that the strut supporting the sheriff's decision had been removed, and the decision could not stand. The present case is not similar. The sheriff did not rely on the expert evidence. *Armstrong & Ors* does not, therefore, regulate the position.

[20] The sheriff made a discerning judgment on the evidence which he accepted, drew inferences of causation based on common experience, and reached a judgment which was supported by the evidence and inferences. Such a course is open to the court in cases relating to uncomplicated injury which is amenable to assessment on the basis of common experience (*Marsh* v *Taylor* SLT (Sh Ct) 28 per Sheriff Principal R.D.Ireland).

Disposal

[21] The appeal is refused. Parties should attempt to agree expenses, failing which within 21 days the clerk will arrange further procedure, whether written or oral.