



EXTRA DIVISION, INNER HOUSE, COURT OF SESSION

[2023] CSIH 1
PD167/21

Lord Malcolm
Lord Pentland
Lord Boyd of Duncansby

OPINION OF THE COURT

delivered by LORD BOYD OF DUNCANSBY

in the Reclaiming Motion

by

MARGUERITE HENDERSON

Pursuer and Reclaimer

against

BENARTY MEDICAL PRACTICE

Defenders and Respondents

Reclaimer: Party; Trevor Turner, lay representative
Respondents: Ferguson KC, MDDUS

10 January 2023

Introduction

[1] On 28 February 2018 the reclaimer was admitted to hospital with sepsis. Her condition deteriorated and she underwent life-changing amputations. She raised an action against the partners and former partners of her local medical practice averring breaches of duty by reception staff resulting in a delay in her receiving treatment. She claims that this delay ultimately led to her amputations.

[2] Following proof the Lord Ordinary held that the claimer had not established liability on the part of the respondents and absolved the respondents (see [2022] CSOH 28). The Lord Ordinary explained that the parties had agreed that the real issue for proof could be narrowed down to the content of a telephone call that took place at 09:34 on Wednesday 28 February 2018 between the claimer and Heather Leslie, a receptionist at the respondents' medical practice. The critical issue concerned whether an appointment the claimer had with the treatment room nurse at 14:55 that day was cancelled at the claimer's own request. If the respondents' position that the claimer had cancelled the appointment was accepted, the respondents would not be liable. The claimer's position was that the court should make findings about what occurred during the call and fix further procedure to consider the findings. The Lord Ordinary found, as a matter of fact, that Ms Leslie had cancelled the claimer's appointment at the claimer's request. The claimer claims (appeals) that decision.

[3] The claimer was represented by senior and junior counsel at the proof but was unrepresented at the summary roll hearing (appeal). Mr Trevor Turner was authorised by the court to act as lay representative. Substantive notes of argument were lodged by the claimer and the respondents and we heard oral submissions in supplement. Mr Turner kindly provided the typed version of his oral submissions. We are grateful to Mr Turner and counsel for their submissions.

Facts

[4] On 25 February 2018 the claimer noticed a cut on her right index finger. The following day, she noticed a blue-ish spot on the cut and attended the pharmacy. The pharmacist advised her to make an appointment with her GP. The claimer's registered

medical practice at that time was Benarty Medical Practice. She spoke with Gillian Simon, a receptionist at the practice, who arranged an appointment with a treatment room nurse for 27 February at 15:45. The appointment was cancelled on the morning of 27 February at the claimer's request. She spoke with another of the practice's receptionists, Brenda McDonald, and advised that she felt too unwell to attend. Ms McDonald rescheduled the appointment for Wednesday 28 February at 14:55.

[5] Owing to extreme weather conditions on 28 February, falling within the period when the UK was facing the "Beast from the East", Heather Leslie made contact with patients that morning. She spoke with the claimer at 09:34 and, while what took place on that call is a matter of dispute between the parties, Ms Leslie cancelled the claimer's appointment. By the afternoon of 28 February, the claimer's condition had deteriorated. She spoke again to Brenda McDonald at or around 17:00 and reported feeling extremely unwell and experiencing pain in her arm and underarm. Ms McDonald reported the claimer's symptoms to the on call doctor, Dr Susan Filsell, who called the claimer at 17:27.

[6] Dr Filsell, suspecting that the claimer had sepsis, advised her that, as there were no doctors left at the practice at that time, she should contact the NHS out of hours service at 18:00. Shortly thereafter, the claimer's daughter and her husband visited her. Concerned about her condition they took her to the emergency department of Victoria Hospital. Her symptoms were investigated and she was treated for sepsis. However, her condition deteriorated further. On 3 April 2018 she underwent a left forearm amputation along with amputation of the fingers and part of the thumb of her right hand. On 12 April she underwent bilateral below-knee amputations. On 8 May she underwent further debridement of her right hand. She continued receiving extensive in-patient treatment until she was discharged on 24 August 2018.

[7] In March 2018 the reclaimer's daughter submitted a complaint to the practice via Elizabeth Fallas, NHS Fife's patient relations officer. On 5 April 2018 the respondents responded to each of the points raised in the complaint, in sum denying any liability, and confirming it would undertake a Significant Event Analysis to identify future learning and training points. The reclaimer intimated a formal letter of claim alleging negligence via her solicitors on 19 November 2019.

[8] On 28 August 2020 the reclaimer released a book about her experiences entitled "*My Story: Sepsis Raw and Real*".

The evidence

[9] The Lord Ordinary sets out the evidence in detail in her opinion: see paras [7]-[47]. What follows are the pertinent parts of the evidence relative to the issues which arise for determination in this reclaiming motion.

