



SHERIFF APPEAL COURT

**[2022] SAC (Civ) 17
PIC-PNI789-21**

Sheriff Principal C D Turnbull
Appeal Sheriff A M Cubie
Appeal Sheriff R D M Fife

OPINION OF THE COURT

delivered by SHERIFF PRINCIPAL C D TURNBULL

in the appeal in the cause

DAVID MOTHERWELL

Pursuer and Appellant

against

COVEA INSURANCE PLC

Defender and Respondent

Pursuer and Appellant: R Conway, solicitor-advocate; Conway Accident Law

Defender and Respondent: S Law, solicitor; Kennedys

29 April 2022

Introduction

[1] This appeal is in relation to the decision of the sheriff of 28 September 2021, in terms of which he *inter alia* found the defender liable to the pursuer in the expenses of process to the date of a tender on the Summary Cause scale. The pursuer maintains that the sheriff should have awarded expenses on the Ordinary Cause scale.

Background

[2] On 4 September 2020 the pursuer was a front seat passenger in a motor vehicle, then stationary at a roundabout giving way to traffic. A second motor vehicle failed to stop safely behind the vehicle in which the pursuer was travelling, colliding with the rear of it. The defender is the insurer of the second motor vehicle. The pursuer suffered loss, injury and damage as a result of the collision.

[3] A claim was intimated to the defender shortly after the accident. No response was received. Reminders were sent. A medical report and statement of value of claim for the pursuer were submitted in May 2021. The pursuer's claim was valued at £5,651.09, that comprising solatium of £5,500 together with interest from the date of the accident in the sum of £151.09. In response, the defender offered £2,800 in full and final settlement. The pursuer's solicitors then indicated to the defender that they would recommend settlement if an offer of £4,000 was made. The defender responded offering £3,000. That offer was rejected. On 2 August 2021 the defender indicated that they would not increase their offer from £3,000.

[4] The present action was served on 3 August 2021. The defender lodged a notice of intention to defend and a minute of tender, both prior to the expiry of the induciae. The tender (dated 24 August 2021) was in the sum of £3,500 (net of recoverable benefits). The defender's tender was accepted by the pursuer on 1 September 2021. The pursuer's motion to grant decree in terms of the minute of tender and acceptance was opposed, on the basis that expenses should be awarded in favour of the pursuer on the Summary Cause scale. Parties were content that the opposed motion be dealt with by way of written submissions. These were duly lodged and the interlocutor now complained of was issued on

28 September 2021, accompanied by a note by the sheriff setting out the reasons for his decision.

Submissions

Submissions for the Pursuer

[5] Judicial expenses are of importance to parties, especially in modest value cases (see *Burns v Royal Mail Group* 2014 SLT (Sh Ct) 73). The pursuer acknowledged the reluctance of appellate courts to interfere with findings on expenses unless there is some error in principle; a misdirection in law; the sheriff is plainly wrong; or the result is wholly unreasonable. In the present case, the sheriff acknowledged what the pursuer referred to as “the guiding principles” contained in *Macphail, “Sheriff Court Practice”* (3rd ed.) at paragraph 19.49 but, in fact, did something rather different.

[6] Instead of focusing on the range of quantum and deciding whether the pursuer’s solicitor was entitled to choose the ordinary cause forum from the top thereof, the sheriff appeared to take a view (without any reasoned analysis of the case law) that the actual or realistic value of the claim was below the £5,000 threshold. He departed from the traditional approach of finding a range as outlined in *Macphail* (3rd ed.) at paragraph 19.49. The matter should not be weighed too finely in the balance. The finding that the litigation valuation on full liability may be “either side of the line” should have ended the matter. Instead of giving an objective view on the possible litigation value range and the maximum figure which might be awarded having regard to the cases cited to him, the sheriff carried out an exercise whereby he intuited the pursuer solicitor’s “realistic valuation” of the case, having regard to the settlement figure and discussions. There is no significant disproportion between the

settlement figure of £3,500 and the ordinary cause threshold of £5,000, such as would justify a departure from the “traditional rule”.

[7] The sheriff equated what the pursuer was prepared to settle at by way of compromise for immediate payment, with the full litigation value of the case had it proceeded to proof with the pursuer completely successful. There was no need to speculate on the pursuer's solicitor's valuation on full liability. It was contained in the Statement of Valuation sent by the pursuer in the Compulsory Pre Action Protocol. The amount of that valuation was £5,500 together with interest of £151.09 from the date of the accident until the date of the valuation. As a matter of practicality, the choice of forum will inevitably be decided by solicitors on the basis of their view of valuation. It is not difficult to understand a pursuer's instructions to accept a less than full value but immediate sum, as against a wait for a proof date, particularly in cases of modest value.

