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Certification of Expert Witnesses: Where do you stop?

In the case of ***Thomas Downie v Christie & Son (Metal Merchants) Limited***, the Defenders opposed the Pursuer's motion for certification of the Pursuer's orthopaedic expert and pain expert on the basis that the Defenders had already instructed a report from an orthopaedic expert at an early stage, with the agreement of the Pursuer.

Two separate reports had been prepared by that expert and the Pursuer then relied upon the reports throughout the action. He relied upon the original orthopaedic expert's opinion as the basis of his valuation. His vocational expert relied upon the original opinion in preparing his own expert report. The Pursuer also cited the Defenders' orthopaedic expert as a witness.

As far as certification of the pain expert was concerned, the Defenders contended that their orthopaedic expert had addressed chronic pain in his report and accordingly, the instruction of an additional expert, albeit a pain specialist, was irrelevant and unnecessary.

A further ground of opposition put forward by the Defenders was that the reports were instructed based upon what the Pursuer had told his agents, but the Defenders had obtained surveillance footage which contradicted his account. This of itself, they argued, suggested that the instruction of the challenged experts was unreasonable.

In rejecting all of the Defenders' arguments, Lady Scott held that it was not unreasonable for the Pursuer to instruct his own orthopaedic expert, despite relying upon the evidence of the Defenders' expert and citing him as a witness.

Further, the instruction of a pain expert was not unreasonable in the circumstances, not least when the Defenders had subsequently instructed their own additional expert. This, Lady Scott considered, signified the reasonableness of the Pursuer having done so.

Lady Scott also stated that the fact that the Defenders' orthopaedic expert was relied upon in compiling the Statement of Claim on behalf of the Pursuer, did not mean that a second expert opinion should not be obtained for the different and broader purpose of preparation for proof. The fact that the first orthopaedic expert was preferred by the Pursuer as a witness did not bear upon the reasonableness of the instruction of the second orthopaedic expert.

In respect of the surveillance argument, Lady Scott considered this to be irrelevant. The Pursuer's agents acted upon the Pursuer's instructions and the experts supported his credibility despite the fact that the surveillance suggested otherwise.

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When does the prescriptive period start?

In the case of ***David T Morrison & Co limited v ICL Plastics Limited***, the Supreme Court were asked to consider whether the Pursuers' claim had prescribed, having been raised more than five years after the date of the originating accident. The action related to a claim for damages raised by the Pursuers following the explosion at the Stockline Plastics factory in May 2004.

The Pursuers raised proceedings in August 2009, more than five years after the date of the explosion. The Defenders argued that the Pursuers' claim had prescribed under sections 6 and 11 of the Prescription and Limitation (Scotland) Act 1973. At first instance, Lord Woolman agreed. This decision was overturned upon appeal with leave being granted to appeal to the Supreme Court.

In a majority decision of 3:2, the Supreme Court held that the Pursuers' claim had prescribed. Significantly, the Supreme Court departed from the two stage approach followed by the Scottish Courts to date with respect to the correct interpretation of section 11(3) of the 1973 Act. Prior to the Supreme Court's decision, the approach adopted by the Scottish Courts was that the commencement of the prescriptive period was postponed where the creditor in the obligation was not aware and could not with reasonable diligence have been aware, that loss, injury or damage had occurred **and** that any such loss had been caused by the breach of a duty owed to him.

The Court accepted that section 11(3) of the Act could be interpreted in two different ways. However, by a majority, the Court stated that the correct interpretation was that a creditor had **only** to be aware of the occurrence of loss for the prescriptive period to start running and that knowledge that the loss was caused by a breach of duty was not essential to the commencement of the prescriptive period. Accordingly, the Court held that the Pursuers were obviously aware that they had sustained loss from the day of the explosion and the claim having been raised more than five years after that date, had therefore prescribed.

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Fair Notice in Fatal Claims

In the case of ***Margaret Anne Gallagher & Others v S C Cheadle Hume Limited & Others***, Lord Uist provided some helpful commentary upon the requirement for fair notice from Pursuers when pleading loss of society in fatal claims.