The reclaimer's belief of whom the appointment was with

[10] This dispute centres on the 26 February call between the reclaimer and Gillian Simon when the initial appointment was booked. In her evidence the reclaimer stated that she believed the appointment was with a doctor, not a treatment room nurse. It is not in dispute that the appointment as booked was with the latter.

[11] In her statement Ms Simon states that she would routinely confirm various details with patients at the end of a call booking an appointment, that is, the date and time of the appointment and who it was with. She was of the view that she would have also done this on the call with the reclaimer. That evidence was not challenged.

Whether the claimer told Brenda McDonald she had a virus

[12] The claimer cancelled her initial appointment on 27 February by calling the practice and speaking with Brenda McDonald. The claimer was unclear in her evidence as to the timing of the call. She initially claimed that she had called the practice before 09:00 and disputed a typed note by Brenda McDonald which suggested the call was at 13:43. When faced with records from the audit trail supporting Ms McDonald's note, she conceded that her recollection of the timing must be wrong. However, she stated that she was clear about what she had said on the call. She said that she had "flu like symptoms". She did not mention her finger. Ms McDonald then told her that there was a "virus going about".

[13] Brenda McDonald spoke to being on first name terms with the claimer. The claimer told her that she was not feeling well that day, that she had been sick and thought she had picked up a virus. Ms McDonald responded saying something to the effect that "you could be right...it's maybe a wee virus". While they had both mentioned a virus, it was not possible that Ms McDonald had mentioned it first.

[14] Elizabeth Fallas, a patient relations officer with NHS Fife, assisted the claimer's daughter in framing the initial complaint to the respondents. In the complaint Ms Fallas had noted, on the family's behalf, that the claimer, when speaking with Ms McDonald, identified she might be suffering with a virus. The claimer disputed this. In her statement Ms Fallas noted that she could not confirm with any certainty the detail of her conversation with the claimer's daughter when formulating the complaint.

The cancellation of the appointment on 28 February

[15] The Lord Ordinary noted that the real issue between the parties at the proof was the content of the telephone call on 28 February at 09:34 between the claimer and

Heather Leslie. It was at or around this time that the reclaimer's appointment for that afternoon was cancelled. The issue arising was whether this had been done at the reclaimer's request.

[16] The reclaimer stated that she had been woken from sleep by the call. She was drowsy and drifting in and out of sleep all day. Ms Leslie said she was calling to enquire whether patients with appointments that day still needed appointments in light of the extreme weather conditions. The reclaimer said she did. She had been feeling worse than the day before. She described some of her symptoms and the pain she was experiencing to Ms Leslie. The reclaimer's position regarding whether she mentioned her finger to Ms Leslie on that call was unclear, however she was adamant she had not said it was feeling better. She was told that the appointment would be left "as is". The reclaimer was of the view that Ms Leslie was not really listening on the call. She only wanted to cancel or reschedule the appointment. She did not ask the reclaimer how she was feeling. That said, the reclaimer did accept it would have been odd for Ms Leslie to have cancelled the appointment where she had said in terms she needed it. Furthermore, she had some recollection of Ms Leslie saying that a replacement nurse was available that day but only recalled being asked whether she wanted to cancel or reschedule.

[17] Heather Leslie recalled that 28 February was an unusual day because she had to contact all treatment room patients and inform them another nurse was available to see them. It was not any busier than a normal day. She remembered the reclaimer saying she did not think she needed the appointment. She thought her finger was getting better and, while Ms Leslie said that a nurse would still be there and she could be seen, the reclaimer said she would "leave it just now". In order to cancel appointments Ms Leslie had to follow a two-step process, first, by bringing up the patient's name on the screen and clicking

“cancel” and, secondly, by clicking again to confirm the cancellation. The conversation between Ms Leslie and the claimer was very brief. She estimated it lasted no more than a minute. The claimer did not tell her she was feeling worse or had to see a doctor. Had she done so, Ms Leslie would not have cancelled the appointment. She denied being on a mission to cancel appointments that morning. While she wanted to get home safely, she was not trying to get away from work early.

[18] Dr Filsell spoke with the claimer on the evening of 28 February. In her statement she said that had the claimer told Ms Leslie about her symptoms and that she needed a doctor to look at her finger, it is likely she would have been passed straight through to Dr Brown. Dr Brown had just finished dealing with a patient at 09:33. She did not see her next patient until nearer 10:00. Alternatively, she could have been given an emergency appointment, which were available with Dr Filsell that day, or a home visit could have been made.

[19] Dr Katy Green encountered the claimer following her admission to Victoria Hospital. In a note she took of the claimer’s history, she noted that the claimer had a cut on her right finger which “appears to have settled”. She also recalled the claimer having told her the finger was improving over the preceding day. She noted that Dr Pugh, who examined the claimer following her admission to hospital, referred in his note to a cut, healing finger.