[8] Predictability for practitioners is an important consideration in this area. The approach outlined in *Macphail* (3rd ed.) at paragraph 19.49 appears to have stood the test of time and provides an objective basis for choice of forum. It provides a deterrent against solicitors seeking unreasonably to maximise expenses, as was done in *Robertson v D.B.Marshall (Newbridge) Ltd* 1989 SLT (Sh Ct) 102. The pursuer submitted that it was difficult to avoid the conclusion that the sheriff has worked backwards from the settlement figure, and had elevated that figure into the top of the objective realistic range. An exercise of shrewd intuition does not provide a predictable framework for practitioners when deciding choice of forum. The pursuer invited the Court to re-state the guidance for practitioners contained within *Macphail* (3rd ed.) at paragraph 19.49; to allow the appeal; to recall the interlocutor of 28 September 2021 in so far as it relates to the scale of expenses; and to find the pursuer entitled to expenses on the Ordinary Cause scale.

Submissions for the Defender

[9] The level of expenses remains a matter of judicial discretion. The nature of judicial discretion is such that, on the same material, different sheriffs may reach different decisions, any of which a sheriff may make without being held to be wrong. A discretionary decision can only be interfered with if one of a number of particular circumstances is satisfied. The appellate court may intervene if it is satisfied that a sheriff, in exercising his discretion, misdirected himself in law. The pursuer cannot show that the sheriff has misdirected himself in law in this case. He did not err in his approach to arriving at a reasonable and realistic estimate on the award of damages. He was not bound to set out a range of quantum, nor was he bound to find a forum entitlement at the top of the range of figures put to him.

[10] There was no misunderstanding by the sheriff of the material before him, nor did he misuse these. He was entitled to consider the range of case law submitted by the parties and effectively distinguish the upper end value on the basis of the factual circumstances and medical evidence of this particular case. There was no requirement upon the sheriff to take into account outlying precedents when determining the realistic value of the claim. The sheriff correctly exercised his discretion in determining that the higher value cases he was referred to were not relevant to the factual circumstances of the case.

[11] The sheriff did not take into account an irrelevant consideration. The sheriff was entitled to take into consideration the matters he did in the exercise of his discretion. The sheriff was entitled to base a decision on the whole picture - that being the pre-litigation position as well as the realistic value he placed upon the pursuer's claim. The pre-litigation position was relevant in determining if there was a disproportionality and in fortifying the

sheriff's assessment of the reasonable value of the case. The sheriff's conclusion was measured and had a basis in fact and in law. It cannot be said that he exercised his discretion wrongly or that his conclusion was plainly wrong or unreasonable. The defender invited the Court to refuse the appeal and to adhere to the decision of the sheriff.

Discussion

[12] The pursuer's argument relies on the approach outlined in *Macphail* (3rd ed.) at paragraph 19.49, which, in so far as relevant to the issue before the Court, is in the following terms:

"... in determining the matter the sheriff should consider two questions: (1) whether the pursuer was entitled to raise the action as an ordinary cause in the first instance: and if so (2) whether in the course of the action he should have taken steps to have it treated as a summary cause ... If the answers are (1) Yes, and (2) No, the sheriff in his interlocutor awarding expenses directs the auditor to tax the account on the scale appropriate to an ordinary cause. In marginal cases the questions should not be answered by weighing the matter is too fine scales."

The relevant wording in the Third Edition of *Macphail* was unchanged from that which appeared in the First and Second Editions. No authority is cited in support of the approach advocated, save for *Smith v British Rail Engineering Ltd* 1985 SLT 463 in relation to the final sentence quoted above, namely, that which refers to "marginal cases". The position in the Fourth Edition of *Macphail* is markedly different. We return to this below at paragraph [16].

[13] The pursuer submitted that the decision of Sheriff Macphail (as he then was) in *Robertson v D.B.Marshall (Newbridge) Ltd supra* offers principled guidance as to the criteria to be applied. The passage relied upon (at page 104) is in the following terms:

"I appreciate that in personal injuries actions it is advisable to state as the sum sued for an amount somewhat greater than the pursuer's advisers' own estimate of the probable award in order to take account of the discretionary element in the assessment of damages and the rule that while decree for less than the sum sued for may be granted, decree for more cannot be obtained. The amount of the sum

sued for should not, however, be plucked out of the air but should be responsibly, albeit generously, stated as the maximum figure which an award on the basis of full liability is not to exceed. It should therefore bear some reasonable and realistic relationship to the pleader's estimate of the probable award on the basis of full liability. There may, of course, be a problem where the value of the claim is so small that the selection of the sum sued for will determine the form of process: the question of the amount to be sued for may be difficult to determine where the pursuer's advisers consider that the value of the pursuer's claim is around the borderline between small claims and summary causes or between summary causes and ordinary causes. It is not suggested, however, that this was such a case."