Lord Uist stated that:

"*in a case where a pursuer is seeking to make out that he or she had a more than ordinary relationship with a deceased so as to affect the amount of the award being sought under section 4(3)(b) of the 2011 Act it would be helpful if the special features of the relationship were averred in the pleadings, even in an action brought under Chapter 43 of the Rules of Court. If this is done then proper notice will be given to defenders of those special features and they will be able to take them into account when making an offer or tender. It is clearly both undesirable and unfair that defenders should first learn of such special features in the course of the evidence being led at a proof.*"

When faced with unspecific or vague claims made by Pursuers' agents on behalf of a deceased's family, that there existed some kind of special bond or relationship between an individual family member and the deceased, Lord Uist's comments will hopefully provide some useful ammunition for Defenders dealing with fatal claims.

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Below Par Claim by Golf Spotter

In the case of ***David McMahon v Gavin Dear***, a golf enthusiast failed in his claim in the Court of Session for an injury that he sustained whilst officiating as a ball spotter at a golf tournament. His injury occurred when he was hit by a golf ball struck by the Defender who was one of the competitors in the golf tournament.

The Pursuer sued the Defender personally for damages, claiming that the Defender owed him a duty of care as the risk of injury to the Pursuer was reasonably foreseeable. He claimed that had the Defender exercised reasonable care in ensuring that no one was standing in a position in which they could be hit by the ball, or by shouting a warning, the Pursuer would not have been injured.

The Defender argued that the Pursuer, who had accepted the role of a ball spotter, required to be in the vicinity of where the ball was anticipated to land. The risk of injury was therefore implicit in the occupation of ball spotting on a golf course.

Lord Jones, found in favour of the Defender and granted decree of absolvitor.

In coming to his decision, Lord Jones focused on 3 questions:

1. Did the Defender owe the Pursuer a duty of care?

2. What ought the Defender to have done in the exercise of his duty of care?

3. If he was in breach of a duty of care, would the accident have been avoided if he had performed such a duty?

In answering his first question, Lord Jones found that the Defender did owe the pursuer a duty of care. Turning to the second question, Lord Jones opined that the question was whether or not the Defender "*has committed an error of judgment that a reasonable competitor being a reasonable man of the sporting world would not have made*". He stated that in doing so, the whole circumstances required to be considered.

He stated that, a reasonable competitor as a reasonable man of the sporting world would expect ball spotters to appreciate they were at risk of being hit by a stray ball, particularly so when it was their task to spot stray balls and that those who performed that function, assumed that risk.

The Pursuer had volunteered to officiate, and therefore, must have taken to appreciate the risk of being struck by a mishit ball. He therefore concluded that the Defender had not breached his duty of care to the Pursuer.

Whilst he had held that there was no breach of the Defender's duty of care, Lord Jones still went on to address causation, stating that, even if the Defender had shouted “fore”, the accident would not have been avoided.

In summary, Lord Jones considered that the Defender played his shot in the ordinary course of play. The danger of being hit was a risk that was incidental to the competition and was further accepted by the Pursuer. In any event, the injury was not caused by an error of judgment on the part of the Defender that a reasonable competitor being a reasonable man of the sporting world would not have made.

The judgment offers some interesting commentary on the duty of care owed by sportspersons to both spectators and officials, in what is an area in which we have seen a rise in claims over recent years. That said, the nature of the relationship of competitor and spectator or official is largely untested in the Scottish Courts, leading Lord Jones to consider a number of authorities in some detail, bringing some useful guidance and clarity on how to approach the issue going forward.

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Update

Further delay on Discount Rate?

The Ministry of Justice has indicated its intention to create a panel to review the Discount rate.

The Lord Chancellor is sourcing a panel of three experts to provide testimony on potential changes to the discount rate on personal injury damages.

The exact make-up of the panel has yet to be decided, but the Lord Chancellor is calling for advisors with knowledge of actuarial, investment and other related financial services issues.

Once confirmed, the panel will be expected to report back to the Lord Chancellor by Spring 2015.

The new panel will continue a consultation process first launched in August 2012, when the Ministry of Justice first asked for responses on how the discount rate should be set.

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