The claimer’s knowledge that the appointment was cancelled

[20] The claimer gave evidence that, when speaking with Brenda McDonald on 28 February, she believed her appointment that day was still to come. She accepted that this call took place just before 17:00, however she said that her condition was such that she

was unaware the appointment had already passed. It was put to the reclaimer that her account was inconsistent with a letter sent to MDDUS by her solicitors related to the complaint her daughter made on her behalf. The letter stated that the reclaimer was advised by Ms McDonald when she called the surgery for help that afternoon that all appointments had been cancelled due to the weather. A note taken by Laura Adams, the practice manager, following her meeting with the reclaimer's daughter and her husband in relation to the complaint posed a question of why Heather Leslie had cancelled the appointment. The reclaimer disputed the contents of both. She was unaware her appointment was cancelled until some months later when the case was reviewed. In her initial discussions with her daughter she was under the influence of strong medication. She did not call the practice to advise she was too unwell to attend the appointment. The passage in the summons averring that she had was wrong.

[21] Brenda McDonald said she received the call not long after 17:00. The reclaimer sounded totally different from when she had spoken to her on 27 February. She recalled asking the reclaimer whether she had attended her appointment that afternoon to which the reclaimer responded "no". She did not ask the reclaimer why she had not attended. The reclaimer did not say that she had missed the appointment, nor did Ms McDonald recall any reference on the call to the appointment having been cancelled.

[22] Ms Fallas, while noting that she could not confirm with certainty the details of her discussions with the reclaimer's daughter, spoke to a typewritten note stating the reclaimer had been unable to attend due to weather conditions. The initial terms of the complaint stated she could not be seen due to bad weather. Ms Fallas could not explain the difference in emphasis between the two. Following the respondents' response to the complaint, which

she received and forwarded to the claimer's daughter, she had no further involvement with the family.

The replacement treatment room nurse

[23] In their evidence both the claimer and Heather Leslie spoke to there being mention on the 28 February call that a nurse was available to see the claimer, who was, irrespective of the claimer's knowledge, booked in as a treatment room patient.

[24] Laura Adams gave evidence relating to an appointment book kept by the practice. On 27 and 28 February it was recorded that the treatment room nurse, Louise Thomson, could not make it to the practice. NHS Fife were noted to have provided a replacement, Kara Mackie. Ms Adams stated that NHS Fife were also Louise Thomson's employers.

[25] Kara Mackie gave a signed statement. Her evidence was unchallenged. She stated she was a community staff nurse. Due to heavy snow she had been unable to travel to her own work base on 28 February. She was advised to call to her nearest GP practice to cover essential visits. She called to Benarty Medical Practice. She was asked to see a couple of treatment room patients in the afternoon and, under reference to her 2018 diary, spoke to having seen and treated one patient that afternoon. She left the practice sometime after 15:00.

Audit trail of appointments on 28 February

[26] Laura Adams gave evidence relating to audit trails she had conducted of the clinical system relating to the claimer, restricted to actions taken between 26 and 28 February 2018, both dates inclusive. She spoke to the initial booking of the appointment and the first cancellation processed by Brenda McDonald. She also confirmed that Heather Leslie had

cancelled the claimer's 28 February appointment following their call at 09:34. Under reference to the appointment book she noted that patients had been seen by the practice nurse, Dr Brown and Dr Filsell on 28 February. Dr Filsell had seen patients in the afternoon with the last patient leaving at 15:31.

[27] Heather Leslie confirmed, under reference to the audit trail, that on 28 February some appointments were cancelled and others were booked. An appointment was booked for 10 minutes at 15:50. The audit trail illustrated that at 09:30 she had booked an appointment for a patient to attend the treatment room in the afternoon of 28 February. This was because the treatment room was an afternoon clinic, notwithstanding she had been trying to put appointments into the morning to free up the afternoon. The claimer had been given three 5 minute slots on 28 February. All of these slots were cancelled following the 09:34 call.

[28] Kara Mackie's statement, as already noted, spoke to having treated a treatment room patient in the afternoon of 28 February.

The handwritten statements

[29] In her evidence Laura Adams said she followed her normal practice when receiving complaints. She requested statements from Brenda McDonald and Heather Leslie before sending a letter of response. She had no further input once she requested the statements. Ms McDonald and Ms Leslie would have handwritten the statements and then typed them up.

[30] Brenda McDonald said she was asked to make a note of her recollection of events a few weeks after the complaint was received. The events had stuck in her mind because of

what she learned about the claimer's condition later. She did not have notes to prompt her recollection. She wrote the initial statement at the beginning of April 2018.

[31] Heather Leslie also said she handwrote the statement in April 2018 shortly after the complaint was received. She signed it but it was undated. She handed the handwritten statement to Laura Adams whom she believed typed it up. She recalled going over the typed note with Ms Adams and comparing it with her handwritten statement. She was confident that she would have checked it but, in any event, was content that it accurately reflected what she had said in her handwritten statement.