It is worthy of mention that the decision in *Robertson* is not cited in any edition of *Macphail*.

[14] The pursuer's solicitor's choice of forum was determined by the perceived value of the claim; that problematic issue was identified (but not applicable) in *Robertson*, which offers no guidance as to how the issue is to be addressed.

[15] At the time of publication of the Third Edition of *Macphail*, the terms of General Regulation 2 of the Act of Sederunt Fees of Solicitors in the Sheriff Court (Amendment and Further Provisions) 1993 ("the 1993 Act of Sederunt") applied. In terms thereof, the pursuer's solicitor's account was to be taxed by reference to the sum decerned for unless the court directed otherwise. The 1993 Act of Sederunt was revoked with effect from 29 April 2019, subject to certain savings which are not relevant for present purposes. The sum decerned remains an important consideration for the court in determining the scale of taxation, notwithstanding the revocation of the 1993 Act of Sederunt.

[16] The Fourth Edition of *Macphail* was published in early 2022, prior to the hearing of the present appeal. It was not referred to by parties in oral argument. The relevant paragraph for the purposes of this appeal is paragraph 19.60, which is in the following terms:

"The entitled party's solicitor's account as between party and party is taxed by reference to the table of fees applicable to the nature of the type of proceedings (the type of action and the court in which they were brought) unless the sheriff otherwise directs. A party seeking a direction that an account be taxed other than by reference

to the table otherwise applicable should so move the court when the motion for expenses is dealt with. It is thought that whether such a motion should be granted is a matter for the discretion of the sheriff; and that in determining the matter the sheriff should consider whether the choice of court or procedure was reasonable. In marginal cases, the matter should not be weighed in too fine scales.”

[17] The taxation of expenses in the sheriff court is now regulated by the Act of Sederunt (Taxation of Judicial Expenses Rules) 2019 (“the 2019 Act of Sederunt”). The 2019 Act of Sederunt does not, however, apply to summary cause actions (see rule 1.2(1)(a)(iii)). The charges to be allowed are set out in tables contained within the 2019 Act of Sederunt, with the relevant provisions applying, unless the court otherwise directs (see rule 3.3(5)). The Fourth Edition of *Macphail* correctly states that a party seeking a direction that an account be taxed other than by reference to the table which would otherwise be applicable should so move the court when the motion for expenses is dealt with. Whether such a motion is granted is a matter for the discretion of the sheriff. In determining the matter, the sheriff should have regard to all the circumstances of the case. It is not simply a case of determining whether the choice of court or procedure was reasonable. As noted above, the sum decerned remains an important consideration (see *Coyle v William Fairey Installations Ltd* 1991 SC 16 at 18). In cases such as this, the realistic value of the pursuer’s claim and the positions adopted by parties in pre-litigation correspondence will also be important considerations.

[18] We turn now to look at the decision of the sheriff, in light of the general observations we have made. The sheriff carefully considered the submissions of the parties in relation to the realistic valuation of the pursuer’s claim. He reached the conclusion that that valuation fell in the lower half of the range brought out in the cases cited to him (i.e. below £5,000). He was fortified in the conclusion he reached by the parties’ respective final positions in the

settlement discussions referred to at paragraph [3] above. The sheriff concluded that the action should have been raised as a Summary Cause.

[19] The fact sensitive nature of damages assessment was recognised by the sheriff. There is nothing to suggest that he weighed the matter too finely in his assessment of the realistic valuation of the pursuer's claim. The respective final positions of the parties pre-litigation are telling - the defender's final offer was £3,000; the pursuer's solicitors indicated to the defender that they would recommend settlement if an offer of £4,000 was made. Settlement was achieved at the mid-point between parties' final pre-litigation positions. Having regard to each of the foregoing considerations, the sheriff was entitled to reach the conclusion he did. There is no basis upon which this court would be entitled to set aside the sheriff's exercise of his discretion in the present case.

Decision

[20] The appeal will be refused and the interlocutor of the sheriff adhered to. The question of the expenses occasioned by the appeal will be reserved.