The significant event report

[32] The report was put to Heather Leslie. She said Laura Adams had shared it with her, she believed, because of her involvement in the events. Ms Leslie was asked about the section of the report headed "What went wrong" where "communication between patient and practice" and "extreme weather conditions" were noted. Ms Leslie disputed there was anything wrong in the communication between her and the claimer.

The Lord Ordinary's decision

[33] The Lord Ordinary considered that all witnesses had been doing their best to tell the truth. The matter turned on which of the witnesses' recollection had been accurately retained (*Onassis v Vergottis* [1968] Lloyd's LR 403, Lord Pearce at 431) and the internal and external consistency of their evidence (*Gestmin SGPS SA v Credit Suisse (UK) Ltd & Another* [2020] 1 CLC 428, Leggat J at paragraphs 16-20). Their demeanour was of little assistance. There was one issue of dispute between the respondents' witnesses namely who prepared the typed statements. On this issue the Lord Ordinary preferred Heather Leslie's

evidence over Laura Adams'. She considered that Laura Adams had been responsible for typing up the handwritten statements.

[34] In terms of the contents of the call on 28 February 2018 at 09:34, the Lord Ordinary preferred Heather Leslie's account. She gave three principal reasons for doing so. First, there was no reason for Heather Leslie to cancel the appointment. It was inexplicable that she would have done so where the claimer had expressly stated that she still needed the appointment. The claimer herself recognised that this would have been odd. She recalled there being some mention of a nurse being available to see her in the afternoon if required. The cancellation of appointments was a two-step process. This made it unlikely that Heather Leslie cancelled the appointment inadvertently. The short duration of the call supported Heather Leslie's account that the claimer did not describe her symptoms. The Lord Ordinary accepted the evidence of Dr Filsell that, had the claimer done so, Heather Leslie would have passed the call to a doctor. The claimer's contention that she kept the 28 February appointment, when on her own account she was feeling worse than the day before, was inconsistent with her having cancelled the appointment on 27 February because she felt too unwell to attend. In the course of cross-examination, it became clear she had given no thought to how she would get to the practice for the appointment.

[35] Secondly, there was evidence that some appointments at the practice were still being kept and new ones made for that day including with the replacement treatment room nurse. The audit trail illustrated that appointments had been booked for that day. This contradicted the claimer's claim that Heather Leslie was "on a mission" to cancel appointments.

[36] Thirdly, Heather Leslie's account that the claimer said her finger was getting better was consistent with the note taken by Dr Green shortly following the claimer's admission

to hospital. Senior counsel for the claimer accepted that the claimer had been inconsistent about whether she mentioned her finger on the call. Dr Green's notes, as well as those of Dr Pugh who examined the claimer later that day, both recorded that the cut on the claimer's finger was healing. There were other reasons why Heather Leslie's account was to be preferred. While the claimer criticised her statement on the basis it was not a contemporaneous account, it was provided within weeks of the event. There were sound reasons why she would be able to remember that day, namely the serious adverse weather conditions; the actions she had to take as a result; and what she learned of the claimer's condition soon thereafter.

[37] In terms of the 27 February call between the claimer and Brenda McDonald, the Lord Ordinary preferred Brenda McDonald's account. She regarded it as inherently unlikely that an experienced member of non-medical staff would have suggested the cause of a patient's symptoms. Brenda McDonald's evidence was supported by the terms of the initial complaint submitted by Ms Fallas on the claimer's behalf. The call between the claimer and Brenda McDonald on 28 February added nothing. The external evidence indicated that she was aware the appointment had been cancelled. Brenda McDonald could not speak to this. She gave evidence that the claimer informed her she did not attend but did not explain why. However, a note prepared by Ms Fallas following her meeting with the claimer's daughter suggested the claimer had been unable to attend the appointment due to weather conditions. The Lord Ordinary concluded that the claimer's position was untenable when assessed with reference to the unchallenged evidence. It was based on "wishful thinking" (*Onassis v Vergottis supra*).

Submissions

Reclaimer

[38] The reclaimer contends that the Lord Ordinary's reasons are unsatisfactory and that this court is entitled to interfere (*Thomas v Thomas* 1947 SC (HL) 45). The three principal reasons given for preferring the evidence of Heather Leslie are vitiated by errors the Lord Ordinary made in assessing the evidence, namely that she made critical findings in fact with no foundation in the evidence; failed to take into account relevant evidence; and misunderstood the evidence. Heather Leslie's account was unreliable when assessed both internally and against the external evidence. She was able to provide limited information about the day of the event and the precise words she used on the call. The external evidence suggests no treatment room was to be run on 28 February. It was an afternoon clinic. Kara Mackie, who Laura Adams was speaking about in her evidence, was covering essential visits. She had not been arranged to attend the treatment room as a replacement for Louise Thomson at the time of Heather Leslie's call with the reclaimer. This does not appear to have been arranged until a later call. Heather Leslie was speaking about a different nurse, Karen Gold, the practice nurse, who ran a morning clinic and who was also unavailable in the afternoon. As there was no replacement nurse available, Heather Leslie could not have offered to keep the appointment.

[39] Heather Leslie's evidence that all the appointments she cancelled were done at the request of patients was incredible. It was not suggested that she had cancelled the reclaimer's appointment inadvertently, but there were ample reasons for her to do so, namely the unavailability of a replacement nurse; the extreme weather conditions; and that those conditions were to deteriorate in the afternoon when the treatment clinic would usually run. The short duration of the call, which based on the audit trail could in fact have

lasted up to 3 minutes, indicates Heather Leslie was not listening to the reclamer. Had she done so, she would have recognised the reclamer was suffering symptoms of severe sepsis, required urgent medical attention and the amputations would not have been required.

Heather Leslie's employment relationship with the respondents, which meant she had a stake in the proceedings (*Gestmin supra*), was also left out of account. The Lord Ordinary found she had not typed her own statement. Her handwritten statement was not available at proof. These were all matters which should have led the Lord Ordinary to reject her evidence.

[40] Neither the audit trail nor the appointment book, both of which were before the Lord Ordinary at the proof, demonstrate that an appointment was booked for the treatment clinic in the afternoon. Laura Adams did not suggest there was. The only evidence to this effect was from Heather Leslie. To this extent the Lord Ordinary was misled. None of the appointments that took place with doctors in the afternoon, of which there were three, was new either. Dr Brown's appointments were brought forward from the afternoon into the morning, meaning she could not have carried out a home visit to the reclamer had she requested this.

[41] The Lord Ordinary failed to recognise the distinction between "community staff" and "treatment room" nurse. Kara Mackie was the former. While she treated a treatment room patient in the afternoon, her role was to cover for the community staff nurse and carry out essential home visits. The other patient she was supposed to treat failed to attend. It is likely he got the message the appointment was cancelled. There were also inconsistencies in Dr Filsell's evidence, as between the contemporaneous note she prepared following her call with the reclamer on 28 February and the email she sent to Laura Adams almost immediately thereafter. There was a discrepancy as to whether the reclamer had mentioned

that the pain in her right axilla into her breast started that day or the day prior. Dr Filsell's statement makes clear that the latter is correct. Nor was there any mention of a red swollen fingertip in the contemporaneous note. The claimer's fingertip was never affected; the cut was near to the knuckle on her right index finger. It is likely this information was added following Dr Filsell's call with Brenda McDonald shortly after the call with the claimer, during which time Brenda McDonald is shown to have accessed the claimer's file.

Dr Filsell's contradictory position is also highlighted by Dr Green's note which records that the pain had developed the day before and the claimer's finger was not causing her concern. The Lord Ordinary, in accepting Dr Filsell's evidence that Heather Leslie would have passed the claimer to a doctor had she been informed of her symptoms, expressly "[left] aside" the claimer's evidence that she already thought the appointment was with a doctor. The claimer need not have given much thought to how she would attend the practice given her house is in close proximity and various friends and family lived nearby to assist her.

[42] In terms of the 27 February call between the claimer and Brenda McDonald, the latter ought to have recognised the claimer was suffering sepsis. Brenda McDonald's handwritten statement, which refers to the claimer stating she thought she may have "picked up a bug", was inconsistent with the typed statement which refers to "a virus". The handwritten statement supports the claimer's account that she never mentioned having a virus to Brenda McDonald. The introduction of desk aids and the contents of the significant event report are indicative of the respondents' having accepted their receptionists' negligence. The latter, which was relied on by senior counsel at proof, suggests the partners recognised clinical decisions were being made by receptionists, asked them to consider their actions and *reiterate* that they do not make clinical decisions. The

clinical decisions included: Gillian Simon booking the appointment with a nurse rather than a doctor; the cancellation of the claimer's appointments resulting in a delay in her seeing a doctor; and the failure by reception staff to report her deteriorating symptoms promptly.

The report was a crucial document and was not considered in its entirety. The Lord Ordinary only referred to section 3. Neither Heather Leslie nor Laura Adams have explained why receptionists were considered to have made clinical decisions or what prompted the partners to call on them to consider their actions and reiterate they do not make clinical decisions.

Respondents

[43] The claimer should not be permitted to introduce new evidence that was not before the Lord Ordinary (*Scotch Whisky Association v Lord Advocate* [2016] CSIH 77). She has failed to identify any proper basis for disturbing the Lord Ordinary's primary findings in fact. The approach to be taken by the appellate court in such appeals is well-established (*Thomas v Thomas; Henderson v Foxworth* 2014 SC (UKSC) 203, Lord Reed at paragraph 67; *McCulloch v Forth Valley Health Board* 2021 SLT 695, Lord Tyre at paragraph 25). The Lord Ordinary has a deeper familiarity with the case (*Carlyle v RBS* 2015 SC (UKSC) 93, Lord Hodge at paragraph 22). She had sight of the whole body of evidence which is not before this court. She took advantage of seeing and hearing the witnesses and tested their accounts against extraneous evidence. She found the claimer's account to be untenable and was entitled to do so.

[44] The first strand of the claimer's submission is the suggestion that the Lord Ordinary left out of account or misunderstood relevant evidence. However, her senior counsel at proof did not rely on much of the evidence she now seeks to. The Lord Ordinary

did not leave out of account that the claimer believed the appointment was with a doctor. She was focusing on the implausibility of the claimer's account that Heather Leslie would have cancelled the appointment despite the claimer describing her symptoms and expressly stating she wanted to keep it. The absence of an audio recording of, or contemporaneous note from, the call did not preclude the Lord Ordinary deciding which of the competing accounts she prefers. The issues raised in relation to Heather Leslie's credibility were put to her at proof. They are insignificant matters and do not undermine the Lord Ordinary's conclusions, which were clear, cogent and unassailable. Her better memory of that call was understandable given what she learned of the claimer's condition within a couple of days of it.

[45] The Lord Ordinary found Heather Leslie's account of the call to be accurate and established as a matter of fact. The critical proposition that underpins the claimer's case is that Heather Leslie decided to do the exact opposite of what a patient asked her to do. It does not matter that the appointment was cancelled unless the court accepts that the claimer described her symptoms to Heather Leslie and requested the appointment be kept. On the morning of 28 February Heather Leslie was contacting patients to check if they wished to keep their appointments. It was unclear whether Kara Mackie, who the practice had spoken to early in the day, would have to attend the practice in the afternoon. That would depend on whether she was required. It does not follow from Heather Leslie advising the claimer a nurse was available that Kara Mackie was at the practice at that very moment. There is no dispute that Kara Mackie treated one patient. It is speculative to suggest the reason why the other patient did not attend. Some appointments were kept and others arranged for that day. It is accepted that the Lord Ordinary was incorrect to find a new treatment room appointment was booked for the afternoon, but this does not

undermine her decision. It was not a critical finding. The preponderance of evidence supported the Lord Ordinary's conclusions. The short duration of the call is illustrated by the audit trail which shows Heather Leslie performing an administrative task 1 minute later. The reclaimer was found to be inconsistent on certain matters. She fails to engage with the other evidence the Lord Ordinary relied on. Gillian Simon directly contradicted the reclaimer's evidence about her knowledge of whether the appointment was with a nurse and the respondents challenged that evidence. In any event the real issue was whether and why the appointment was cancelled.

[46] The significant event report played a minimal role at proof. It is a learning exercise; it is not a forum for attributing blame or acknowledging fault. The Lord Ordinary correctly recorded the excerpts put to Heather Leslie. The issues with communication noted in the report arise from the conflicting accounts of whether the reclaimer said to Heather Leslie that the appointment should be left "as is" or left "for now". The introduction of desk aids do not yield any inference of negligence either.

[47] The second strand relies on the apparent distinction between types of nurse. This did not feature at proof and has no foundation in the evidence. It is a matter of fact that Kara Mackie treated a treatment room patient. She was correctly understood to be a replacement for Louise Thomson, irrespective of whether she was known to be attending the practice when Heather Leslie first started contacting patients. By the time she contacted the reclaimer, other patients not having answered, she knew a replacement nurse might have to be available in the afternoon. The appointment books were not before this court. All the Lord Ordinary accepted from the audit trail was that new appointments were made "that day", not specifically for the afternoon.

[48] The third strand suggests Heather Leslie's evidence was tailored to match Dr Green's notes. It was unclear from the oral submissions whether the reclaimer was maintaining this argument. If she was, it was not advanced at proof and has no foundation. Dr Green's notes were first made available on 24 December 2019 and she was precognosed on 21 March 2021, long after the event, whereas Heather Leslie provided her statement within only a few weeks of it. It is fanciful to suggest that Heather Leslie colluded with Dr Green prior to preparing her statement. The typed statements of Heather Leslie and Brenda McDonald are not materially different from their handwritten statements. Brenda McDonald's statement does not support the reclaimer's account. It is of no moment whether she said "bug" or "virus". No case of fault was pled against her and the reclaimer's case, insofar as it now alleges negligence by her, is irrelevant. The contents of the 27 February call only bear upon the general credibility of witnesses.

The law

[49] The applicable law is not in dispute. It was summarised in the respondents' note of argument as follows. A finding of primary fact made by a Lord Ordinary can be interfered with if -

- a. The Lord Ordinary has made a material error of law.
- b. The Lord Ordinary has made a critical finding of fact without there being any evidence to support it - either because there was no evidence, or because the Lord Ordinary has demonstrably misunderstood relevant evidence.
- c. The Lord Ordinary has left out of account relevant evidence.
- d. The Lord Ordinary has made a finding of fact which is "plainly wrong".
- e. The Lord Ordinary's reasons are unsatisfactory.

[50] These propositions are derived from a line of authority starting with *Thomas v Thomas* 1947 SC (HL) 45; *Henderson v Foxworth* 2014 SC (UKSC) 203; *McCulloch v Forth Valley Health Board* 2021 SLT 695 at para [25]. Issues of credibility and reliability having regard to the other evidence are pre-eminently for the Lord Ordinary; *McGraddie v McGraddie* 2014 SC (UKSC) 12, at para [28].

[51] Mr Turner accepted that statement of the law and relied on propositions (b) to (e) in his submissions.

Discussion

[52] The proposition that the reclaimer sought to advance was that Heather Leslie had telephoned her “on a mission” to cancel the appointment. The reclaimer had told Heather Leslie that she did still need her appointment and that she still felt unwell, worse than the day before. She said she told Heather Leslie that she was lethargic, unable to get out of bed and that her right arm was aching. She said she had been conscious that she had not seen a doctor yet about the cut on her finger and mentioned this to Heather. She said that Heather Leslie told her that she would leave the appointment in place for that afternoon.

[53] In the face of that narrative the reclaimer contends that Heather Leslie nevertheless cancelled the appointment without informing her and leaving her believing that the appointment was still going ahead. The Lord Ordinary found this to be inexplicable.

[54] This appears to us to be an implausible scenario especially since that would have left the reclaimer attending the surgery for her appointment only to find it had been cancelled. The Lord Ordinary was satisfied that cancellation was unlikely to have occurred accidentally. In our view the undisputed fact that Heather Leslie cancelled the appointment

is more consistent with her account than that of the reclaimer. If the appointment was cancelled accidentally, given that the reclaimer did not attend the practice that afternoon, nothing would flow from that.

[55] Issues of credibility and reliability are pre-eminently for the Lord Ordinary who had the distinct advantage of having listened to all the evidence and weighed it against the documentary productions. The Lord Ordinary found that both Ms Leslie and the reclaimer were credible witnesses but preferred the evidence of Ms Leslie. The reclaimer relied on the *dicta* of Leggatt J in *Gestmin SGPS SA v Credit Suisse (UK) Ltd* where he noted,

“The nature of litigation is such that witnesses often have a stake in a particular version of events. This is obvious where the person is a party or has a tie of loyalty (such as an employment relationship).”

[56] Three points may be made on this passage. First, the Lord Ordinary quotes the passage in full at the start of her assessment of the evidence. It is clear therefore that it was at the forefront of her mind. Secondly, it does not imply that because a witness is an employee her evidence should be rejected. Thirdly, the *dicta* apply equally to the reclaimer as to the respondents' employees. In the course of submissions it was suggested that the respondents' employees had colluded in their evidence and that Heather Leslie's evidence had been tailored to fit with that of Dr Green. None of this was suggested to any of the witnesses at the proof. Nor could it properly have been since there is no evidence to support such a contention.

[57] The Lord Ordinary gave sound reasons for preferring the evidence of Ms Leslie. She noted that there was no reason for Ms Leslie to cancel the appointment; other appointments were being made for that day and this negates the suggestion that Ms Leslie was “on a mission” to cancel appointments. The audit trail supports the Lord Ordinary's conclusion that the call was a brief one which tended to suggest that there was insufficient time to

discuss symptoms. The medical records from Dr Green and Dr Pugh support the conclusion that the claimer told them that her finger was improving, providing further support for Heather Leslie's account. The Lord Ordinary accepted the evidence of Dr Filsell that Ms Leslie was an experienced receptionist whose general competence was not questioned. Had Ms Leslie been told of the symptoms in the course of the call it is likely that she would have passed the call onto Dr Brown who was available in the surgery that morning. While Ms Leslie's typewritten statement was not in the strictest sense contemporaneous the Lord Ordinary accepted that it reflected her best recollection within a few weeks of the incident. Her evidence was consistent with that statement.

[58] There were inconsistencies in the claimer's evidence. The claimer said in evidence that it was Ms McDonald who had first mentioned a virus in the course of the telephone call on 27 February. That was not consistent with the initial complaint made on her behalf. The Lord Ordinary concluded that it was the claimer who first mentioned a virus. In her pleadings the claimer had indicated that she had told Ms Leslie that she still needed a GP to look at the cut in her finger. In evidence she initially said that she had not told her that it was about the cut in the finger. Ultimately she said that she could not recall whether she had said anything "out loud" about her finger. She could not account for having told Dr Green that her finger was improving, other than to say that her finger was not her main concern at the time. There were further inconsistencies in her evidence about the timing of the call to Ms McDonald in the afternoon of 28 February.

[59] The claimer nevertheless contends that the Lord Ordinary left out of account critical evidence, and in particular a significant event report which was completed by the respondents following these events. We are not persuaded that the Lord Ordinary left the report out of her consideration. It is specifically mentioned in paragraph 41.

We understand that other than its use in cross examination of Ms Leslie counsel for the claimer did not seek to found on it in submissions. That is not surprising since it is of no assistance in determining the content of the telephone call. Mr Turner sought to persuade us that the reference in section 2 to “cancellation of appointments” as a factor was an acceptance that the appointment was cancelled by Ms Leslie. We cannot accept that proposition; there is no dispute that the appointment was cancelled. The report does not assist in identifying who cancelled the appointment. Section 5 of the report states that reception staff involved in the incident had considered their actions and reiterated that they do not make clinical decisions and will continue to inform GPs promptly. Mr Turner argued that this showed an acceptance by the staff that they had indeed made a clinical decision in respect of the claimer. We cannot accept that interpretation. This was a reiteration by the staff that they do not make clinical decisions, not that they had done so in the past. The respondents’ introduction of “desk aids” to assist reception staff in identifying sepsis does not constitute an admission that they failed to do so in the past.

[60] Nor are we persuaded that the Lord Ordinary was in error in accepting that a treatment room nurse was available in the afternoon of 28 February. While it is true that Ms Mackie was a community nurse she was a nurse who had been asked by NHS Fife to contact her local GP practice and cover home visits. She did so and was asked to see patients in the treatment room that afternoon and indeed saw one patient. Whether or not Ms Leslie was referring to Ms Mackie or to another nurse in the practice, Ms Gold, when she spoke to the claimer in the morning does not matter. Ms Leslie knew that a nurse would have to be available in the afternoon in the treatment room and that is what happened. Had the claimer turned up that afternoon for her appointment she could have been seen by Ms Mackie, or indeed Dr Filsell who was still in the practice at that time.

[61] The claimer complains that the Lord Ordinary relied on what the claimer described as “fake” statements from Ms Leslie and Ms McDonald. Both women had written statements in hand and these had been typed up later. There was some controversy as to who typed the statements. The Lord Ordinary did not accept Ms Adams’ evidence that she had not typed them. She did however accept Ms Leslie’s evidence that the typed statement reflected the terms of her handwritten account. The Lord Ordinary was entitled to reach that conclusion.

[62] Since the proof the respondents have provided to the claimer the handwritten statements of both Heather Leslie and Brenda McDonald. The claimer now seeks to found on what Mr Turner describes as a discrepancy between Ms McDonald’s evidence, which includes a typed note of the telephone calls she had with the claimer, and the handwritten note of these calls. Counsel for the respondents objected to the introduction of new material in a reclaiming motion. Ordinarily we would not entertain the introduction of new material to this stage in the proceedings. We have nevertheless considered the point.

[63] Ms McDonald’s typed note of the call on 27 February is as follows

“27/2/18 Telephone call from patient asking to cancel appt she had to check her finger. Pt thought she had ‘picked up a virus’ and rescheduled appt to attend next day”

[64] The handwritten note of the call which has now become available is in identical terms except that for the word “virus” in the typed version there is the word “bug”.

Mr Turner submitted that this demonstrated the deceit and dishonesty of the respondents’ staff as Ms McDonald had sworn under oath that the typed version was correct.

[65] We reject this submission. There is no material difference between the words “virus” and “bug” which are often used interchangeably. “Bug” might be a more colloquial term than “virus” but in the context of a telephone call between a patient and a receptionist both

have the same meaning. Whether one or other of the words was used is immaterial and a long way short of suggesting that Ms McDonald lied, far less that there was deceit on the part of the respondents' witnesses. In any event the handwritten note does nothing to advance the claimer's position that it was Ms McDonald who first mentioned that there was a virus going about.

[66] Counsel for the respondents conceded that the Lord Ordinary was in error in para [60] when she stated that new appointments were being made for the treatment room nurse that day. We agree that such a conclusion is not borne out by the evidence. The rest of the paragraph however is accurate. Appointments were being kept for that day, including for the treatment room and new appointments were being made with doctors. We are satisfied that nothing turns on this point.

Decision

[67] We recognise the catastrophic consequences that sepsis has had on the claimer and she has our sympathy. We have carefully considered all of the 16 grounds of appeal and the written and oral submissions. We can however find no error in the Lord Ordinary's opinion which is cogent, comprehensive and well-reasoned.

[68] The reclaiming motion is refused. We adhere to the Lord Ordinary's interlocutors of 5 April 2022. We reserve all questions of expenses in the reclaiming motion.